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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *vs.* PHILIP F. SCHILLING.	*Certificate of Chancellor.*

On indictment and conviction in the Essex County Court of Oyer and Terminer of the crime of murder in the first degree.

This is to certify that application has been made to me for the allowance of a writ of error to be issued out of the New Jersey Supreme Court for the review of the judgment of the Essex County Court of Oyer and Terminer, convicting the said Philip F. Schilling of the crime of murder in the first degree, and that I have refused to order a writ of error for the review of said judgment.

Dated at Trenton, New Jersey, December 15th, 1919.

E. R. WALKER,
Chancellor.

Endorsed: "Filed Dec. 15, 1919, THOMAS F. MARTIN, Clerk."

New Jersey State Library

ORDER DENYING APPLICATION TO DISMISS WRIT OF ERROR.

Filed March 5, 1920.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* PHILIP SCHILLING, *Plaintiff-in-Error.*	*Order Denying Application to Dismiss Writ of Error.*

Notice of a motion to dismiss the writ of error, heretofore issued in the above said cause, out of this court, having heretofore been given to J. Henry Harrison, Esq., prosecutor of the pleas, in and for the County of Essex, to Harold Simandl, attorney for the above-named defendant, and argument having been had thereon, and the Court having considered the same.

IT IS HEREBY ORDERED, this 5th day of March, 1920, that the said application to dismiss said writ be, and the same is hereby denied.

By the Court,

E. R. WALKER,
C. & P. J.

On motion of

BENJAMIN M. WEINBERG,
Of Counsel with Defendant.

Endorsed: "Filed Mar. 5, 1920, THOMAS F. MARTIN, Clerk."

Order Denying Application to Dismiss Writ of Error.

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of order denying application to dismiss writ of error, between The State of New Jersey, Defendant-in-Error, vs, Philip Schilling, Plaintiff-in-Error, as the same is taken from and compared with the original, filed Mar. 5, 1920, and now remaining on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this fifth day of March, A. D. 1920.

(SEAL)

THOMAS F. MARTIN,
Secretary of State.

ORDER VALIDATING WRIT OF ERROR.

Filed March 5, 1920.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* PHILIP SCHILLING, *Plaintiff-in-Error.*	*Order Validating Writ.*

Application having heretofore been made by the defendant, for an order validating the writ of error heretofore issued out of this court, and for a continuance of said cause, and notice of said application having been given to J. Henry Harrison, Esq., prosecutor of the pleas in and for the County of Essex, and argument on said application having been heard, and the Court having considered the same,

IT IS HEREBY ORDERED, this 5th day of March, 1920, that the said writ of error heretofore issued in said cause, as aforesaid, be and the same is hereby, in all things vitalized and validated;

AND IT IS HEREBY FURTHER ORDERED, that oral argument upon the printed state of the case, and briefs, be had before this court, on the first conference day of the same, or on such other day, as this court shall by order direct.

By the Court,

E. R. WALKER,
C. & P. J.

On motion of

BENJAMIN M. WEINBERG,
Of Counsel with Defendant.

Endorsed: "Filed Mar. 5, 1920, THOMAS F. MARTIN, Clerk."

Order Validating Writ of Error.

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of order validating writ, Between: The State of New Jersey, Defendant-in- Error, vs. Philip Schilling, Plaintiff-in-Error, as the same, is taken from and compared with the original, filed Mar. 5, 1920, and now remaining on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this fifth day of March, A. D. 1920.

(SEAL)

THOMAS F. MARTIN,
Secretary of State.

WRIT OF ERROR.

Filed.

NEW JERSEY, *ss.*

(SEAL) The State of New Jersey, to William S. Gummere, Esq., one of the Justices of the Supreme Court of the State of New Jersey, and to the Judges of the Court of Common Pleas of the County of Essex, constituting the Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, of the term of September, in the year of our Lord, nineteen hundred and nineteen.

Because in the record and process, and also in giving of judgment upon a certain indictment against Philip F. Schilling, late of the City of Newark, in the County of Essex, aforesaid:

"That, Philip F. Schilling, late of the City of Newark, in the County of Essex aforesaid, on the sixteenth day of July, in the year of our Lord one thousand nine hundred and nineteen, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, one Patrick J. Ryan, in the peace of God and of this State then and there being wilfully, feloniously and of his malice aforethought did 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 diginity of the same."

Pro ut the said indictment and the several counts therein, whereof, before you, he, the said Philip F. Schilling hath been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Philip F. Schilling, as it is said, manifest error hath intervened to the great damage of the said Philip F. Schilling, as from his complaint we have received information, we being willing, in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Philip F. Schilling, 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 the same to our Court of Errors and Appeals, in the last resort in all causes of law, to be held at Trenton, on the 2nd day of January next,

Return.

and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, Edwin Robert Walker, Esq., our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, this fifteenth day of December, A. D., one thousand nine hundred and nineteen.

THOMAS F. MARTIN,
Clerk.

HAROLD SIMANDL,
Attorney.

HARRY UNGER,
Of Counsel with Defendant.

Presented in open court this 17 day of December, 1919.

WM. P. MARTIN,
Judge.

RETURN.

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

I, William P. Martin, Judge of the Court of Oyer and Terminer in and for Essex County, New Jersey, do hereby certify and return to the Court of Errors and Appeals of the State of New Jersey the indictment, judgment record and proceedings together with all things touching and concerning the same and the entire record of the proceedings had at the trial as by the within writ to me directed, I am commanded.

In Witness Whereof, I have hereunto set my
(SEAL) hand and the official seal of said court and county this sixth day of April, A. D. 1920.

WM. P. MARTIN,
Judge.

Indictment.

INDICTMENT.

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

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the first Tuesday in April, in the year of Our Lord one thousand nine hundred and nineteen, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of John D. Everett, John L. Cox, James P. King, Ray Cohen, William O. Kuebler, August F. Hinrichsen, Charles A. Foster, Jacob L. Schwarz, Charles Holbrook, M. D., David H. Slayback, August F. Olsen, T. Louis Hansen, Fred C. Heilos, Chauncey H. Marsh, Arthur W. Greason, Gustave Kunz, John J. Blondel, Conrad Oechler, Thomas H. Hoover, Henry Koehler, William Little, Isaac L. Evans, Fred E. Seiler, good and lawful men of the said County of Essex, duly summoned and then and there duly sworn, and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

ESSEX OYER AND TERMINER, April Term, A. D. 1919. Essex County, to wit: The Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oath, present that Philip Schilling, late of the City of Newark, in the County of Essex aforesaid, on the sixteenth day of July, in the year of our Lord one thousand nine hundred and nineteen, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, one Patrick J. Ryan, in the peace of God and of this State then and there being, wilfully, feloniously and of his malice aforethought, did 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.

J. H. HARRISON,
Prosecutor of the Pleas.

Judgment Record.

And on the twenty-fourth day of July, A. D. nineteen hundred and nineteen, on which day the said indictment was presented by the Grand Jury aforesaid to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be delivered to the said Clerk of the Court of Oyer and Terminer in the aforesaid county, and then and there the said indictment was delivered and duly filed by said clerk and an entry of such delivery and filing was then and there made in the minutes of said court, at the same time pursuant to the statute in such case made and provided.

PLEA.

And afterwards, that is to say, at the same session of the Court of Oyer and Terminer holden at Newark, on the thirty-first day of July, A. D. nineteen hundred and nineteen, before Honorable William P. Martin, Judge of the Court of Common Pleas, holding the Court of Oyer and Terminer, comes the said Philip Schilling in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, in whose custody in the jail of the county aforesaid, he has been before committed for the cause aforesaid being brought to the bar of this court in his own proper person by the said sheriff to whom he is also committed and having heard the indictment and being forthwith demanded of and concerning the premises in the above indictment specified and charged upon him how he would acquit himself thereof, he says, that he, Philip Schilling, is not guilty thereof, and therefore, for good and evil he puts himself upon the county and J. Henry Harrison, Prosecutor of the Pleas, for the County of Essex aforesaid, who prosecutes for the State of New Jersey, in this behalf doth the like.

On the 29th day of September, A. D. nineteen hundred and nineteen, to which day the said indictment was set down for trial, the defendant's counsel, Harold Simandl, Esq., moved that the trial be postponed for the purpose of having defendant, Philip Schilling, examined as to his mental condition, after argument of counsel the Court granted said motion and ordered the trial postponed until October 14, A. D. nineteen hundred and nineteen, at 10 o'clock A. M.

On this day, being the fourteenth day of October, A. D., to which day the said trial was postponed, the defendant's counsel,

Judgment Record.

Harold Simandl, Esq., moved for another adjournment, and produced affidavits setting forth the reason for the application and motion for adjournment, which motion was opposed by John H. Bernhard, Esq., Second Assistant Prosecutor, and the Court after having heard the argument of counsel granted said motion and ordered that trial of said indictment be postponed until October twentieth, A. D. nineteen hundred and nineteen.

Therefore, let a jury thereupon come before the judge aforesaid, at Newark aforesaid, in the County of Essex, at the same session of the Court of Oyer and Terminer aforesaid on the twentieth day of October in the year of Our Lord, one thousand nine hundred and nineteen, twelve free and lawful men each of whom shall be a citizen of this State and a resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years by whom the truth of the matter may be better known and who are not of kin to the said Philip Schilling, to recognize upon their oath whether the said Philip Schilling is guilty of the murder in this indictment aforesaid specified, or not guilty, because as well the said J. Henry Harrison, Prosecutor of the Pleas of the County of Essex aforesaid, who prosecutes for the State of New Jersey in this behalf as the said Philip Schilling has put himself upon the jury, and the same day is given to the parties aforesaid, at the same place, at which day, to wit: the twentieth day of October in the year of Our Lord one thousand nine hundred and nineteen, at the same Term of Oyer and Terminer, holden at Newark, aforesaid, in the County of Essex, before the Honorable William P. Martin, Judge of the Court of Common Pleas, holding the Court of Oyer and Terminer, in and for the said County of Essex, comes as well the said J. Henry Harrison, Prosecutor of the Pleas, who prosecutes aforesaid, and the said Philip Schilling, in the custody of John R. Flavell, Sheriff of the county aforesaid, being brought to the bar in his own proper person, by the said sheriff. And the jurors of the jury by the said sheriff for this purpose empanelled and returned, to wit: After the following number of challenges were exhausted: By the State 8, By the defendant 18, 2 jurors were excused for cause and 8 jurors were excused by consent of counsel. The special panel having become exhausted after eleven jurors having been drawn and sworn and juror No. 12 was returned from the general panel and sworn as a juror, William C. Simmons, George H. Blanchard, William

Judgment Record.

Ewald, William H. Fielding, Arthur L. Clark, Robert B. M. Taylor, Herbert A. Davis, William Rupprecht, Robert W. King, David A. Cooper, William B. Halsey, David Biederman (Harold Simandl, Esq., attorney for defendant, made a motion to sequester the witnesses during the trial which motion was denied by the Court), being called come and were sworn on that jury who to speak the truth of and concerning the premises and thereupon the trial of the issue commenced and continued before the said Court and jury, from day to day, until the twenty-fifth day of October, A. D. nineteen hundred and nineteen, at Newark aforesaid, the jury in the meantime having all that time been kept together and in the care of officers of the said Court for that purpose, at which last-mentioned day the said issue after a charge from said Court was submitted to the said jury, and the said jury in charge of said officers of said Court for that purpose were taken to a private room to consider of their verdict, and afterwards, that is to say, on the day aforesaid, at Newark, the said jury returned into and before the said Court in charge of the said officers sworn to keep them in charge, and then and there in the presence of the said Prosecutor J. Henry Harrison and the said defendant, Philip Schilling, say that the said Philip Schilling is guilty of murder in the first degree, and so they say all.

Judgment Signed,
October 27, 1919.
Wm. P. Martin,
Judge.

Whereupon, all and singular, the premises being seen, and by the Court now here fully understood, it is, on this twenty-seventh day of October, A. D. nineteen hundred and nineteen ORDERED and adjudged that Philip Schilling be taken to the County Jail from whence he came, and there to be kept in strict custody and from thence that he be taken by the sheriff within ten days after the issuing of the warrant to him for that purpose, and delivered to the principal keeper of the State Prison to be kept by him in solitary confinement until the week beginning Sunday, December 21, A. D. nineteen hundred and nineteen, and upon some day within the said week, at his discretion, as to the time within the walls of the buildings provided, by the Board of Inspectors of the State Prison for that purpose, or within the yard or enclosure adjoining thereto the principal keeper of the State Prison shall execute the punishment of death upon the

Judgment Record.

said Philip Schilling, by causing to pass through his body a current of electricity of sufficient intensity to cause death as speedily as possible, the application of such current to be continued until the body of the said Philip Schilling be dead.

And may the Lord have Mercy upon his soul.

Opening.

Essex County Court of Oyer and Terminer

The State *vs.* Philip Schilling.	*Indictment No. 14; September Term, 1919.*

Before Hon. William P. Martin, *J.*

For the State appears John A. Bernhard, Esq., Assistant Prosecutor of the Pleas.

For the defendant appears Messrs. Simandl & Unger.

(A jury is drawn and sworn.)

Mr. Simandl. If your Honor please, at this time, before the case proceeds any further, I desire your Honor to order the witnesses for the defense and for the State from the court room, on the ground that I feel that this case presents certain aspects which are liable to be prejudicial to the defendant. I feel that the witnesses, there are so many of them, who are here to testify to corroborative facts, and I think that they should tell corroborative facts and not listen to what another witness says upon the stand. I think it is in due fairness to my client that this be done.

Mr. Bernhard. I understood counsel say both the witnesses for the State and the witnesses for the defense. That does not alter the State's position in any way. The inference to be gained from what counsel already stated to the Court, is that the witnesses for the State would be influenced by what the prior witness has said, and that is an unfair inference and might be prejudicial to the State's case. The State sees no reason for the segregation of any witnesses. The matter is addressed to the discretion of the Court, but the mere statement of counsel that the witnesses will be influenced by what other witnesses have said is not fair and is not based upon any facts. If your Honor feels, of course, that through the large number the atmosphere of the court room would be more healthful by their absence in the corridor, then the State will offer no objection. But for the reason stated by counsel, the State earnestly and urgently opposes any such application.

The Court. The jurors may retire for a few minutes. You may go into my chambers.

(The jury retires.)

I desire to call counsel's attention to your application for an adjournment of a week ago. You said to the Court that the question principally involved in this trial would probably be one of insanity, and not so much as to the physical acts which occurred. Now, if that be so, it seems to me that the sharp conflict which is natural to arise in the case will not be as to the physical acts, but to the mental question, is not that so?

Mr. Simandl. Yes, sir.

The Court. What I have had the jury retire for is that you will not be prejudiced in what might be said at this time. I want to arrive at a conclusion as to the seriousness of your difficulty.

Mr. Simandl. I will admit that I did make such a motion and I did make such a statement. However, this case, if your Honor please, presents what could be called essentially a police case. In other words, we have so many testifying in behalf of the State, a great number of them are policemen, the rest of them are, perhaps, private citizens. What the police may say, or what the private citizen may say may be influenced by perhaps methods which I have no influence over, or the Court has no influence over, and, furthermore, this case presents a question which is a very deep question as to premeditation. The State can only prove premeditation beyond a reasonable doubt by witnesses and certain acts which are very, very close, and this is a very close question. Therefore, I think in order to give the accused all possible—an impartial trial—I think that the witnesses should be excused to the corridor, so that when they go to the stand they can tell their story unbiased and uninfluenced, and if they are telling the truth they will be in no way subject to any criticism.

The Court. I have tried some twenty-five or thirty murder cases and a great many criminal cases, and my experience is that when the witnesses are excluded as a rule it works for confusion. In the first place, the witnesses are outside of the room; they are sent for and brought in, then they testify as to some unimportant feature, necessary to be proved, but unimportant rela-

tively, and after they have testified they are allowed to remain in the room, and then later on they are called on something else, and then something is overlooked and they are called again. I agree with you that the witnesses should testify as to all that is competent and proper at one time, but sometimes it is impossible to do that. If there is going to be a very sharp conflict as to the acts that took place, then there may be something offered on behalf of the proposition that there is a sharp conflict of evidence—

Mr. Simandl. I think there is.

The Court. —and that it is necessary to have before the jury the various shades of the facts, the coloring of the situation of each event. But, if it is, as it appeared to me last week, I do not mean to say you are bound by any statement you made, except the fact is the Court knows you made the statement and therefore I ask you about it. I am very anxious to give the defense the fullest opportunity to present all its case and I am very anxious that the State should have equal rights. If there is any substantial right violated or any danger, you should have this allowed, but I cannot see anything which you have pointed out which shows that.

Mr. Simandl. I will substantially have to bring out a great many facts on cross examination of the State's witnesses. I will be compelled to do so because of the fact that we practically have no eye-witnesses. The State has a great many. Now, if one witness goes on the stand and constantly repeats what the other one has said and listens to my cross examination and understands the point of view of what I am driving at, your Honor will readily see I will be unable to accomplish anything unless I can have each witness come in separately and cross examine him separately, each one not hearing what his predecessor said on the stand.

The Court. Then that part of your application which relates to the excluding from the room of the witnesses for the defense does not really apply to anybody.

Mr. Simandl. Why, one or two witnesses, one witness at present. There may be two or three perhaps later in the day, who are not witnesses to the act. But I wanted to be fair, inasmuch as I was making the application before the jury, although I only have one witness here. We have no eye-witnesses at all.

Edward H. Schwartz, direct.

The Court. Well, that would exclude the Prosecutor's detective who is unquestionably preparing the case and assisting the Prosecutor; it would exclude your experts; it would exclude, possibly, witnesses that you would not object to, such as witnesses as to the fact of death, or something like that.

Mr. Simandl. No, it wouldn't; those witnesses, I think, are substantially necessary and I wouldn't want them excluded, but I mean the eye-witnesses to the occurrence, the men who actually saw this alleged crime; those are the men upon which the State expects to base their conviction by their testimony of a first degree charge, and they are the men who are really the material men here and whom I desire to have a chance to cross examine without having them having heard the former testimony.

The Court. I will reserve decision on your application and allow the Prosecutor to open so that we may know something about what the case concerns. Then I will endeavor to decide the matter and give you an opportunity after the formal parts of the case are in evidence to renew your application.

Mr. Bernhard opens for the State.

EDWARD H. SCHWARTZ, sworn in behalf of State.

Direct examination by Mr. Bernhard.

Q At the present time what is your business? A I have charge of the Bureau of Identification of the Police Department; superintendent of the Bureau of Identification.

Q And your profession is what, what trade? A Civil engineer.

Q How long had you been a civil engineer before you became superintendent of the Bertillon system? A About ten years.

Q And your office is where? A New York.

Q Were you requested to make that map which now hangs upon the wall there? A Yes, sir.

Q When did you receive that request? A Thursday, July 17th, in the morning, 1919.

Q From whom? A Lieutenant Godfrey of the prosecutor's office.

Q When did you go to the vicinity which is indicated on the map? A In the morning of July 17th.

Edward H. Schwartz, direct.

Q Who made that map? A I did.

Q From what did you make it? A From notes and measurements taken at the scene, as shown on the plan.

Q Who made the actual measurements? A Myself.

Q After you had made the measurements what then did you do? A Drew the plan from the measurements which I made at the time.

Q What does the map show? A It shows a section of Norfolk street and South Orange avenue, the northeast and northwest corners of South Orange avenue; the sidewalk, showing the northwest corner of Norfolk street and South Orange avenue, also the northeast corner of Norfolk street and South Orange avenue; showing the trolley tracks in and from Norfolk street and South Orange avenue and part of the trolley tracks on South Orange avenue; also the house line of the northeast side of Norfolk street; the yard in the rear of the corner of Norfolk street and South Orange avenue, that is, the northwest corner; also the house line on the northeast side of Norfolk street.

Q Now, you speak of a house line; is there a house there? A On which side?

Q On the northwest corner. A Yes, sir.

Q What kind? A A frame building occupied as a cafe on the first floor, or saloon.

Q Do you recall the name of the owner of that saloon? A No, but it is called The Transfer Cafe.

Q That is the name you took from the window? A Yes, sir.

Q Which corner? A Northwest.

Q Have you a measurement there which shows the distance between the westerly curb line of Norfolk street and the house line? A Well, I have it in sections; I have not it in full.

Q Just calculate the sections. A 12 feet 2.

Q And what is the length of that building, if you have it? A I would have to measure that.

Q What is the scale of the map? A The scale of it is one-quarter inch to one foot.

Q Won't you measure the building and tell us the distance? A 68 feet.

Q What is there in the rear of that, "that" meaning the building? A There is a vacant yard there.

Q How is access to the vacant yard reached? A Reached from the street through this gateway (indicating) marked on

the map between the building and signboard, what was a high signboard, covering, rather, the outside of the yard facing Norfolk street.

Q Is there actually a gate or just the opening? A There is a gate.

Q Did you measure the distance of that gateway? A 2 feet 8 inches width.

Q And that leads to where? A Leads to the yard to the rear of the northwest corner of Norfolk street.

Q Proceeding directly west through the gateway to what point would you come? A The gateway is here between this support of the signboard and to the rear of this building; right back to the fence, there is a small shed, 6 feet 5 in height, and to the rear of that there is a board fence.

Q How high? A 6 feet 2.

Q And the shed which adjoins the fence is 6 feet 8? A 6 feet 5.

Q What is the distance from the gate itself to the shed directly to the west? A 26 feet 8 inches.

Q What is there westerly beyond the fence that you have just called our attention to? A Beyond this shed?

Q Beyond the fence. A There is another vacant yard to the rear of this fence and this shed here; I don't know what is to the west of that.

Q The vacant yard is to the rear of what building, do you know? A The next building to the corner, South Orange avenue side.

Q When you went there on July 17 what was the general condition of that fence, if you can tell us? A It was the ordinary board fence, and I think there were one or two boards broken in the fence proper; on the shed there were none broken, and from the north end of this small shed here there was a pile of rubbish in this corner, stones, cans, and several other things, and a matter of perhaps two feet from this pile of rubbish there was a beam projecting from the building.

Q Where would that beam be from the southerly end of the fence which adjoins the building? A 10 inches.

Q And are you able to tell us from any measurements you made how far that projection is from the ground, the beam you just testified about? A 2 feet 2 inches from the top of the pile of rubbish.

Edward H. Schwartz, direct.

Q What is the yellow body that you have placed on the map? A Dirt, or yard; there was no pavement.

Q Vacant ground? A Yes, sir.

Q I call your attention to another vacant body on the easterly side of the building line; what is that? A That is a dirt walk between the sidewalk and the building; just merely dirt; it is not paved.

Q Do you know whether or not there is any entrance to the saloon from Norfolk street? A Yes, sir.

Q Will you point out to the Court and jury where that is located? A It is located here, showing the stoop with two steps—

Q Here does not mean anything on the record; located how far from the front of the building? A I could describe that better by describing from the end of the concrete sidewalk; it is 27 feet 6 inches to the stoop line, or, rather, the platform.

Q You speak of the stoop; what kind of a stoop? A Plain platform, with two steps.

Q How wide? A 3 feet 6 inches.

Q How high is the platform from the ground? A 2 feet 6 inches.

Q Is there anything else indicated on your map on the westerly side of the building? A Nothing but the windows.

Q There is a black mark in the building line; what is that? A That is a window, and also showing the two side windows, Norfolk street side of the cafe.

Q Being indicated by black lines? A Yes, sir.

Q What is the building at the northeast corner of Norfolk street? A The corner store is occupied as a stationery and cigar store.

Q Is there anything along the curb line which you have indicated on your map? A Yes, sir.

Q What? A A fire hydrant.

Q How is that indicated on your map? A By three rings and a blue center.

Q Next to that is what? A Trolley post, indicated by ring and blue center.

Q How far from the hydrant is the trolley post? A 4 feet 5 inches, and a telegraph post which is marked by a circle and yellow.

Q How far is that? A 4 feet 4 inches from the trolley post.

Q Is there anything else indicated on the easterly curb line as you have it there? A No, sir; just the hydrant, the trolley post and the telegraph post.

Q What is the distance of Norfolk street from curb to curb? A 35 feet 4 inches.

Q Did you measure the width of South Orange avenue there at the northeast or northwest crossing? A No, sir; I did not.

Q There is a red line I notice on your map running southerly from the northwest corner; what is that? A Just to give the distance between the trolley tracks to that curb.

Q That is what we would like to have. A From the curb to the first track is 2 feet 7; 5 feet 8 between the tracks, and 3 feet 8 inches between the two tracks.

Q I will ask you a general question. Have I forgotten to ask you any questions about your map and the drawing? A Did I draw it myself?

Q Is there any other point I have not brought out about the drawing of the map? A No, not that I know of.

Q You went there on July 17th? A Yes, sir.

Q Did I ask you the time of day; what time did you go? A I should imagine we got there about ten o'clock in the morning.

Q You said "we," whom do you mean? A Lieutenant Godfrey, Mr. DeVerge, in the Bureau of Records office, and myself.

Q Anyone else? A No, later on Lieutenant Gannon, Sweeney and Heller came there with Schilling.

Q Is Lieutenant Gannon in court. Is the gentleman that stands up the Lieutenant Gannon to whom you refer? A Yes, sir.

Q Is officer Sweeney in court? A Yes, sir.

Q Sergeant Heller; are these the three? A Yes, sir.

Q What time did they come to the point where you were making this map? A Well, I couldn't state the time; I had just started to make the photographs when they came there; I should imagine it was half-past nine or ten o'clock.

Q Anybody else with them? A Schilling.

Q What occurred after Officers Gannon, Heller and Sweeney reached the spot where you were making the measurements with Schilling, anything? A Yes, sir.

Q What? A I was on the south side of South Orange avenue taking the photographs when a machine containing the three officers and Schilling arrived—

Edward H. Schwartz, cross.

Q Is it possible for you to indicate to the Court and jury where you stood? A Well, directly opposite Norfolk street on South Orange avenue.

Q Norfolk street stops there? A Yes, sir; that is, it does not stop there, it ends.

Q (*By the Court.*) There is a dead end of Norfolk street on the diagram? A Yes, sir.

Q What happened then, if anything? A Schilling and the officers got out of the machine and I then walked over to them and asked for directions, and I particularly asked Schilling—

Q Is Schilling in court? A Yes, sir.

Q Point him out. A Between the two officers.

Q You asked the defendant what? A To point out the different positions that they stood in relation to Ryan and himself, and also where Ryan had first apprehended him, or caught him.

Q Did you get any reply to those questions? A Yes, sir.

Q Do you recall whether or not you remained in the spot where you held this conversation with Schilling, or whether you went anywhere? A No; I remained in that spot.

Q What replies did you get to your questions from Schilling?

Mr. Simandl. I object, if your Honor please; I can't see why this witness should now be called upon to testify to any admissions when he is testifying as to the correctness of a certain map; he is here merely as an expert to prove the map. I think this is irregular.

The Court. That is your point. He can testify to anything he knows, can he not?

Mr. Simandl. The map is not in evidence as yet.

The Court. You offer the map in evidence?

Mr. Bernhard. Yes, sir.

Cross examination by Mr. Simandl.

Q I understand from this point, indicating on the map where the gate is marked—where the alleyway is supposed to be on the map—from a point where the alleyway is supposed to be on the map, to the end of the map, is covered by a signboard, is it not? A Yes, sir.

Q That is in the rear of the building, if your Honor please. Can you give us the height of that signboard? A Eleven feet.

Edward H. Schwartz, further direct.

Q Is there a gate leading to the alleyway? A Yes, sir.

Q Does that gate swing entirely back; that is to say, is it absolutely parallel? A No; it was intended possibly to swing it back, but at that time it would not swing back.

Q This shed is how high, indicating a shed marked on the map, measuring eighteen feet two inches? A Six feet five inches.

Q And there is a board fence at the westerly end of the yard, is there not? A Northwest.

Q That board fence is not surrounded by any building, is it—that is, from the northwest? I say, there is no building on the northwest which abuts against that fence? A No.

Mr. Simandl. That is all.

Mr. Bernhard. I now renew my offer.

Mr. Simandl. There is no objection.

The Court. Diagram received and marked Ex. S. 1.

Further direct examination by Mr. Bernhard.

Q What reply, if any, did you get from Schilling to your inquiry with reference to points? A The first question that I asked of him where he stood in relation to Ryan at the time of the shooting.

Q Did he reply? A He did.

Q What reply did he give you? A He said, "We wrestled from the opposite side of the street, and as I got here," indicating a point about four feet from the northeast curb of Norfolk street, "I shot him here."

Q Will you be good enough to step down and indicate to the jury the point you have just described? A I stood at the crosswalk here (indicating).

Q Crosswalk leading from where? A That would be the northeast side of Norfolk street; Schilling stood in the tracks.

Q Which tracks? A Northeast tracks; northeast side, and he was handcuffed to Officer Sweeney. Lieutenant Godfrey stood right directly back of Gannon and Schilling. He said, "I stood about here," indicating a point four feet from the curb of the northeast corner of Norfolk street, and he said, "We wrestled"—

Q Did he point out where the wrestling began? A Yes, sir; he said across the street; he said, "We wrestled all across the street," and, he said, "As we reached this point four feet from the curb I shot him."

Edward H. Schwartz, cross—further direct.

Q Were there any other questions asked at that time? A Yes, sir; I asked him if he knew he shot him the first time when he shot again.

Mr. Simandl. I object, on the ground that this is in the nature of a confession; the witness is trying to lead the jury to believe the prisoner made a confession, and there is nothing proven or to show the necessary ingredient of a confession.

The Court. You may cross examine him, if you want to.

Cross examination by Mr. Simandl.

Q This was the morning after the alleged commission of the crime? A July 17; yes, sir.

Q You are a member of the Police Department, are you not? A I am.

Q Did you say anything to Schilling before you asked him this question that you referred to in your direct? A No.

Q Did you warn him? A No.

Q And say that it might be used against him? A No.

Q There were detectives standing by while this was going on, were there not? A Yes, sir.

Q Was Schilling handcuffed at that time? A He was.

Q Why were you concerned in asking him that question? A I had no other object further than to ascertain the location or the points at which they stood during the shooting and in relation to the manner in which Ryan fell back, or stepped back, or fell to the ground.

Q Did you threaten him in any way? A No.

Q Didn't threaten him at all? A Absolutely not; I had no opportunity to threaten him.

Q He talked voluntarily? A Positively.

Q You didn't tell him that this might be used against him, did you? A No; I warned him in no way at all; I had no conversation with him.

Further direct examination by Mr. Bernhard.

Q I renew my question. What next did you ask him and what reply did he make to your next question? A I asked him if he knew he hit him the first time—

Edward H. Schwartz, further direct.

The Court. Strike out the answer.

Mr. Simandl. I object.

The Court. Objection sustained. I thought you were going to ask him some more questions as to his qualifications and the circumstances to show that this was a confession voluntarily made by the defendant.

By the Court.

Q Did you or anybody in your hearing say anything to warn or in anywise hold out to him any promise, expressed or implied, that it would be helpful or otherwise if he made a statement? A No, sir.

Q Did you or anybody else threaten him on that occasion? A No, sir.

The Court. It is not necessary to warn a defendant in New Jersey; all it is necessary to show is that the alleged confession was voluntary. Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

By Mr. Bernhard.

Q (Question read.) A He said he didn't know when he shot him the second time, but he said he went crazy and continued to fire his revolver.

Q Did you ask him any further questions? A I think not.

Q Was or was not the point where Ryan fell pointed out to you by Schilling? A Yes, it was.

Q How was that brought up? A Well, that was brought out at the first, when I asked him where he stood, when the scuffle or shooting took place, and he said they had wrestled all across the street, and reaching this point on the curb, four feet from the curb, that Ryan broke from him at that point, or, at least, he broke from Ryan, and Ryan backed toward the curb between the hydrant and the trolley post.

Q Now, will you point on the map to the spot where Ryan fell? A Why, he didn't say that he fell.

Edward H. Schwartz, further direct.

Q Then it did not appear? A No.

Q After that, what did you do—after that conversation? A I went across South Orange avenue again and took photographs.

Q How many photographs did you take? A One, of the corner of Norfolk street and South Orange avenue.

Q Did you take them yourself? A Yes, sir.

Q With what kind of camera? A Century, Bausch Lomb lens.

Q Stationary? A Yes, sir.

Q Have you indicated to the Court and jury where your tripod stood? A Directly opposite Norfolk street on South Orange avenue.

Q Who developed those films? A I did.

Q And did you mount them? A No, I printed them, but I did not mount them.

Q And are these the prints? A Yes, sir; this is the one taken facing Norfolk street.

Photographs marked S. 2 for identification and S. 3 for identification.

Q S. 2 and S. 3 represent the same situation? A Yes, sir.

Q Did you take a photograph of any other part? A Yes, sir; I took a photograph of the northwest side of the yard, at the northwest corner of Norfolk street and South Orange avenue.

Q Who developed the film? A I did.

Q And are these the pictures? A Yes, sir.

Q I have handed you two photographs; do they represent the same situation? A Yes, sir; taken at the same place.

Photographs marked S. 4 for identification and S. 5 for identification.

Mr. Bernhard. I offer S. 2 and S. 3 for identification in evidence.

Mr. Simandl. No objection.

Photographs marked Ex. S. 2 and Ex. S. 3.

Q Look at S. 3 and tell us what it shows with reference to the map. A It shows the northeast and northwest corners of Norfolk street and South Orange avenue, and it shows the northwest side particularly of Norfolk street, the entrance to the yard, or the gateway to the yard, the signboard, the stoop and the side entrance to the saloon can be plainly seen.

Edward H. Schwartz, cross.

Q I call your attention to a tree standing on the westerly side of Norfolk street and particularly to an opening in the fence at that point, and ask you whether or not that is the opening indicated by you to the yard on the west side? A It is.

Mr. Bernhard. I offer S. 5 and S. 6 in evidence.

Mr. Simandle. May I cross examine?

The Court. As to his qualifications, do you mean?

Mr. Simandl. No, I just want to have an opportunity to examine him with reference to some thing that appears on the picture here, which I do not think is a part of the photograph.

Cross examination by Mr. Simandl.

Q What are these white marks, indicating white marks on picture S. 4 for identification? A After having made the other photograph of which this is a copy, or, rather, from the same plate, the plate became wet; those are bubbles, or air bubbles on there; it had nothing to do with the photograph at all, and the plate had been disfigured by the bubbles.

Photographs marked Ex. S. 4 and Ex. S. 5.

Further direct examination by Mr. Bernhard.

Q Look at S. 5 and tell us whether or not it shows the fence which you have in your testimony described as running northerly from the shed to the west edge of the yard. A It does.

Q And does it show any part of the shed itself? A Yes, sir.

Q You spoke in your testimony of a pile of stone; is that there? A It shows in the photograph.

Q You spoke in your testimony of a beam, ledge, is that there? A Yes, sir.

Cross examination by Mr. Simandl.

Q Referring to S. 4, is this the pile of rubbish (indicating)? A Yes, sir.

Q Where on the map, please indicate, would that pile of rubbish be? A Right there (indicating).

The Court. Indicating the northwesterly corner of the yard?

Witness. Yes, sir.

Dr. George L. Warren, direct.

Q Where on the photograph, referring to S. 4, is the shed indicated on the map; will you please mark that point on picture S. 4, where the shed, which measures 18 feet 2 inches in width, on the map appears.

(Witness does so.)

Witness. Will I mark that?

The Court. There doesn't seem to be any objection.

Q On your direct examination you said that Mr. Schilling, the defendant, answered certain questions as to why he had shot another time? A Yes, sir.

Q How many people were about, surrounding, on the various corners at that time? A Oh, there may be two hundred people, in fact, we were surrounded by quite a crowd of people; I could not tell the number.

Q Was the crowd in any way threatening? A No.

Q How did Schilling appear to you at that time, was he nervous? A No, just the contrary; he was very normal, not excited.

Q What do you mean when you say normal? A I mean as a man would act under ordinary conditions, no excitement.

Q He was not excited? A Didn't appear to be.

Q He was not nervous? A He didn't appear to be.

Q Was he unconcerned? A Well, I should say so, yes.

Q Was he smoking? A Not at that time.

Q Did he appear to you to be in any way concerned as to what had transpired? A No, he did not.

DOCTOR GEORGE L. WARREN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Dr. Warren, how long have you been—you are a practicing physician? A Yes, sir.

Q For how many years? A For twenty years.

Q Graduate of what institution? A College of Physicians and Surgeons, New York City.

Q Where have you practiced since graduation? A City of Newark.

Q Continuously? A Yes, sir.

Q You are now the county physician of this county? A Yes, sir.

Dr. George L. Warren, direct.

Q How long have you been county physician? A Three years and five months.

Q Did you know Lieutenant Ryan in his lifetime? A Yes, sir.

Q Do you remember when you last saw him alive? A No, I do not; I think in June; I am not positive, June, 1919.

Q Were you called upon to perform an autopsy upon the body of Lieutenant Ryan? A I was.

Q When? A On the 16th day of July, 1919.

Q Where? A Holle's morgue, Branford place and Shipman street.

Q What time? A 9:30 P. M.

Q Is that the first place that you saw Lieutenant Ryan's body? A Yes, sir.

Q Who was present at the time you reached Holle's morgue? A Mr. Thomas O'Mara, who has charge of the morgue, and Officer Lenduci.

Q Where did you find the body? A The body was lying on a table in the morgue.

Q And in what condition of attire? A The body had been undressed, nude.

Q Was it light or dark outside at that time? A Why, it was 9:30 P. M.; it was dark.

Q By what sort of light did you see the body lying on the slab? A Electric light.

Q What did you do when you entered the morgue? A I examined the body.

Q What did you find the condition of the body to be? A The body was nude, the man was dead, and slight warmth and feeling to the touch; the body was limp; there was blood on the right side of the chest and on the left side of the abdomen.

Q Will you point out whereabouts you first noticed the blood? A On the right side of the chest.

Q Locate it for us, will you, to the right of the armpit? A It was down three inches below the upper end of the breast bone, three and a half inches, and one inch and a half to the right of the middle line.

Q What kind of a mark did you find? A I found a circular wound which measured one-quarter of an inch in diameter.

Q What did you do in reference to that wound? A I made the examination.

Q How? A By doing the autopsy; I followed the wound into the skin, into the body.

Q How far in? A The wound extended from that spot on the right side of the chest, through the lung, and to a point in the shoulder blade; it went right through the chest.

Q And you located it where? A It led to an opening between the fourth and fifth ribs, and to another opening that came out between the seventh and eighth ribs.

Q On my back will you indicate where it was? A It was to this bone here, to the lower end of the shoulder bone.

Q And how far in from that lower end of the shoulder bone? A It was imbedded in the bone; there was a fracture of the bone near the end.

Q Through what had it passed? A Passed through the lung.

Q The right lung? A The right lung.

Q Did you find any other marks on his body? A Yes, sir.

Q Where? A On the left side of the abdomen there was a mark about three inches below the lower end of the breast bone and one and one-half inches to the left; this was a circular wound about a quarter of an inch in diameter.

Q Did you follow the course of that wound? A Yes, sir.

Q And it led where? A Through the skin, through the muscles and to the beginning of the intestines; it led from the front part of the body to the back, left to right.

Q Were you able to determine the number of inches the bullet had gone through? A Yes, sir.

Q How far? A The end of this was six inches from the opening in the skin.

Q And what was the general course of the second? A It had gone from left to right and backwards.

Q And what had it punctured? A The stomach.

Q Were there any other wounds? A Yes, sir; there was one below this second wound, one-half inch above the navel and one and one-half inches to the left.

Q How far in distance, in inches, was the second wound from the third wound? A Two and one-half inches below it.

Q And how far was the first wound from the second wound? A No measurement was made of that, about twelve inches.

Q Tell us what you did, please, with reference to the third wound; did you examine as to what course the bullet had taken?

A Yes, sir; it had punctured the skin and muscle and then had passed through the small intestines; there were four puncture wounds in the intestines.

Q And lodged where? A And it passed through the lower end of the bowel called the sigmoid flexure, and it was found in back of the bladder, lying free.

Q Will you indicate the course of the third wound? A It had taken a downward course and backward.

Q So that the course of the first wound, I understand you, was directly through the body? A Yes, sir.

Q The course of the second wound was? A From left to right and backward.

Q Upward or downward? A In a straight course.

Q And the third wound took a downward course? A Yes, sir.

Q Did you ascertain what injury, if any, those wounds had caused? A Yes, sir.

Q What? A It had caused a perforation of the lung and ruptured blood vessels, producing hemorrhage.

Q Did you form an opinion after performing your autopsy what caused the death of Lieutenant Ryan? A Yes, sir.

Q What? A That death had been caused by bullet injuries.

Q And did you determine which one of the bullet injuries had caused his death? A Any one would have caused death.

Q Where did you locate the hemorrhage? A The right chest was full of blood and there was quite a large amount of blood in the abdominal cavity.

Q Did you form an opinion as to how long Lieutenant Ryan had been dead? A Within three hours.

Q You have spoken, Doctor, of locating the places where the bullets were lodged, did you get the bullets? A Yes, sir.

Q I show you an envelope containing some bullets and ask you whether or not you recognize the handwriting on that envelope? A Yes, sir.

Q Whose is it? A The signature in the lower corner is my signature.

Q What does the envelope contain? A Bullets.

Q Won't you produce them? (Witness does so.)

Q How many bullets do you produce? A Two, and a piece of lead.

Dr. George L. Warren, cross.

Q These two bullets and a piece of lead which you produce were procured from where? A The bullets were taken from the body of Patrick J. Ryan, and the piece of lead was found during the autopsy on the autopsy table.

Q Do you know where it came from? A No, we couldn't locate that.

Q Is there any way that you now have of testifying which of these bullets came from the upper and lower wounds? A Yes, sir; I marked the bullets.

Q Won't you explain the marks? A The one cut near the tip and with a cross on the tip is the one taken from the chest; the one with the tip cut and a little punch hole in it is the one taken from the bladder.

Q Is that the highest and lowest? A Yes, sir.

Q (*By the Court.*) You say, "Taken from the chest," you mean that wound that punctured that? A Yes, sir.

Cross examination by Mr. Simandl.

Q You didn't find, then, Doctor, the bullet that went through the abdomen and right above the navel? A Yes, sir; the one that passed through the stomach I didn't find.

Q Were there any powder marks on the body? A No.

Q There were none? A No.

Q Was there any other injury found? A No, sir; no other injury.

Q Was the face lacerated in any way? A No, sir.

Q Was the jaw bone broken? A No, sir.

Q Who did you say was present? A Thomas O'Mara and Officer Landuci.

Q There were no others present? A No, sir.

Re-direct examination by Mr. Bernhard.

Q Do you know whether or not O'Mara was in the room at the time you reached there? A O'Mara; yes, sir; he was there.

Mr. Bernhard. I offer the bullets in evidence.

Marked Ex. S. 6.

Joseph Cordano, direct.

JOSEPH CORDANO, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Mr. Simandl. Now, if your Honor please, I think it is proper for me to renew the motion I made before we adjourned.

The Court. Before we adjourned the Court announced that it would not grant the motion, but would reserve its decision and later permit you to renew the motion. I think upon consideration, in view of all the facts which have developed, that in the reasonable and proper exercise of the discretion of the Court that the motion should not be granted. The motion is therefore denied.

Defendant's counsel prays an exception to this ruling of the Court and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q Where do you live? A I live at 25 Chelsea avenue.

Q How old are you? A Fifty-one.

Q Married? A Yes, sir.

Q Your business is police officer of the City of Newark? A Yes, sir.

Q How long have you been a police officer? A Twenty-seven years and six months.

Q And you are at the present time captain of what precinct? A Eighth precinct.

Q How long have you been a captain of the Police Department of the City of Newark? A Since 1913; six years.

Q Did you know Lieutenant Ryan in his lifetime? A Yes, sir.

Q Did you know whether he was married or single? A He was single.

Q Did you know where he lived in July, 1919? A Yes, sir.

Q Where? A 36 Chelsea avenue.

Q And that is located where with reference to your own residence? A Practically across the street, catacornered.

Q With whom did he live? A Lived with his mother and father and a couple of sisters.

Q How long had you known Lieutenant Ryan? A About thirty years.

Joseph Cordano, direct.

Q Do you know how long he had been a police officer in the city of Newark? A I do.

Q How long? A Twenty years.

Q Do you know to what department he had been detailed? A Detailed to the detective department for the last fourteen years—fifteen years.

Q Did you see him on the 16th day of July? A I did.

Q Where? A I met him on South Orange avenue car while I was going west up South Orange avenue.

Q Whereabouts? A About South Orange avenue and Prince street he got on the car.

Q (*By the Court.*) He got on or you? A He got on.

Q You had boarded that car where? A Plane and Market streets.

Q Do you know how far Prince street is from Norfolk street? A I do.

Q Won't you tell the Court and jury? A Two blocks.

Q Ordinary city blocks? A Why, yes, sir.

Q As Lieutenant Ryan boarded the westbound car at Prince street and South Orange avenue, where were you? A I was sitting on the inside of the car on the left-hand side, about three feet from the door.

Q Which door? A The rear door.

Q Were you in uniform? A No, sir.

Q Was Lieutenant Ryan in uniform? A No, sir; he was not.

Q Did you speak to him? A He spoke to me; I spoke to him afterward; he spoke first.

Q How far did you ride with him? A Two blocks.

Q To what place? A Norfolk street and South Orange avenue.

Q What did you do when you reached Norfolk street and South Orange avenue? A We got off.

Q From the time that he boarded the car at Prince street till you both got off at Norfolk street and South Orange avenue, had you or had you not engaged in conversation with him? A We just started to have a little conversation.

Q When you and Lieutenant Ryan got off the car at Norfolk street and South Orange avenue, what did you do? A Why, we got off—you know, the car stops about fifty feet from the corner, and we got off and walked to the corner, and looked around and Ryan started to run.

Q Which way? A Across Norfolk street.

Q I wonder if you could designate the route that Ryan took when you say he started to run across Norfolk street? A We got off right at the corner here (indicating).

The Court. Indicating the northeast corner of Norfolk street and South Orange avenue.

Witness. About there (indicating).

Mr. Bernhard. A point opposite about the letter X.

Witness. Yes, sir.

Q And then you did what? A Ryan started to run after a man that was getting up off the stoop.

Q How do you know that? A I seen the two men sitting on the stoop over here (indicating).

The Court. Indicating a stoop on the east side of the cafe.

Mr. Bernhard. No, sir; he indicates a stoop on the west side.

The Court. The east side of the cafe on the west side of Norfolk street.

A (Continuing.) A man got up from the stoop there and he started to run in this direction.

Q (*By the Court.*) North? A North. Then through that little gate there.

Q To the alley? A Yes; the gate was open and he ran into that yard and Lieutenant Ryan was closely behind him.

Q Closely might mean something to your mind and something different to the jury. How far behind? A 25 feet.

Q And what was he doing? A Running; sprinting.

Q Go ahead. A The man was trying to get over the fence.

Q How do you know that? A I was looking at him.

Q Where were you when you were looking? A I was right on this side of the street.

Q On the westerly side of Norfolk street? A I was walking rather lively, because I wanted to go with him; I did not know whether I would have to chase him or somebody else.

Q So you looked in? A Yes, sir.

Q What did you see? A I see Ryan get ahold of this man by the leg and pull him down.

Q Can you tell which leg? A The left leg.

Q Where was the man when Ryan had ahold of the left leg? A His body was up on top of the shed.

Q Then what happened? A He pulled him down and gave him a friske.

Q By that you mean? A He searched his pockets.

Q Did you see what Lieutenant Ryan did? A Yes, sir.

Q Tell the Court and jury. A Just passed his hand under his coat, feeling his pants pockets on both sides.

Q All right, then what? A Just then I came in the yard and he said, "Get the other fellow."

Q Was there any other fellow? A There was.

Q What had become of him? A He was standing outside looking in the yard.

Q Outside where? A On the sidewalk; he was out there.

Q About midway of the sidewalk? A And we were in here (indicating).

Q How far away was the man on the sidewalk from you when Ryan said, "Get the other one?" A About twelve feet.

Q What did you then do? A I started to run after the other fellow.

Q What did he start to do? A He started to run.

Q Did you follow him? A I did.

Q How far? A Down below Rutgers street.

Q Where was Lieutenant Ryan and the other fellow when you started to run toward the other man on the sidewalk? A They were standing in the yard; Ryan had him this way.

Q Indicating the right wrist. A This way (illustrating).

Q With which hand did Lieutenant Ryan have ahold of the other fellow? A He had ahold of him with the right hand, holding the right wrist, and he had his left hand in the back of the prisoner's coat collar.

Q That was the position of Ryan and the other man when you started to run for the other man that was on the sidewalk? A Yes, sir.

Q How far did you go after the other man? A A block and a half; that is, between Rutgers street, near Boston street.

Q Which streets lie between Prince street and Norfolk street? A Well, Prince street only reaches South Orange avenue.

Q Yes. A Right on the other side is Boston street.

Joseph Cordano, direct.

Q Is that the street you speak of that you chased the other man to? A Yes, sir.

Q What became of the other man? A The other man was gaining on me; he was a young man.

Q When he reached Norfolk street how far was he ahead of you? A About one hundred and fifty feet; not on Norfolk street, at Boston street.

Q Then what did you do? A I heard shots.

Q Just exactly where were you when you heard shots? A Boston street, at the corner of South Orange avenue.

Q And on which side of South Orange avenue were you, north or south? A I was on the north side.

Q Where was the man you were following? A He was on the north side at that time.

Q What did you do when you heard shots? A I ran back.

Q How many shots did you hear? A I counted four.

Q Can you indicate to the Court and jury within what space of time you counted the four shots? A Yes, sir; they went like one, two, three, four.

Q (*By the Court.*) You are speaking as if there was a pause between two and three. A Yes, sir.

Q When you heard the first shot what did you do? A Why, I halted.

Q As you halted what then happened? A Why, I started to run back right away.

Q Had the second shot been fired before you started to run back or not? A Just about as I was turning.

Q When was the third shot fired? A It was all in the course of three seconds, two seconds.

Q Do you suppose that you can tell the Court and jury from the time you halted and started to run how far you had gotten before the fourth shot had been fired. A I had not gone five feet.

Q And that five feet did you cover walking or running? A Running.

Q When you turned did you see anything? A I didn't see anything until I got to the corner of South Orange avenue and Norfolk street.

Q What time of the night did you hear the shots? A This was shortly before seven, about ten minutes.

Joseph Cordano, direct.

Q How do you figure it? A Because I looked at my watch when I got on the car at twenty-five minutes to seven, and shortly after when I got to the hospital it was seven o'clock.

Q And what kind of a night was it? A It was not, as I could see, very clear; it wasn't raining.

Q How about the light? A It was daylight.

Q You say that when you reached the corner of Norfolk street and South Orange you saw something? A Yes, sir.

Q What did you see? A I seen Lieutenant Ryan partly lying down in the arms of some people.

Q Can you indicate on the map the point where you saw Lieutenant Ryan lying? A He was about here (indicating).

Q You are pointing to the sidewalk? A Yes, sir; right near the store window.

Q Witness points to a place on the sidewalk on the easterly side of Norfolk street, near the window at the corner. In what position was he lying? A He was down like this (illustrating).

Q Lying with— A With his legs stretched out on the pavement and somebody was holding his body up.

Q On the pavement, in which direction? A His head was toward the north.

Q You say he was lying in the arms of someone; do you happen to know the man in whose arms he was? A I know one or two; there was different people there; Mr. Baker and his brother; I have the names here; they had an automobile there and we took him to the hospital in the machine.

Q Which hospital did you take him to? A City Hospital.

Q How far were you away from Ryan and the man he had ahold of when you were in the alley in the position which you have described? A I was only about three feet away.

Q Do you know who the man was that he had ahold of? A I didn't know him then.

Q Do you know him now? A Yes, sir.

Q Who? A Philip Schilling.

Q The defendant? A Yes, sir.

Q As you were taking Lieutenant Ryan to the police station who was with you? A Taking—

Q Pardon me, to the hospital. A The owner of the car, Mr. Baker, and his brother.

Q What time did you reach the hospital? A I think it was seven o'clock.

Joseph Cordano, direct.

Q What did you do when you reached there? A Telephoned headquarters.

Q I mean with reference to Lieutenant Ryan. A We put him on the bed and started to undress him.

Q Who started to undress him? A Why, the people there connected with the hospital, and, of course, I was with him, because he wanted to talk to me.

Q Were you present at the time he was undressed? A I was; yes, sir.

Q I show you a coat and ask you whether or not you can recognize that coat? A Well, it was a coat just like that, I believe it is the coat; I didn't mark it, or anything.

Q Do you know what kind of shirt Lieutenant Ryan had on? A The shirt he had on, of course, I seen it there in the street when he unbuttoned his coat I seen the blood coming from it.

Q Do you recall the color? A I can't very well recall.

Q What time did you telephone the police station? A I telephoned as soon as I reached the hospital.

Q And who attended Lieutenant Ryan at the hospital? A The doctor?

Q Yes. Do you recall his name? A No, I do not.

Q How long did you remain at the hospital? A I remained about half an hour.

Q Then where did you go? A Down to police headquarters.

Q What was the condition of Lieutenant Ryan when you left the hospital a half hour later? A He was in a dying condition.

Q You went where? A Police headquarters.

Q How long did you remain there? A Five o'clock the next morning.

Q Then you went where? A I went home.

Q Do you know whether or not during that evening any prisoners were brought into the police station? A Yes, sir.

Q When next after you saw Ryan with the man in the alley did you next see the man? A Police Headquarters.

Q What time? A One in the morning.

Q Who was that man? A Philip Schilling.

Q Did you have any conversation with Ryan at the hospital? A I was present—yes, sir.

Q What room was Ryan in at the time the doctor was present? A Why, he was taken upstairs in Ward 7.

Joseph Cordano, direct.

Q Was it in the receiving room, or had he been taken in another room? A He was undressed downstairs in the receiving room and then we put him on one of these beds with wheels on and took him upstairs.

Q You said that Ryan was dying when you left the hospital? A Yes, sir.

Q How did you know? A Why, he couldn't hardly talk any more.

Q Did Ryan himself say anything about it? A Said he was dying; yes, sir.

Q At the time that Ryan said that he was dying do you know who was present?

Mr. Simandl. I object.

The Court. Why do you object?

Mr. Simandl. I withdraw my objection.

A In the hospital, the doctor, myself and the priest was there, nurses.

Q What priest? A I don't know.

Q Go ahead. A And some of the officers, Sweeney and other officers came there when he was still talking.

Q Now, after Ryan said that he was dying, did he say anything more? Answer that yes or no.

The Court. Don't tell us what he did say, but whether or not he said something.

A Yes, sir.

Q And at the time that he did say something do you know who was present? A Well, the priest was there and the nurse and—that was the last time I was with him.

Q How about the doctor? A The doctor was in to see him, but I was not present when the doctor was there.

Q Now, then, from the time that Ryan told you he was dying until he made the other statement, how much time elapsed? A Only half a minute.

Mr. Bernhard. Is Dr. Bissett in the court room? I desire the right to examine this witness when Dr. Bissett is here. For the present I turn him over to cross examination.

Joseph Cordano, cross.

Cross examination by Mr. Simandl.

Q When you reached South Orange avenue and Norfolk street on the trolley car about where, please show on the map, did you alight from the car? A This is South Orange avenue (indicating); we alighted about here, the rear of the car, fifty feet from the corner; we walked up.

Q About fifty feet from the corner.

The Court. The witness indicates on the north side of South Orange avenue, east of Norfolk street.

Q (*By the Court.*) When you say fifty feet from the corner, do you mean from the manhole or from the building line? A I think from the curb line.

Q Then you walked up South Orange avenue with Ryan to the corner, did you not? A Yes, sir.

Q Then you walked over Norfolk street on South Orange avenue in a northerly direction, did you not? A Yes, sir.

Q How far did you walk over Norfolk street in a northerly direction? A About twenty-five feet.

Q Then you say you saw someone? A Yes, sir.

Q When did you first see these parties whom you refer to as having seen sitting on the stoop? A Why, just about at that time when we got twenty-five feet from the corner, going north, we seen this fellow getting off the stoop and started to run north.

Q You didn't see them when you turned the corner, did you? A Not until we got around the corner, twenty-five feet from the corner.

Q Where did the other man run to originally? A Why, he didn't make any effort to get away; he started to move in a southerly direction, but he did not run.

Q And you remained standing on the easterly side of Norfolk street? A No, I didn't remain standing.

Q What did you do? I was running.

Q You were running? A But not as fast as Ryan.

Q Which way did you run? A Following Ryan.

Q Didn't I understand you to say on your direct examination that you walked northerly on Norfolk street after Ryan commenced to run? A No; we was together all the time, except he run faster than I did.

Joseph Cordano, cross.

Q Didn't I understand you to say that you were standing on the easterly side of Norfolk street and looked through the gate at Ryan while he grabbed Schilling? A He was then about twenty-five feet ahead of me; he grabbed Schilling before I could run into the yard; he grabbed him by the leg and pulled him down.

Q Are you sure that you did not say on your direct examination that you were not standing on the easterly side of Norfolk street when you saw Ryan and the prisoner in the yard? A I wasn't standing at no time; I was undecided whether to run around and head him off; I thought maybe he would jump the fence and get away, and when I seen he had him by the leg I went in to help him.

Q Where were you when you saw Ryan get ahold of Schilling by the leg? A I was on my way into the yard; I was on the street.

Q Where was the other man at that time? A He was not far away to our left; he did not make any effort to run, not so I could notice.

Q And then Ryan, you say, instructed you to run after the other man? A Told me to go get the other fellow; yes, sir.

Q How far were you away from him when you started to run after him? A I was about twelve feet from him.

Q Please indicate, Captain, where you were standing when you saw Ryan grab ahold of Schilling by the leg? A Why, this is the shed (indicating).

The Court. Indicating a place in the yard behind the saloon.

A (Continuing.) Ryan was pulling Schilling down off this shed, from this fence or shed, and I was going in from the sidewalk into the yard.

Q Then Schilling was trying to mount this shed, indicating a shed which is marked as being eight feet wide in the rear of the cafe; is that the shed? A That is right.

Q You are sure about that? A Yes, sir.

Q And he was attempting to climb up on the easterly side of that shed? A Yes, sir.

Q That would be this side (indicating)? A Yes, sir.

Q Then he was not trying to stand up on an obstruction? A He was on top of the shed, except one leg; he didn't get that one up in time.

Q And you were practically on the sidewalk? A Yes, sir.

Q On the westerly side of Norfolk street? A Yes, sir.

Q What did Schilling do when Ryan grabbed him from the shed? A Why, he was struggling; kind of resisting.

Q Did he say anything? A Said something—says, "You ain't got me right, Paddy."

Q And he did say, "You ain't got me right?" A Yes, sir.

Q Did he ask Lieutenant Ryan to let go of him? A No.

Q And then how soon after Schilling said, "You ain't got me right," did you go after the other man? A Just about at that time, because Ryan said, "That is all right;" he said to me, "Go get the other fellow, Cap."

Q Did you notice whether Lieutenant Ryan grasped Schilling gently or not? A No, I did not.

Q Did he just lay his hands upon him gently? A Oh, he pulled him down off the shed and passed his hand—frisked his pockets; that is about all he done, and then he got ahold of the back of the coat.

Q How many men have you frisked, Captain, in your experience in the Police Department? A I don't know; I have made about a thousand arrests; I do not friske them all.

Q Isn't it customary to start frisking a man all the way down from his chest in police circles? A It all depends on who they are.

Q Is it customary or not? A Well, it is customary in murder cases, or burglar's, or something like that; not in every case.

Q Are you sure that Lieutenant Ryan did not friske this boy on his chest and all the way down? A I am sure of that; I seen him pass his hand right under his coat and feel of his pants pockets; never bothered with the coat.

Q Then he grasped him? A By the collar and the sleeve of the right wrist.

Q Was it the collar he was wearing or his coat collar? A Coat collar.

Q Did he grasp him gently? A I couldn't say.

Q How did he grasp him? A Just as we generally do.

Q How do you generally grasp them? A Hold them strong enough to prevent them from making an escape.

Q Is that gentle or with some force? A No; it is with some force.

Joseph Cordano, cross.

Q You are not sure of whether he had him by the coat collar or shirt collar, are you? A That I would not swear to.

Q It might have been the shirt collar? A It might have been.

Q Was there any scuffle while you were present between Ryan and Schilling? A Just during the time that he was pulling him down off the fence and until he got him standing there where I was, and he said, "Go and get the other fellow;" it was only a couple of seconds; two or three seconds.

Q And then you ran after the other fellow, southerly on Norfolk street to South Orange avenue? A Yes, sir.

Q And the man continued running down on the northerly side of South Orange avenue? A Yes, sir.

Q And you ran after him about a block and a half? A Yes, sir.

Q Then you heard a shot? A Yes, sir.

Q And then you heard three more shots? A Yes, sir.

Q Now, how quickly did the three other shots come after the first shot? A There was just one, two, three, four, like that.

Q As quick as a flash? A Yes, sir.

Adjourned until tomorrow, Tuesday, October 21st, 1919.

ESSEX COUNTY COURT OF OYER AND TERMINER.

Tuesday, October 21, 1919.

STATE,

vs.

PHILIP SCHILLING.

Contiued pursuant to adjournment.
Present, counsel as before stated.

JOSEPH CORDANO, resumes the stand in behalf of the State.

Cross examination (continued) by Mr. Simandl.

Q As I remember your testimony, you said the shots came as quick as a flash, is that right? A Not as quick as a flash; I don't think I said that.

Q They came in very rapid succession? A I enumerated the shots, the four of them; about five or six seconds.

Q Well, just enumerate them again; how did they come to your ear? A One, two, three (witness pauses), four.

Q When did you see Schilling after the occurrence? A At one o'clock in the morning.

Q Where? A Police headquarters.

Q You saw him at police headquarters? A Yes, sir.

Q What was his appearance when he got at police headquarters? A Normal; that is, I did not see nothing out of the ordinary.

Q Nothing at all? A No.

Q Did he have any lacerations on his face? A No.

Q Are you sure about that? A Might have been scratched a little.

Q Oh, he did have some scratches? A Not many; I think one.

Q Don't you know that both of Schilling's eyes were swollen? A No, sir.

Q Are you sure about that? A Yes, sir.

Q And you say the only visible marks on Schilling were a few scratches? A That is all.

Joseph Cordano, cross.

Q How did he appear to you when he got down to police headquarters? A He appeared to be the same as any other man would under the conditions.

Q What do you mean by that; was he normal? A Yes, sir.

Q Was he concerned? A No, he wasn't very much concerned.

Q Was he nervous? A No, sir.

Q Absolutely calm? A He was.

Q You said that Ryan said he was dying, is that so? A Yes, sir.

Q How long afterwards did he die? A Why—

Q If you know. A I don't know.

Q When Schilling arrived at police headquarters were you there? A I was just coming back from a trip looking for Schilling in another direction in the city.

Q And Schilling had already arrived? A Yes, sir.

Q There was a great crowd at police headquarters? A Yes, sir.

Q Very large crowd? A Yes, sir.

Q Rather threatening crowd? A I don't know about threatening.

Q Well, there were some threats made by the crowd?

Objected to.

Q I withdraw my question. There was a large crowd in police headquarters? A Yes, sir; seventy-five or a hundred; fifty or a hundred.

Q (*By the Court.*) Did you say there was a large crowd at police headquarters or outside? A The crowd was just coming in when we came around in an automobile; some was inside and some was by the door on the steps.

Q Did you hear any of the crowd say anything in the presence of the accused? A I didn't hear anything.

Q You say he was perfectly calm? A I should say he was; yes, sir.

Mr. Simandl. That is all up to that point. I understand Mr. Bernhard is going to recall the captain.

Mr. Bernhard. I said I desired to reserve the right to recall him if I desired to do so.

The Court. As to what Ryan said, if he said anything?

Mr. Bernhard. Yes, sir.

The Court. Any objection to that?

Mr. Simandl. No.

Q (*By the Court.*) Now, from the time that the late Mr. Ryan got on the South Orange avenue trolley car going west, you got off with him at Norfolk street and went across the street running, as you described, he went across, and then as you saw him with Schilling and later on the ground, someone holding his body partly up, did you see a revolver in his hand? A I did not.

Q Did you help undress him? A I did.

Q Did you see a revolver in his pocket? A I did not.

FRANK DONNELLY, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are a member of the Police Department of the City of Newark? A Yes, sir.

Q For how long? A A little over eleven years.

Q Assigned to any particular department in May, June or July? A Police headquarters.

Q Did you know Ryan? A Yes, sir.

Q How many years? A Since I have been in that department.

Q Do you recall whether or not you were on duty July 16th? A I was.

Q Where were you when you reported for duty? A Police headquarters.

Q What time? A Shortly before seven.

Q How long did you remain there? A All night.

Q Had you or had you not seen Ryan during the day? A Yes, sir.

Q Did you or did you not hear during the evening of what occurred? A Yes, sir; I did hear.

Q Did you go anywhere then? A Yes, sir.

Q Where? A Norfolk street and South Orange avenue.

Q Did you go anywhere else? A City Hospital.

Q What time did you go to the City Hospital? A Shortly after seven.

Q What did you do at the City Hospital? A Had an interview with Ryan.

Frank Donnelly, direct.

Q Did you do anything else? A Yes, sir; I notified police headquarters; had a conversation with police headquarters about several things.

Q Was it before or after you notified police headquarters that you had a conversation with Ryan? A Before.

Q How was he dressed? A Nude.

Q Did you know where his clothes were? A Yes, sir.

Q Where? A Receiving room.

Q Where was he? A In ward 7.

Q How did you know his clothes was there? A I seen them.

Q How did you know they were Ryan's clothes? A The orderly just took them off and told me so.

Q Was there any other way that you knew? A Seen them on him.

Q When? A That morning.

Q Would you recognize the clothes if you saw them?

Mr. Simandl. I object. The witness does not seem to be sure that these were the clothes.

The Court. You mean by that the morning of the 16th of July?

Witness. Yes, sir.

The Court. What is the objection?

Mr. Simandl. I understood him originally, when the prosecutor asked the question, the orderly told him those were the clothes; then he qualified the statement.

The Court. No, he does not qualify it; he amplifies it; he says in the morning he saw them on him.

Mr. Simandl. I still enter my objection.

Q I show you a coat and ask you whether or not you recognize that coat as to whose coat it is? A That was the one I saw on Ryan the morning of the 16th of July and the one I saw at the hospital on the night of the 16th of July.

Q I show you a pair of trousers and ask you if you recognize who wore those trousers? A Lieutenant Ryan's trousers.

Q I show you a shirt and ask you whether or not you recognize the shirt as his?

Mr. Simandl. Your Honor, I think that calls for an answer, yes or no.

The Court. Yes.

Frank Donnelly, direct.

Q Do you or do you not recognize whose shirt that is? A I do.

Q Whose is it? A Lieutenant Ryan's.

Mr. Bernhard. I ask that the coat be marked for identification and the trousers and the shirt.

Q (*By the Court.*) When did you see the trousers and shirt? A The morning of July 16th and the night of July 16th.

Q (*By the Court.*) Where were they in the morning? A On Ryan's body.

Q (*By the Court.*) Where were they at night? A At the hospital in the receiving room; they were on the floor of the receiving room of the City Hospital.

(Coat marked S. 7 for identification. Trousers marked S. 8 for identification. Shirt marked S. 9 for identification.)

Q Beside the coat, trousers and shirt, did you see any other clothing on the floor of the receiving ward? A I saw one shoe there.

Q And is that all that you now recall? A Yes, sir; all I recall.

Mr. Bernhard. I now offer the coat, trousers and shirt in evidence.

Mr. Simandl. I object to their admission on the ground that it does not seem logical to presume that the witness knew a shirt such as this from any other shirt that Ryan wore. He does not state specifically why he knows that Ryan wore that shirt. It seems to me that in view of his own admission that the orderly told him they were Ryan's clothing he is acting on his imagination so far as that shirt is concerned.

The Court. Is not that shirt of a distinct pattern?

Mr. Simandl. I don't think it is.

The Court. It is not black or white; it is a distinct pattern; it has distinguishing features so that a man might testify if he does recognize it.

Mr. Simandl. I object to it on that ground; to all of the articles.

Frank Donnelly, cross.

The Court. You do not object because they are offered in bulk, instead of separately?

Mr. Simandl. No, sir.

The Court. Now, as to the evidence, as I understand it, Ryan was seen with the clothing on on the morning of July 16; he was shot with three bullet wounds in his body; Captain Cordano says he heard four shots; he was taken to the hospital and in an adjoining room, or somewhere near the place where the witness saw Ryan nude, these articles of clothing were present; that seems to show a state of circumstances from which one might draw the inference that these articles of clothing are the articles of clothing that he had on at the time he was shot.

Mr. Simandl. Yes, sir.

The Court. Then they are admissible. Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

The Court. They will be admitted by striking out the words "for identification."

(Coat marked Exhibit S. 7.)

(Trousers marked Exhibit S. 8.)

(Shirt marked Exhibit S. 9.)

Cross examination by Mr. Simandl.

Q From what hours were you working on July 15th and July 16th; during what hours? A I was continually at police headquarters from seven o'clock at night to seven in the morning on the 17th of July.

The Court. He said from the 15th to the 16th.

A On the 15th from nine in the morning until ten-thirty at night.

Q And on the 16th you worked during what hours? A Reported in the morning at nine o'clock and reported back at seven o'clock at night and worked until the morning of July 17, eight

George Katz, direct.

P. M. In other words, I was detailed on duty from the night of the 16th to the morning of the 17th at police headquarters.

Q How long did you speak to Lieutenant Ryan when you met him in the morning? A I had a conversation with him in our business room and at the desk.

Q What called your attention to this particular clothing? A Why, nothing about it any more than it was a brown suit and the shirt was a peculiar shirt; there isn't a man down there got a shirt like it, a stripe as fine as that.

GEORGE KATZ, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Do you reside at 44 Jones street? A Yes, sir.

Q And what is your business? A Tool maker.

Q Where? A Rextel & Dyke Company.

Q How close is 44 Jones street to South Orange avenue and Norfolk street? A Right in the middle of the block.

Q How long have you worked at this place you mentioned? A A week and a half.

Q Where did you work in July? A I had a business of my own.

Q Whereabouts? A 535 Bloomfield avenue.

Q And you live at 44 Jones street? A Yes, sir.

Q Do you recall where you were on the evening of July 16th? A Lillian's delicatessen stroe.

Q Where is that? A Five doors away from Norfolk street.

Q Which way, towards South Orange? A Towards South Orange.

Q And on which side? A Right side, going up South Orange avenue.

Q What is on the upper corner of South Orange avenue and Norfolk street, on the right-hand side? A A saloon.

Q And what is next to the saloon? A A bill posting sign.

Q What is next to that on South Orange avenue side? A House.

Q And next to that is what? A Saloon.

Q Whereabouts were you at the delicatessen store, inside or out? A Inside.

Q And what time were you there? A A few minutes to seven.

George Katz, direct.

Q How long did you remain there? A Well, I was there about ten or fifteen minutes.

Q Anybody with you? A No.

Q Then what did you do? A I was eating in there.

Q What did you do after that? A Went outside.

Q Where did you go when you went outside? A I heard some shots and went outside to see what it was.

Q Where were you when you heard the shots? A Inside.

Q Standing up? A Standing up.

Q How many shots did you hear? A Four.

Q Can you indicate to the Court and jury how those shots came? A No, sir.

Q You say you heard four? A Four.

Q From the time that you heard the first one until you heard the fourth one how much time passed? A I cannot tell.

Q Were you standing when you heard the first? A Yes, sir.

Q Where were you when you heard the fourth? A Outside.

Q How far from the door were you standing when you heard the first one? A Oh, about a few feet.

Q Can you be more specific? A About six feet.

Q Was the door open? A Open.

Q When you heard the first shot what did you do? A Went outside to see what it was.

Q How did you go? A Walked out.

Q How far did you get before you heard the fourth shot? A About to the door.

Q But while you were walking from six feet away from the door to the doorway, during that space I understand you heard four shots? A Yes, sir.

Q What did you do when you went outside? A Just looked around to see what was the matter.

Q Did you see anything? A I seen a man running away.

Q Where were you when you saw the man running away? A In the doorway.

Q Which way were you looking? A Toward the corner of Jones street and South Orange avenue.

Q How far from Norfolk street is Jones street? A Probably about two hundred feet or so.

Q That is your best recollection? A Yes, sir.

Q Where was the man actually when you saw him running the first time? A Right at the corner of Jones street and South Orange avenue.

George Katz, direct.

Q And which corner, the upper corner of South Orange avenue? A The lower.

Q One toward Newark? A Yes, sir.

Q I understand this is a vacant lot? A Yes, sir.

Q And which way was he running? A Toward Jones street.

Q What sort of a view did you have of him? A What do you mean?

Q Did you have a full view, side view, or back view? A Back view.

Q What did you do when you saw him running? A I just run across the street to see what was up.

Q Which way did you run? A Toward Jones street.

Q And toward which side? A The lower side.

Q How close did you get to him? A Well, I just couldn't say exactly.

Q About? A About twenty feet or so.

Q Did you continue to watch the man? A Yes, sir.

Q Where did he go? A 19 Jones street.

Q 19 Jones street is on which side of Jones street, the upper side or lower? A The upper side.

Q And how far from the corner of South Orange avenue and Jones street is number 19? A Oh, about nine or ten doors away.

Q And what is number 19 Jones street? A A house.

Q And where did he run to? A In the gateway there.

Q What kind of a gateway? A It is a little alleyway.

Q And which side of 19 Jones street, the side nearer South Orange avenue? A Nearer South Orange avenue.

Q How close were you away when you saw him run into the gateway? A About the middle of the distance from 19 Jones street to South Orange avenue.

Q Were there many people there? A A few.

Q What did you do? A I just stopped there.

Q Where was the man when you stopped running? A Just about at the alleyway.

Q Where did he go? A In the alleyway.

Q Where was the man when you last saw him? A In the alleyway.

Q What was he doing? A Running into the alley.

Q Did you see him again? A No, sir.

Q Did you have a look at his face at any time? A No, sir.

George Katz, direct.

Q Then what did you do? A Walked.
Q Where to? A Corner of South Orange avenue.
Q Which corner? A I just can't remember which corner; I met a bunch of fellows and started to talk.
Q Did you see anything there at the corner of South Orange avenue? A I seen a bunch of fellows.
Q Whereabouts? A At the corner, on the upper corner.
Q The saloon corner? A Yes, sir.
Q Did you see anything else? A No, sir.
Q How long did you remain there? A A few minutes.
Q Did anything happen while you remained there? A Not exactly, but a few policemen came over and asked me where he ran to.
Q Some policemen came and asked you some questions? A Yes, sir.
Q When you got to the corner of South Orange avenue and Jones street, the corner of the lot, who reached that point first, you or the man that was running? A He did.
Q How far ahead of you was he at that time? A Very near; I cannot just exactly tell you how far.
Q Did you see how he was dressed? A Yes, sir.
Q How was he dressed? A In a dark suit, light top shoes; no tie; no hat; that is as near as I can recollect.
Q Did you notice anything else about him? A Only that a gun was in his hand.
Q Where did you first notice the gun? A The middle of the block.
Q Middle of which block? A Jones street.
Q Which hand did he carry the gun in? A Left.
Q What became of the gun, if you know? A I don't know.
Q Where was it as you saw him disappear in the alley at 19 Jones street; where was the gun then? A In his hand.
Q Which hand? A Left.
Q Same hand in which you first saw it? A Yes, sir.
Q (*By the Court.*) Do you mean a revolver or a gun? A Yes, sir; revolver.
Q Did you know Lieutenant Ryan in his lifetime? A I had seen him; yes, sir.
Q Did you or did you not see him on the night of July 16th? A No, sir.
Q Did you go to the spot where this crowd was standing? A Yes, sir.

George Katz, cross.

Q Did you see anything there? A Nothing but blood stains.

Q Where did you see the blood stains? A On the pavement.

Q Whereabouts on the pavement? A Right at a pole there and a little towards the window.

Q Are you familiar with this map? A A little.

Q Can you indicate on the map where you saw the blood stains?

The Court. He indicates two places—one near the trolley pole and one near the store window, on Norfolk street, near the northeast corner of South Orange avenue and Norfolk street.

Q Are you able to tell from the view you had of those blood stains the size of the spot near the trolley pole? A No, sir.

Q Are you able to tell the Court and jury of the view you had of the blood stains the size of the spot near the store? A No, sir.

Cross examination by Mr. Simandl.

Q How do you know that these stains were blood stains? A They looked red.

Q They may have been paint? A They may have been; I don't know.

Q And you are absolutely sure this man had a gun in his left hand? A Yes, sir.

Q His back was turned to you? A Yes, sir.

Q Was his hand moving? A Well, that I could not tell you.

Q He was running? A He was running.

Q And his hands were moving? A They must have.

Q How do you know he had a gun in his hand? A I seen it.

Q You are sure about that? A Yes, sir.

Q How far were you from him at all times? A Well, that time I was about the middle of the block, about the middle from South Orange avenue to that house.

Q How far would that be? A About ten houses away.

Q And you are sure it was the left hand he had it in? A Left hand.

Q You say that you were ten houses away from him? A Yes, sir.

George Katz, cross.

Q Do you know what the average size of a house is in Newark? A I don't know.

Q Do you know the average size of a house on Jones street? A Well, approximately twenty-five feet.

Q Then it would be about 250 feet away, you think? A Or more.

Q And at that distance do you think you could tell clearly that he had a revolver in his hand? A Yes, sir.

Q The shots that you heard came out as quick as a flash? A Well, I would not say as quick as a flash; I couldn't just tell you how quick they came out.

Q Well, they came so quick that you only had an opportunity to walk a few feet between the first and last shots? A Yes, sir.

Q You said on direct examination, as I remember, to the first question that the prosecutor put to you, as to how far you walked in the delicatessen store, you said you walked two feet? A Six feet.

Q You later changed it to six?

Mr. Bernhard. I object.

The Court. Overruled. The witness said he was two feet from the door, and you asked him to state the fact, you wanted it accurately, and he said six feet.

Q Now, what was it, two feet from the door or six feet from the door? A Approximately six feet.

Q May have been less? A May have been less.

By the Court.

Q How long were you sitting down when you heard the first shot? A Standing up.

Q Had you finished the meal? A Yes, sir.

Q What were you doing when you were standing up? A I was about to pay.

Q You did not stop to pay him before you went out? A No, sir; paid him when I came back.

Q Where did you first see this man running; where was he when you first saw him? A About the corner of South Orange avenue and Jones street.

Q And this delicatessen store is on South Orange avenue? A Yes, sir.

Barnet Inlander, direct.

Q About four houses away from the corner of Norfolk? A About four or five.

Q Then you ran down to the corner of South Orange avenue and Jones street? A Yes, sir.

Q And then, when you got there and looked to see where this man was, where was he? A Right about at the corner.

Q When you got to the corner of Jones street and South Orange avenue where was the man then running? A Toward 19 Jones street.

Q How far away from you was he then? A I just couldn't tell you.

Q About how far—five houses or ten or fifteen? A I couldn't tell you; I didn't take any notice.

BARNET INLANDER, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q How old are you? A Twenty-one.

Q Married or single? A Single.

Q Where do you live? A 490 Fifteenth avenue.

Q Is that where you lived in July? A Yes, sir.

Q What is your business? A Truckman.

Q For whom? A Myself.

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

Q Where is your business located? A 8-10 Jones street.

Q That is on which side of Jones street, the side nearer Newark or South Orange? A Lower side of Jones street.

Q How far from the corner of Jones street and South Orange avenue? A It is the second house.

Q What is there on the lower corner of Jones street and South Orange avenue? A A lot.

Q And then comes what? A 8 Jones street.

Q And the next? A Is 10.

Q That is where you are located? A Yes, sir.

Q Do you recall where you were on the evening of July 16th? A Yes, sir.

Q Where were you? A At the barber shop, around the corner on South Orange avenue.

Q Whereabouts is the barber shop located? A The first house from the corner; first comes a lot and then comes the barber shop.

Barnet Inlander, direct.

Q Do you know where Norfolk street is? A Yes, sir.

Q Where is the barber shop with reference to Norfolk street? A Right opposite.

Q If you walked out Norfolk street you would walk directly into the barber shop? A Yes, sir.

Q What were you doing there? A Sitting there in a chair.

Q You mean a waiting chair? A Yes, sir.

Q Where was that chair? A Right as soon as you come in at the doorway.

Q And which side as you come in, the right side or left? A Right.

Q What kind of door is that? A Screen door.

Q Do you recall whether it was open or closed? A I don't remember.

Q What time did you go there? A About half-past six.

Q How long did you remain? A Well, about, say, about twenty minutes; I don't know exactly.

Q Were you shaved while you were there? A No, sir.

Q Why did you leave? A I heard a shot; I didn't know at first whether it was a shot or tire; I didn't pay any attention to it.

Q You heard a noise? A Yes, sir.

Q What did you do? A Nothing.

Q What kind of noise did you hear? A Seemed as though a tire blew out.

Q What did you do? A I didn't do anything then; then I heard another shot and stood up and looked around.

Q Through what did you look? A Through the screen door.

Q Which way did you look? A Facing Norfolk street.

Q Did you see anything? A Saw a crowd.

Q Whereabouts? A That was right opposite the saloon.

Q Then what did you do? A Just stood at the doorway.

Q How long did you remain at the doorway? A About a minute.

Q Then what did you do? A Then I ran.

Q Which way did you run? A Right over to the lot.

Q When you went out of the door which way did you turn? A To my left.

Q Why did you run over to the lot? A I saw a man running.

Barnet Inlander, direct.

Q Where was the man who was running when you first saw him? A Well, about half way up the lot on South Orange avenue.

Q How did he go across the lot, around the corner of Jones and Norfolk streets or across the lot? A Right around.

Q How far away was he from you when you first saw him? A When I first saw him at the barber shop?

Q Yes. A About two houses.

Q Where did he go? A Around over Jones street.

Q Where did you go? A I followed him.

Q How close were you to him? A About two houses.

Q Can you not be a little more definite; can't you tell us the number of feet? A About 50 to 60 feet.

Q How was he going, the man that you followed? A If he was running?

Q Yes. A He wasn't running very fast.

Q Was he running or walking? A On a fast walk; he wasn't running.

Q How was he dressed? A I don't know; I was excited; I didn't take any notice.

Q Did you notice anything else about him? A He carried a gun.

Q How do you know? A That is why I stopped chasing him.

Q Where did you first notice the gun? A On Jones street.

Q How far did you continue to follow him? A Just as soon as I saw the gun I stopped and turned the other way.

Q How many feet did you follow him, if you can tell us? A Well, about as far as 10 Jones street.

Q Where was he when you last saw him? A He was on Jones street.

Q On what part of Jones street? A About number 14.

Q And on which side of Jones street? A In the middle of the block.

Q Then where did you go? A Then I ran into the store and called up police headquarters.

Q Which store did you go into? A My own store.

Q Did you go anywhere after that? A Back into the barber shop.

Q At any time did you go across to the corner of Norfolk street and South Orange avenue? A No, sir.

Barnet Inlander, cross.

Cross examination by Mr. Simandl.

Q You were in the barber shop on South Orange avenue which faces Norfolk street? A Yes, sir.

Q The barber shop is on the southerly side of South Orange avenue, isn't it? A Going down on the right-hand side; going down on South Orange avenue.

Q That would be the southerly side of South Orange avenue, would it not (indicating on map)? Here is your compass; there is your north point and your curb and the Transfer Cafe appears to be on the northerly side of South Orange avenue; now, the barber shop is over here on the opposite side of South Orange avenue? A Yes, sir.

Q Where were you sitting in the barber shop? A Right at the chair just as soon as you open the door, about the third seat.

Q Was anybody in front of you or alongside of you, sitting there waiting? A I don't remember.

Q What were you doing? A I was reading a magazine.

Q And you heard a noise? A Yes, sir.

Q What did you do? A Nothing.

Q Did not do anything? A Nothing at all.

Q Then what did you hear? A I heard a noise again.

Q How quickly after the first noise you heard did the second noise come? A It was right after it.

Q Quick succession? A Well, kind of quick.

Q Now, you say that there were two noises; is that what you mean, there were only two noises? A No, there were more, but I didn't pay any attention until I heard the second noise.

Q Then you heard the second noise? A Yes, sir.

Q Did you hear a third noise? A Yes, sir.

Q Did you hear a fourth noise? A I don't just remember.

Q You heard a third noise? A Yes, sir.

Q How quickly after the second noise did you hear the third noise? A It was not long after.

Q How long? A I just couldn't tell the time.

Q Was it quick or long? A Long.

Q It was long after? A Well, not long afterwards; it was—

Q Well, how many seconds can you say intervened between the second and third shots? A About eight or nine seconds.

Q Do you know how long eight or nine seconds is? A Yes, sir.

Barnet Inlander, cross.

Q How long is eight or nine seconds? A Just about eight taps; fast taps.

Q There was a screen door, you say, in the doorway? A Yes, sir.

Q Was it open or closed? A I don't remember.

Q Might have been closed? A Might have been.

Q It always is closed, as a matter of fact, isn't it? A Yes, sir.

Q Were there any curtains in the windows? A No, sir.

Q Open windows? A Well, he has got a stand in front of it, it ain't no curtain.

Q A stand in front of it? A Cigar stand.

Q And you ran out to the screen door? A Just as far as the screen door.

Q When you got to the screen door did you see anyone? A A crowd.

Q What did you do? A Stood there for a minute.

Q Then what did you do? A I saw them chasing after a man and I ran.

Q You ran after him? A Yes, sir.

Q Were you in front or back of the witness who preceded you on the stand? A I don't know; I didn't take any notice of him at all.

Q You don't know whether he was there or not? A I didn't pay any attention to him; there was a crowd there; I don't know whether he was there or not.

Q About how many people were there at that time? A About four or five hundred people.

Q That is, I mean at the time you came to the doorway after you heard the shots? A Yes, sir.

Q There were four or five hundred people there? A All around through the neighborhood.

Q How many people do you think are in this court room? A About one hundred and fifty.

The Court. Will you have somebody count them so we may know how many there are?

Mr. Simandl. We might have one of the officers count them; I think there are about two hundred people.

The Court. Do you agree to that, Mr. Bernhard?

Mr. Bernhard. I think there are perhaps between one hundred and fifty and two hundred.

Abraham Block, direct.

Q You are sure there were five hundred people there? A I said four or five hundred.

Q When you were standing by the screen door looking out toward Norfolk street? A Yes, sir; because I could see the full view, because there is an empty lot on Jones street; I see the whole crowd there.

Q And the time intervening between the time which you got up off the chair and went to the doorway was how long? A About a minute.

Q And then you looked out and you saw four or five hundred people there on Norfolk street? A Well, the cars are stopped there; there was about four or five cars that were packed with people; they all stopped.

Q You say the man was not running fast? A No, sir.

Q Was he running slowly? A Yes, sir.

Q Very slowly? A Not very slowly—well, it wasn't fast or slow; he was on a fast walk.

ABRAHAM BLOCK, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q How old are you? A Fourteen years old.

Q Where do you live? A 12 Rutgers street.

Q With whom? A Mother and father.

Q How far is that from the corner of South Orange avenue and Norfolk street? A Two blocks.

Q Which way? A Well, it is to the west.

Q How far in from South Orange avenue? A One block.

Q Do you recall where you were on the evening of July 16th of this year? A Yes, sir.

Q Where were you? A In front of the moving picture house.

Q Whereabouts is the moving picture house? A On the right-hand side of Norfolk street, from South Orange avenue.

Q Going which way, going toward Central avenue, on the right-hand side? A Yes, sir.

Q How far in on Norfolk street is the moving picture house? A About thirty-five feet.

Q What is directly across the street from the moving picture house on Norfolk street? A A big sign.

Abraham Block, direct.

Q What is there between the sign and the corner of Norfolk street on that side? A Transfer saloon.

Q What is back of the Transfer saloon? A I know there is an empty lot.

Q Whereabouts were you, inside the lobby or outside? A Outside on the sidewalk.

Q Anybody with you? A There was a little boy talking with me.

Q What time was that? A It was quite near seven.

Q How was the light? A It was daylight.

Q Did anything attract your attention? A I was trying to get into the movies when this boy told me somebody was getting arrested.

Q Your attention called to something? A Yes, sir.

Q What was your attention called to; what did you see? A When this boy told me to look around I seen Mr. Ryan and the prisoner coming out of the lot.

Q Mr. Ryan and whom? A Mr. Schilling.

Q Coming out of where? A This lot like.

Q This lot you have just told us about back of the cafe? A Yes, sir.

Q Where were they; where were they, in the lot or on the street? A On the sidewalk.

Q How were they walking? A They were walking on the right-hand side; they were going across to the right-hand side.

Q Going across in which direction? A Toward South Orange avenue.

Q On which side of the prisoner, as you call him, was Lieutenant Ryan walking? A Yes, sir.

Q On which side? A He was on the right-hand side of the prisoner.

Q Do you remember whether or not he had ahold of him? A Yes, sir.

Q Do you recall in what way? A By the collar and by the cuff.

Q Which cuff did he have ahold of the prisoner? A I don't just remember.

Q Which hand did he have on the prisoner's cuff? A I think it was the right hand.

Q What did you do? A I was going to follow him and see how he would lock him up.

Q Did you follow him? A I did.

Q How close did you get to them? A About ten feet.

Q What is your idea of ten feet? A It is about from here up to that man there.

The Court. Which gentleman?

Witness. Right there.

The Court. You mean that gentleman there? (Indicating.)

Witness. Yes, sir.

The Court. Will you agree that that is about ten feet?

Mr. Bernhard. No, sir; it is more than that. I accept your Honor's estimate of it.

Mr. Simandl. I think it is about twenty feet.

Q Where were you approximately when you were following, as you say; won't you explain that to the Court and jury? A I was right on the same side where I was standing, but I just walked out to or three feet.

Q Did you remain where you were until they came across to your side of the street? A I only walked one or two steps.

Q When they got over to the other side of the street where were they? A About the same distance.

Q Did you have a look at the man Lieutenant Ryan had ahold of? A Yes, sir.

Q What kind of a look? A I had a good look.

Q What do you mean by that? A That he was well dressed.

Q Could you see his face? A Yes, sir.

Q Would you recognize the man again if you saw him? A Yes, sir.

Q Is he in the court room? A Yes, sir.

Q Whereabouts? A Right there (indicating).

Q Referring to the defendant? A Yes, sir.

Q Is that the man you saw Lieutenant Ryan have ahold of as they came across the street? A Yes, sir.

Q You say you followed them? A Yes, sir.

Q About how far? A About five steps.

Q Five of your steps? A Yes, sir.

Q That brought them to what location? A They were just about at the water pipe.

Abraham Block, direct.

Q Do you know what is on the corner of South Orange avenue and Norfolk street, near the moving pictures, what kind of store and building? A Yes, sir.

Q What is there there? A A Stationery store.

Q Where is the entrance to the stationery store? A Right at the corner.

Q Of the building? A Yes, sir.

Q Where is the hydrant with reference to the entrance? A On Norfolk street.

Q And how far away? A About six or seven feet.

Q (Pointing.) And is that the hydrant that you say you followed them to? A Yes, sir.

Q What happened? A When I looked as them I seen Schilling; I did not see him pull a revolver.

Q Explain what you saw happen when Ryan and Schilling reached the hydrant at the corner of Norfolk street and South Orange avenue. A Why, they just about got to the hydrant; I seen the man shoot through his arm and that hit Mr. Ryan right about here some place and he shot more again.

Q Pointing to your stomach? A Yes, sir.

Q That was the first shot? A I think so; he shot right after, too.

Q Where were you when the shots were fired? A I was about the distance from that man to here.

Q How were the two men, what were the positions of the two men with reference to each other at the time the shots were fired? A Ryan had ahold of his collar and his cuff.

Q Were they standing or walking? A They were walking.

Q With which hand was the shooting done, if you know? A I think it was with this hand here.

The Court. Indicating the left.

Q I understood you to say that you did not see the revolver drawn. A No, sir.

The Defendant. Just a minute, your Honor, these people have been schooling that kid up there.

The Court. These proceedings will not be interrupted, if you have anything to say you may say it to your counsel. Now, we will proceed in order. The jury will disregard anything that is not said under oath. Now, we will proceed.

Q I understood you to say that you did not see the revolver drawn? A No, I did not.

Q That is correct? A Yes, sir.

Q Are you able to tell the Court and jury how many shots you heard? A Exactly four shots.

Q Why do you say exactly? A Because I heard them.

Q Are you able to tell the Court and jury within what time the shots were fired? A Well, it looked like one, two, three four; there was a little space like between the second and third.

Q And during the time that you heard these four shots what was your position with reference to the man who was doing the shooting and the place where you were standing? A Well, I seen him running and I stood still.

Q What happened after the first shot, anything? A No, not the first shot.

Q Did anything happen after the second shot? A Nothing.

Q Did anything happen after the third shot? A Well, Mr. Ryan let go of him then, third or fourth.

Q In what way; you use the words "let go;" what do you mean by that? A He was holding him and then he let go.

Q What happened to Ryan? A He backed toward the window of the store, the stationery store.

Q Are you able to tell the Court and jury in what way he backed? A He went sideways, like that (illustrating); he had his hand on his stomach and went sideways.

Q Then what happened? A Then I looked and seen the prisoner running toward Jones street.

Q What course did the defendant take toward Jones street? A Well, he cut across lots.

Q You say, "running"; are you able to tell the Court and jury how he was running? A Well, he was on a pretty fast gait.

Q What had become of the revolver, if you know? A He still had that in his hand.

Q Do you not recall which hand he had it in? A No, I do not.

Q What did you do? A I stood there and then I went over to Mr. Ryan.

Q Who, if you know, was the first person to reach Mr. Ryan? A I think it was the theatre manager.

Abraham Block, direct.

Q Do you know in what order you reached Mr. Ryan? A Well, he was right up to the window then.

Q How many people were ahead of you? A About two or three.

Q What do you mean by being up against the window? A He backed up toward the window and there somebody held him.

Q In what position? A His feet were toward South Orange avenue.

Q And where was his head? A Somebody was holding his body.

Q Where was the defendant at the time you last saw him? A Crossing the lots into Jones street.

Q How long did you remain at the spot? A Where Mr. Ryan was?

Q Yes, where you had gone to Mr. Ryan. A Until he was taken to the hospital.

Q How much was that, if you know? A About five minutes.

Q Are you able to tell us by looking at the map the exact spot where Mr. Ryan stood at the time he was shot? First, be sure that you know the map? A Where he stood when I saw him?

Q (*By the Court.*) When he was shot, first shot. A When he was first shot right about there (indicating).

Q What is there? A A fire hydrant.

Q Where was he when the fourth shot was fired? A He was in the same place; only he let go of him.

Q Do you know whether or not his feet had moved at all from the time the first shot was fired until the fourth shot was fired? A Well, he backed one of his feet a little.

Q Did you notice how the defendant was dressed? A Yes, sir; he was very well dressed.

Q But did you notice what clothes he had? A I only noticed his shirt and collar.

Q Do you know what the color of his clothes were? A No, sir.

Q Do you know whether or not he wore a hat? A He did not when he come out of the alleyway or the gateway.

Q Was your answer he did or did not? A He did not.

Q Do you know whether or not from the time you first saw him to the last time whether or not he wore a hat? A Last time I saw him.

Q Yes. A No, he did not.

Abraham Block, direct.

Q At any time did he have a hat on? A No, he did not.

Q What did you do, anything after that? A Well, as he was crossing the street I heard him talking to Ryan about his hat.

Q Crossing the street where? A With Mr. Ryan.

Q And how far were you away when you heard this conversation? A Well, he was right on the car tracks.

Q And there are two car tracks on Norfolk street? A Yes, sir.

Q One leading into South Orange avenue and one into Jones street? A Yes, sir.

Q Which car track was he on? A He was on the one that leads into South Orange avenue.

Q What conversation did you hear? A I heard him say that, "Let me go back for my hat," and Mr. Ryan would not let him; he said, "I will go back for it."

Q Who said that? A Mr. Ryan.

Q And did he go back for it? A No, sir.

Q Did you hear any other conversation? A That is all.

Q What did you do with reference to the conversation you had heard? A After he was taken to the hospital I went over to Jones street; then I went over to Norfolk street and found the hat.

Q Where did you find it? A I found it about three feet in the yard from the gateway.

Q Would you recognize it again if you saw it? A Yes, sir.

Q Will you look at that hat and tell me whether or not you recognize that hat? A Yes, sir.

Q That is what hat? A That is the hat that was found in the yard.

Q By whom? A By me.

Q What did you do with it? A I picked it up.

Q Then what did you do with it? A Some man told me to drop it, and I dropped it.

Q Where did you drop it? A The same place it was found.

Q Do you know what officer that was that came there? A Not exactly.

Q Do you know whether or not he is in court? A Yes, sir; I think it is that man right there; I am not quite sure that is him, but I think it was him.

Q The second officer? A Yes, sir.

Abraham Block, cross.

Q You think it was Officer Sweeney? A Yes, sir.

Q After he picked it up what did you see him do with it? A He asked me my name, and I don't know just what he done with the hat.

Q Did you give him your name? A Yes, sir.

Q Did you give him your address? A Yes, sir.

(Hat marked S. 10 for identification.)

Cross examination by Mr. Simandl.

Q What do you do? A I work for my father.

Q Do you go to school? A No, sir.

Q Have you graduated? A No, sir.

Q How far did you go to school? A Seven B.

Q How old are you? A Fourteen.

The Court. Is Seven B in the grammar school?

Witness. Yes, sir.

The Court. What is the highest grade from which you could graduate?

Witness. Eight A.

Q You gave your name to Detective Sweeney? A Yes, sir.

Q When did you see Detective Sweeney again? A I think it was the next morning; I ain't sure.

Q Did he say anything to you? A Yes, sir; told me to go down to the City Hall.

Q Did you go down to the City Hall? A Yes, sir.

Q Whom did you meet down there? A I met lots of officers.

Q Did you tell them this story that you told on the stand? A I told one of them.

Q Who was that? A I couldn't quite tell you who it was.

Q Can't you tell us now who it was? A No, I could not.

Q Is he in court? A I do not know exactly who it was.

Q How many times were you in the City Hall? A Once.

Q Did you see the detectives after that? A No.

Q None at all? A None at all.

Q Did you see them yesterday? A I did, in court.

Q Did they speak to you? A No, sir.

Q Did not say anything to you? A Not a word.

Q Did they say anything to you this morning? A No, sir.

Abraham Block, cross.

Q Did they say anything to you last night? A No, sir.

Q You were standing in the moving pictures? A Right at the entrance on the sidewalk, in front of the moving pictures.

Q That moving picture is how far away from the candy store? A About twenty-five feet.

Q Is it next door to the candy store? A Well, no, it is not; the house back further.

Q The house that the candy store is in fronts South Orange avenue? A Well, the way to get in the candy store—

Q But the house runs along Norfolk street? A Yes, sir.

Q And how far along Norfolk street does it run? A About twenty feet or more.

Q It only runs twenty feet along Norfolk street? A I think it is more than that; about thirty.

Q What kind of a building is it? A A wooden building.

Q How high? A I could not tell you.

Q How many families are there? A I think it is three.

Q And you say you think it is only thirty feet? A I think so.

Q Then what comes between the end of that house and the moving picture? A A gate.

Q And then comes the moving picture? A Yes, sir.

Q And you were standing in front of the moving picture gate? A Yes, sir.

Q Did I understand you to say before that the house on the corner is frame? A It is kind of wooden house; yes, sir.

Q It is a wooden house? A Yes, sir.

Q You are sure about that? A I ain't very sure, but I think so.

Q I show you Exhibit S. 3 for the State, which is a picture; is this the house? A Yes, sir; that is the house.

Q That is the house? A Yes, sir.

The Court. You are indicating a house on the northeast corner of Norfolk street and South Orange avenue, and that has a sign on it, on the awning, "Soda."

Witness. Yes, sir; that is the house.

Q Is that frame? A No; it doesn't look on the picture that it is.

Mr. Simandl. I think it would be wise to let the jury see a copy of this picture.

The Court. Yes; show them all a copy of it.

Abraham Block, cross.

Q Are you willing to admit then that this building is not a frame building? A I think so now; yes, sir.

Q You knew so? A I did not know at all; I just thought so.

Q How often have you seen this building? A Well, I pass by once or twice a month.

Q How many times did you go to the moving pictures? A About once a week.

Q Then you see that building once a week? A I don't go to that show.

Q You saw Detective Ryan? A I did.

Q Where did you first see him? A Well, about the gateway, coming out to the sidewalk.

Q What was Ryan doing when he was coming out of the gateway? A Held Mr. Prisoner.

Q Held the prisoner? A Yes, sir.

Q How was he holding him? A By the collar and by the cuff.

Q Who told you to say that? A Nobody told me to say that; I know so.

Q Are you sure about that? A Sure.

Q Did the prisoner wear a necktie? A I think he did.

Q Did he wear a collar? A I think he did.

Q You are sure about that? A Yes, sir.

Q What was the prisoner doing when he come out of the gateway? A He was struggling a little with Mr. Ryan.

Q How much was he struggling? A Not very much.

Q What was Ryan doing? A Holding him.

Q What was this man doing (indicating the defendant)? A He was trying to go across the street and wanted to go back for his hat.

Q Just show us what he was doing. A He just wanted to go, like that (illustrating).

Q He was fighting? A Not very much.

Q How much? A Just like that (illustrating).

The Court. The witness indicates a movement of his head and shoulders.

Q Then which way did they walk? A Towards South Orange avenue; across the street.

Q They walked toward South Orange avenue on Norfolk street? A Yes, sir; while crossing the street.

Abraham Block, cross.

Q How far on Norfolk street did they walk toward South Orange avenue? A Well, they cut right across the street; they went slant like.

Q They cut right across the street? A Yes, sir.

Q What was going on while they walked across the street? A All I saw, they were walking; he tugged his hand; then he wanted to go back for his hat.

Q How many times have you seen Detective Sweeney? A Once.

Q How many times have you seen any other detective? A I don't know much of that; only one or twice.

Q How many times have you told this story outside of the court? A Once.

Q To whom? A To some detective down at the City Hall.

Q They were not near you after that? A None after that.

Q Just what happened when you got down to police headquarters? A I had to wait there and he called me in, and I gave the story, and then I saw the prisoner, and I went home.

Q Did he ask you any questions? A Only what I saw; that is all.

Q What did he ask? A The same thing you are asking.

Q What did he ask? A Just told me to tell the story, and I told him all I saw.

Q Did he question you? A No; just questioned me what I saw.

Q Are you sure he did not question you? A Well, just what I saw.

Q What did he ask? A He asked me, "Where were you, and what did you see?" and I told him what I saw.

Q You are willing to swear on your oath that Detective Sweeney was the man to whom you gave the hat? A Well, I wouldn't swear, but I think so.

Q You would not swear to that? A I would not.

Q But you are sure? A Not sure.

Q It may have been someone else? A It may have been some other detective.

Q And there may have been a struggle? A Struggle—

Q Going across the street? A I don't think so; no, sir. They were just talking while they were going across the street.

Q They were just walking along there gently? A No, sir.

Q They were not gentle? A No, sir.

Abraham Block, cross.

Q Then what were they doing; you know what they were doing? A Ryan was holding the prisoner, and he said, "Come on," and he gave him a jerk, and he asked him to go back for his hat.

Q Ryan said, "Come on," didn't he?

The Court. Just a moment. Now, go on with your answer. You mean by "him"—whom do you mean by "him"?

Witness. Mr. Schilling. He said, "Can I go back for my hat?"

The Court. Now, go on. After Schilling asked him to go back for his hat, he said, "Come on;" you know what they were doing.

Witness. He said, "Can I go back for my hat?" and Ryan said, "No; I will go back for it afterward." That is all.

The Court. Do not interrupt the witness when he is answering.

Q Then Ryan did shove him, didn't he? A He did not.

Q Didn't you say before he shoved him? A No, I did not.

The Court. He said he jerked.

Q He jerked? A He just tugged at him a little.

Q He just tugged at him a little? A If you call it a jerk, it is a jerk then.

Q What did he do? A He just tugged at him and said, "Come on;" that is all.

Q Gently? A No, not very gently; like they usually do.

Q How is that? A Well, he grabbed him and said, "Come on."

Q Used some force? A Well, a little; not very much.

Q Do detectives generally use a little force?

Mr. Bernhard. I object to that question.

Mr. Simandl. I will withdraw it.

Q Then they got as far as the hydrant? A They did.

Q And then what happened? A Then I heard four shots, and then Ryan backed toward the window and Mr. Schilling ran toward Jones street.

Abraham Block, cross.

Q After the first shot did Ryan let go of him? A No.

Q After the second shot did Ryan let go of him? A No, sir.

Q After the third shot did Ryan let go of him? A He was just about getting loose from him.

Q And after the fourth shot what happened? A He let go of him.

Q Where were you standing? A About ten feet away—fifteen.

Q Ten feet? A Yes, sir.

Q How far is that? A Well, from here to that man (indicating).

Q From here to this man (indicating)? A Yes, sir.

Mr. Simandl. As I understand it, Mr. Bernhard is willing to admit that is eighteen feet.

Mr. Bernhard. It was measured by an officer of the court, and I am willing to admit it.

Q On which side of the prisoner were you, that is, with reference to South Orange avenue, were you on the south side of the prisoner or north side of the prisoner as he was being led across the street? A Well, I think that I was on the side that he was.

Q On the same side that he was? A Yes, sir.

Q And they got to the hydrant? A Got to the hydrant.

Q Then what happened? A Then I didn't see him pull the revolver; I saw the shots; I heard the shots; and then he ran.

Q But you did not know how he was shot? A I did.

Q How did you know it? A I saw him shoot him.

Q You said you didn't see him pull the revolver. A I said I didn't see him pull the revolver, but I saw him shoot him.

Q Just tell us how. A Right through the arm.

Q Did he injure himself? A I don't know.

Q What do you mean when you say he shot through his arm? A He shot through his arm just like that (illustrating).

Q You did not see him pull the revolver out? A No, sir.

The Court. Let us understand. Turn around and show the jury. Put your arm the way you say Schilling's arm was and the way you just described a moment ago he shot through his arm.

Witness. I said he shot through this way, but I ain't sure that this was the arm or that was (illustrating).

Abraham Block, cross.

Q (*By the Court.*) You do not know whether it was the left or the right? A No, I do not.

Q So you are not sure which arm he shot through? A No, sir; I forget.

Q You forget? A Yes, sir.

Q You do not know which arm Ryan had ahold of, do you? A Well, no, I don't.

Q Why did you remember the other things so well if you cannot remember this? A Well, I remembered it because I would have to go to court so much I would try to remember.

Q You were told you would have to go to court so much? A Yes, sir.

Q What do you mean by that? A I got subpoenaed and then I had to go again on the 20th—

Q You have—

The Court. One moment. He is going to be given the fullest opportunity to answer questions without interruption.

Witness. I found that I had to go to court and then I went and then I knew I had to go in another three or four weeks; then I went went again, and so I remember that, and I forget all about the hand.

Q You have been giving considerable thought to this? A Yes, sir.

Q And each time you came down here did you speak to anyone? A No, sir; I went with my friend.

Q Who is your friend? A That boy there (indicating).

Q Is that the only one? A That is the only one.

Q Is that the boy?

Mr. Bernhard. What is his name?

Witness. Fred Drezner.

The Court. Indicating a young man in the audience.

Q How do you know Mr. Ryan was shot in the stomach? A Well, I seen his hands go down there and I was sure he was shot there.

Q When did they go down there? A He backed up like that and went toward the side.

Mr. Bernhard. Witness indicates, putting his hand on his stomach and bending forward.

Abraham Block, cross.

Q What did Ryan do after the first shot? A He didn't let go; still held him.

Q After the second shot? A Still held on.

Q And the third? A Let loose a little.

Q Did he make any motions? A No, sir; just held on to him, but that his fingers were nervous like, and the fourth shot he let go.

Q Then the only way you thought that Ryan was shot in the stomach was because he went like that? A Yes, sir.

Q No one told you to say that? A No, sir.

Q Then the man ran? A Then the prisoner ran; yes, sir.

Q And he kept on running? A Well, he kept on running, and then I turned my attention to Ryan.

Q Have you read the newspaper account of this alleged crime? A Once or twice.

Q You say you heard Schilling make reference to his hat, is that right? A Yes, sir.

Q Then when did you go for the hat? A After Ryan was taken to the hospital I went to Jones street where all the crowd was going after Schilling and turned back and went for the hat.

Q Where did you find it? A Well, about two or three feet in the alley, from the gateway into the yard.

Q Just take this pointer here and show us on the map where you found the hat. A Is that the gateway?

Q That is the gateway. A Well, it was right about there (pointing).

The Court. Indicating a point in the gateway.

Q Did you ever see Detective Sweeney before? A No, sir.

The Court. When?

Q The time that you gave him the hat? A No, sir.

Q Are you sure, now, you gave him the hat? A I ain't sure.

The Court. You have asked him about that three times, as to whom he gave the hat to. He says he dropped the hat on the ground and a man came up and got it.

Q Did you ever see this cap before? A Yesterday.

Q Yesterday? A Yes, sir.

Q Did you go up and examine it? A No, sir.

The Court. Referring to Exhibit S. 1.

Fred Drezner, direct.

Q Did Schilling run or was he walking? A Well, he ran.
Q Did he run fast? A Well, on a pretty fast gait.
Q He ran pretty fast? A Yes, sir.

Re-direct examination by Mr. Bernhard.

Q What is the name of the boy that stood with you in front of the moving picture theatre? A I don't remember; he was a small boy.
Q It wasn't Freddie Drezner? A No.

FRED DREZNER, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Where do you live? A 266 South Orange avenue.
Q And where is that with reference to Norfolk street? A It is pretty far, but I was on my way home then.
Q Will you tell us whether it is toward South Orange or toward Newark? A Toward South Orange.
Q And on which side of South Orange avenue going up, on the right-hand or left-hand side? A Left-hand side.
Q And when you say it is pretty far how far do you mean? A It is about ten blocks.
Q With whom do you live? A Mother and father.
Q How old are you? A Fourteen.
Q And what do you do? A Go to school.
Q Whereabouts? A Robert Treat Junior High.
Q And that is located where? A Norfolk street and Thirteenth avenue.
Q What grade are you in? A Nine A.
Q Do you remember where you were on the evening of July 16th, this year? A Yes, sir.
Q Where were you? A There is a printing shop just a little above Jones street and I was walking past there.
Q And on which side of South Orange avenue is the printing shop? A Left side.
Q When you speak of "little" how far do you mean? A I am not sure; it is two or three houses.
Q Either one or the other? A Yes, sir.

The Court. "Left side," what do you mean? Going up South Orange avenue?

Witness. Yes, sir.

Q What were you doing there? A I was on my way home.

Q When you reached there what did you do? A I heard some shots; at first I thought it was a puncture, but the second one I turned around.

Q Anyone with you? A No, nobody was with me.

Q What time was it? A About seven o'clock.

Q Where had you been? A To my grandmother's.

Q Where was that? A At Prince street.

Q Was it light? A Well, it was light yet.

Q At which shot did you turn around? A The second.

Q How many shots did you hear? A Four.

Q Can you indicate to the Court and jury the time that elapsed between the first and fourth? A No, sir; they come so fast that I could not tell.

Q You heard one shot? A Yes, sir.

Q And at the time you heard the shot what were you doing? A Walking up.

Q What did you do? A I thought it was a puncture at first and I turned toward the street.

Q Which way? A To the right.

Q And as you turned did you see or hear anything more? A I heard another shot.

Q Then what did you do? A Turned around.

Q In what direction? A To the right.

Q And as you turned around did anything happen? A I heard two more.

Q Between the time you heard the first shot and the time you heard the last shot are you able to tell the Court and jury how many steps you took? A I started to run, and ran pretty fast, but only took five steps.

Q Which way? A Down toward Jones street.

Q Why did you run? A Because I saw several people run across Jones street.

Q In which direction? A Some were going up South Orange avenue and turning into the stationery store, and others were coming down.

Q Did you see anything except that? A When I reached the corner, was near the corner, I saw a man start to run from the corner where the stationery store is over South Orange avenue; he just cut the end of the lot and he ran over Jones street with a gun in his hand.

Fred Drezner, direct.

Q Where were you when you saw that man start to run? Do you know that map? A Yes, sir.

Q Can you indicate where you were? A (Indicating.) Here is South Orange avenue and Jones street is about here; the car comes up this way and turns here.

Q Turns which way going up? A To the left, and then there is a drugstore, and I was near the window of the drugstore.

Q Where is the drugstore? A Right at the corner of South Orange avenue and Jones street.

Q Where were you? A Near the window.

Q When you were near the window of the drugstore you say you saw something? A Yes, sir.

Q What? A A man started to run.

Q Where did the man start to run from? A Norfolk street and South Orange avenue.

Q About where? A About here (pointing); I did not see him at first, but when he got about here.

Q He had turned off the first car track? A Yes, sir; he ran this way (indicating).

Q In what course? A There is a lot there (indicating).

Q You are indicating across the car tracks? A Yes, sir.

Q In what direction? A Toward Jones street.

Q Did you watch that man? A Yes, sir.

Q How far did you watch him? A Well, I reached the corner; he was cutting the lot and I ran a little way after him, but I wasn't close to him and saw him disappear, because the crowd got in the way.

Q How close were you to him at the time you were close to him? A I don't know; the distance across the street.

Q Well, with reference to the curbstone of Jones street or with reference to some place in the room, can you tell us? A About from here to the light down there.

Q (*By the Court.*) The light by that curtain there? A Yes, sir.

Q You say he had something in his hand? A Yes, sir.

Q What did he have in his hand? A It looked like a gun to me.

Q Which hand? A I couldn't tell the hand, I am not sure.

Q What was the man doing? A Running.

Fred Drezner, cross.

Q At what rate? A Well, to some people it would be fast, but to me it was not so fast.

Q Where was he when you saw him last? A Disappearing over Jones street.

Q How far over Jones street had he gotten? A Well, about one hundred yards—fifty yards.

Q Whereabouts on Jones street was he? A Well, there is an undertaker store and he was across the street from the undertaker's store.

Q Where was the undertaker's store with reference to the lot you have told us about? A On the opposite side of the street.

Q And how many houses in from Jones street? A Well, on that side it is the sixth house in.

Q Then you turned away? A Well, I tried to get nearer, but there were too many people got in the way.

Q What sort of a view did you have of the man? A I know he was a tall man and his tie was streaming about when he was running.

Q Could you identify that man? A No, I could not.

Q What did you then do? A Well, I met my father and went with him.

Q Where did you meet your father? A On the corner.

Q Which corner? A South Orange avenue and Jones street.

Q Where did you go with him? A Well, the policemen was calling up and I went there.

Q Well, where were they? A There is a police box right on the corner.

Q Of which street? A Of South Orange avenue and Jones street.

Q Do you know how the man was dressed that was running? A Well, it looked like a blue suit to me, but I wasn't near enough to tell the color.

Q Do you know whether it was light or dark? A It looked dark to me.

Q Do you know what sort of hat he wore? A He did not wear no hat.

Cross examination by Mr. Simandl.

Q You were walking up South Orange avenue toward South Orange? A Yes, sir.

Fred Drezner, re-direct.

Q You were on the left-hand side of the street walking up? A Yes, sir.

Q And when you got a little above the corner of Jones street by a printing shop you heard a noise? A Yes, sir.

Q How did that noise sound? A Like a puncture.

Q Very loud? A Well, it was pretty loud.

Q Then what did you hear? A I turned to the street and then I heard another one and then—

Q Just a minute. You heard another? A Another noise.

Q Was it as loud as the first? A About the same.

Q It was about the same? A Yes, sir.

Q Then what did you hear? A I heard two more.

Q Were they as loud as the first? A Well, they come pretty quick; I could not tell if they were as loud as each other.

Q Well, how long did it take, or what space of time came between the first and fourth shots, if you can tell? A Well, I couldn't tell.

Q Was it quick? A It was pretty quick.

Q Very quick? A I couldn't tell how quick it was.

Q Well, just say one, two, three, four, or designate to the Court how fast they came. A Well, I didn't time them, so I couldn't tell.

Q And you came down to the corner? A Yes, sir.

Q That is, the corner of Jones street, the southwest corner of Jones street and South Orange avenue, is that right? A I don't know how that map is.

Q It is the corner of South Orange avenue and Jones street, there is a drugstore on the corner? A Yes, sir.

Q And you stood there? A Well, I was still running when I came there.

Q And you saw a man running? A Yes, sir.

Q Was he running fast? A Well, some people would say it was fast, but I wouldn't say it was very fast.

Q You don't think he was a fast runner? A No, sir.

Q Well, was he just loafing along? A Well, he was running with a pretty long stride.

Q And you say his tie was streaming out? A Yes, sir.

Re-direct examination by Mr. Bernhard.

Q Your father's name is what? A Herman Drezner.

Herman Drezner, direct.

Q (*By the Court.*) Is Jones street between your grandmother's and your home? A You pass Norfolk street.

Q (*By the Court.*) First? A Yes, sir; and then you walk up.

Q (*By the Court.*) So you had passed Norfolk street coming home from your grandmother's? A Yes, sir.

HERMAN DREZNER, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mr. Drezner, the young boy that was just on the stand, is your son? A Yes, sir.

Q Did you meet him on the night of July 16th, of this year? A I did.

Q Where? A Right at the box there where the police signal is, corner of South Orange avenue and Jones street.

Q And is that on the lot corner? A Yes, sir; on the lot corner.

Q At what time? A Well, I should say it was pretty near seven o'clock.

Q What is your business? A Painter and decorator.

Q Where had you been that evening? A In the barber shop.

Q What barber shop? A South Orange avenue, opposite Norfolk street.

Q What time did you leave the barber shop? A I left there pretty near seven.

Q How long had you been in there? A Well, I was in there about twenty minutes.

Q What were you doing while you were there? A I got shaved, and when I put my hat on and I was just about to go out when I heard a shot.

Q Where were you, if you recall, in the barber shop with reference to the door when you heard the shot? A I was just in the front at the door, ready to go out.

Q In which direction? A Right opposite the other side of Norfolk street.

Q What did you do after you heard the shot? A I went outside and heard two or three more shots.

Q How many shots did you hear altogether? A Well, I heard three; I wouldn't say four; I heard three.

Q Where were you when you heard the second shot? A I was on the sidewalk, going over on this side (indicating).

Q Where were you when you heard the third shot? A I was out about in the street, the curb.

Q In which direction were you going? A Going toward where the shots came from.

Q How did you know the direction from which the shots came? A After the first shot the second followed and I looked over and seen on the other side—

Q What did you see? A That is, after the third shot I seen Mr. Ryan go down on the sidewalk by the window there.

Q How did he go down? A He had his hands this way and slid down.

Q Your hands are on your stomach? A Yes, sir.

Q Both hands? A Yes, sir.

Q Do you know what there is on the lower corner of Norfolk street and South Orange avenue? A You mean going down town?

Q I mean the corner nearer Newark? A There is a candy store.

Q Where was it with reference to the candy store that you saw Lieut. Ryan going down? A I say on Norfolk street side just to the end of the window.

Q Which window? A Norfolk street side window.

Q And how close was he to the window when he went down? A Well, he was pretty close; I should say that he could almost touch the window.

Q Had you seen him before that time that evening? A Well, I could not exactly say whether I did or not.

Q Did you see anything that took place at or about the point where Ryan went down before you actually saw him go down? A No, I did not.

Q What did you then do? A I ran over on the other side where that was.

Q Where what was? A Where Ryan went down.

Q Was there anyone there ahead of you? A Well, there was a man there, and then the whole crowd came.

Q So that you were the second person? A No, I wouldn't say that I was the second person.

Q Do you know in what way you reached there? A I don't know.

Herman Drezner, direct.

Q In what position was Mr. Ryan when you reached the spot? A He was with his feet out, kind of crossways toward South Orange avenue.

Q And his head where? A Against the wall there.

Q Did you see any other person around? A Yes, sir; I seen them put him in the automobile; I think it was another officer there.

Q What did you then do? A That is all I done; that is all I could see.

Q Do you know what the condition of Lieut. Ryan was when you reached the spot where he was lying? A I couldn't tell you in what condition; all I knew was he was holding his hands on his stomach and the blood was there.

Q Where was the blood? A Right alongside of the window on Norfolk street side.

Q Did you see any other persons around there? A I seen them put him in the automobile.

Q Do you know who fired the shots? A Well, I could not tell you who fired the shots.

Q When did you meet your son? A I met him after I ran over on the other side by the crowd that was chasing a big, tall fellow.

Q What do you mean, "chasing a big, tall fellow"? A There was a fellow running with a gun in his hand.

Q You did see a man running? A Yes, sir.

Q With a gun in his hand? A Yes, sir.

Q Which hand? A Well, I think it was the left hand.

Q How was he carrying his arm? A Just about this here way; just about like that (indicating).

Q Up from the elbow? A Yes, sir.

Q Where was that man running when you first saw him? A When I first saw him he crossed the street.

Q From where? A From the Norfolk street corner toward Jones street.

Q Let me ask you: did you see him first or did you see Ryan first? A I seen Ryan first.

Q How far from the place you saw Ryan did you see the man who was running? A He was pretty near on the other side.

Q Did you follow him? A I followed over to the other side and then I stopped.

Herman Drezner, cross.

Q Where did you last see the man with the gun? A That is the last I seen him, running across to the corner on the empty lot.

Q Then what did you do? A I didn't go no further.

Q Had you yet met your son? A I did not.

Cross examination by Mr. Simandl.

Q You were in the barber shop? A Yes, sir.

Q On the southerly side of Norfolk street? A Yes, sir.

Q Was Mr. Inlander in there? A I couldn't tell you whether he was or not.

Q Do you know Mr. Inlander? A I know him; yes, sir.

Q You heard him say on the stand he was in that barber shop? A That has nothing to do with me, what he said.

Q I ask you do you know he was there? A I told you before I don't.

Q Were there other men there? A There was men there, but I didn't take notice who was there.

Q He might not have been there? A Maybe.

Q And you had just received your shave? A I had my coat on, just putting my hat on.

Q Had you paid for your shave? A I have never paid for it; I am going to let you pay for it.

Q What is that? A What business is it of yours.

The Court. You answer the question. Had you paid for it at the time you heard the shot?

Witness. I beg your pardon! He asked me whether I paid for it yet.

The Court. Had you paid for it at that time?

Witness. I don't pay on Wednesday; I always pay on Sunday.

Q And when did you hear the shots? A When I was just going to go out of the door.

Q Was the door open or shut? A The door was shut.

Q What kind of a door was it? A Screen door.

Q Then did you hear another shot? A Yes, sir.

Q How quickly after the first one? A Well, it was pretty quick.

Q Then what did you do? A I went over toward the gutter.

Matthew Reynolds, direct.

Q Did you walk or run? A I walked.

Q And you heard some more shots? A Then I heard another shot and I went faster over on the other side.

Q Then you reached the other side? A I didn't reach the other side by the third shot; I was out by the track almost.

Q You were by the track? A Yes, sir.

Q Did you reach Lieut. Ryan's side before Mr. Cordano? A Well, I don't know whether it was Cordano or not; there was somebody there when I got there.

Q Do you know Captain Cordano? A No, I don't.

Q Will Captain Cordano please stand. Did this man reach the side of Lieut. Ryan before you did? A I couldn't tell you.

Q You couldn't say? A I couldn't say.

Q (*By the Court.*) Did you see this man when he was shot? A Seen him after he fell down.

MATTHEW REYNOLDS, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q How old are you? A Fifty-two.

Q And you reside in South Orange? A Yes, sir.

Q Where? A 269 South Third street.

Q How long have you resided in South Orange? A Thirty-three years.

Q And your occupation is what? A Well, now I work for myself.

Q Where were you on the evening of July 16th of this year? A On South Orange avenue and Norfolk street.

Q At what place? A At the Transfer house.

Q At the Transfer Cafe? A Yes, sir.

Q What time were you there? A Well, I should think between six and seven o'clock.

Q Anybody with you? A Yes, sir; there was a friend from South Orange.

Q Who was it? A Mr. Tillie; he is in the iron business.

Q How long did you remain in the cafe? A Well, I was there probably altogether seventeen or eighteen minutes.

Q Why did you leave? A Why, my friend he was going down town and he was after taking the show in and I left with him and he left to go down and take the show in and I was waiting for the South Orange avenue trolley car.

Q Where were you waiting for it? A On the corner.

Q What corner? A I should say Norfolk street.

Q On the cafe corner? A Yes, sir.

Q Did you see anything happen there? A Yes, sir; when I was waiting for the car I heard what I thought was a tire bust and I took no notice; I looked around at the time just alongside of me and I seen no automobile there, and pretty soon after—it was a hesitation I should think—and three more shots went off, and then I happened to look and I seen the man going up with the revolver in his hand.

Q After the fourth shot you saw a man with a revolver? A Yes, sir.

Q Whereabouts? A Coming out Norfolk, crossing South Orange avenue.

Q Whereabouts was he when you first saw him? A Opposite me.

Q How far? A About thirty-five to fifty feet.

Q Going in what direction? A Going over Jones street.

Q In which hand did he carry the revolver? A Left hand.

Q In what position? A The same as a man defending himself.

Q (*By the Court.*) You pointed your hand up in the air? A Yes, sir.

Q (*By the Court.*) How was the revolver pointed? A The hilt of it—

Q (*By the Court.*) How was it pointed? A Inclined up.

Q How was the man moving? A He was moving pretty fast.

Q What do you mean by that? A Well, he was going at a pretty good gait; I think there was nobody else could get him.

Q You mean he was running? A Yes, sir.

Q How far did he run, if you know? A I should judge about two hundred feet over on Jones street, because I followed him in there.

Q You followed him how far? A One hundred and fifty or two hundred feet.

Q And you last saw him where? A When he last put around a house, when he ran through the alleyway.

Q And at the time he ran through the alleyway how far were you, what distance? A I should judge thirty to forty feet.

Q Did you see him after that? A No, sir.

Matthew Reynolds, cross.

Q How was he dressed? A Well, he had a gray coat, or the same as—well, I mean to say, he had kind of a gray coat; he had no hat.

Q Did you notice anything else about his dress? A No, sir.

Q Did you have a look at his face? A Yes, sir; as he was going up I had a look at his face.

Q Could you identify him again if you saw him? A Yes, sir; unless he wore a whisker.

Q Do you know whether or not he is in the court room? A Yes, sir; I think that is the gentleman over there.

Q Where, point him out.

The Court. Go down and put your hand on the man you say was the man over there. (Witness does so.) Is that the man you refer to?

Witness. Yes, sir.

The Court. You have pointed out Mr. James Mango, an attorney and counsellor of this State. Are you the one intended, Mr. Mango?

Mr. Mango. Yes, your Honor.

Q What did you do after you returned, having seen the man disappear in the alley? A I happened to meet a stranger.

Q (*By the Court.*) What did you do? A Well, I came back and got a car a few minutes afterwards.

Q Came back where? A To the same corner.

Q Before you took the car did you see anything around that corner? A Yes, sir; I seen some of the officers.

Q Whereabout? A Right at that corner; some of them went into the Transfer house.

Q How long did you have to wait for the car? A Well, a car might have gone by—some of the officers—I was pointed out as one of them that followed this man there.

Q Did you or did you not talk to the officers? A Yes, sir; I spoke to some of the officers.

Cross examination by Mr. Simandl.

Q Please point on the map S. 1, where you were standing waiting for a car. A Well, I was at the Transfer house; is this the Transfer house?

The Court. No, that is the manhole at the curb.

Matthew Reynolds, cross.

Q The Transfer house is marked 123; that is the entrance to the Transfer Cafe. A If that is the house I was standing at this corner.

The Court. Witness indicates the corner near the building line of South Orange avenue and Norfolk street.

Q Yes. When you were standing there which way were you looking? A Looking toward South Orange avenue when the first shot—

Q Did you see anything on the other side of the street? A Not that I took notice to.

Q Did you take notice to anything? A No, sir.

Q And after you heard the first shot what did you do? A I looked around; just happened to look around; I thought it was an automobile tire.

Q Which way did you look? A To the side, and looked behind; I thought it was behind.

Q Was the first shot loud? A Yes, sir; louder than the other three, I thought.

Q It was louder? A Yes, sir; because the other three went in succession.

Q Did you look toward the candy store across the street? A Well, I had not ever taken any notice of the candy store there.

Q Did you look across the street toward Market street, toward downtown? A After the shot was fired?

Q Yes. A No.

Q You didn't look that way? A No, not down Market street; that is, down toward Market.

Q You didn't look that way at all? A No.

Q Didn't you see anything across the street? A I didn't see anything for to draw my attention.

Q Didn't you see a man getting arrested? A No, I did not.

Q You didn't see him? A No.

Q Was there a big crowd around? A Yes, quite a few.

Q Didn't the crowd attract your attention? A No, sir; and there wasn't an awful crowd at the time, either; there were very few.

Q Very few? A Yes, sir; very few at the time it happened.

Q Now, wasn't there four or five hundred people there? A No, sir.

Q You are sure of that? A Yes, sir; sure about that.

Arthur Marasco, direct.

Q When was the first time you saw a man running with a gun? A Soon after the third shot; after the fourth shot I seen him running across the avenue, he cut over Jones street.

Q That is the first time you saw him? A That is the first time I saw him.

Q You realize you were standing right across the street from where this occurred? A Yes, sir.

Q And yet you did not see anything at all to attract your attention, is that so? A That is what I had not seen, anything; I did not hear any commotion until the shooting started.

Q Whom did you speak to about this case? A Well, one of the officers.

Q Who was that officer? A Well, now, I couldn't tell you.

Q How often have you spoken? A Once.

Q Only once? A That is all, sir.

Q You say the man that was running had a gray coat? A Well, it was more of a brown coat.

Q You say it was brown, now? A Well, it was a mixture.

Q Didn't you say on your direct examination that the coat was gray? A Well, yes, sir; there is different kinds of gray; I wouldn't call it a light gray.

Q Well, then, it was not a brown? A Well, it would be on that style.

Q The first shot, you say, was very much louder than the rest? A I thought so.

ARTHUR MARASCO, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q How old are you? A Twenty-nine.

Q Married or single? A Single.

Q Live where? A 196 Fairmount avenue.

Q Where did you live in July, this year? A 308 South Seventh street.

Q And your business it what? A Ship-builder.

Q Do you recall where you were on the evening of July 16th of the present year? A I do.

Q Whereabouts? A I left my house about ten minutes after six to go to the barber's.

Q And where is your house with reference to the barber shop that you went to? A Why, you go down South Orange avenue, I should judge about twelve blocks.

Arthur Marasco, direct.

Q What barber shop were you going to? A To Maribaldi.

Q Where is that located? A It is located on the south side of South Orange avenue, directly opposite Norfolk street.

Q And when you turned into South Orange avenue, on which side of South Orange avenue did you proceed down? A On the right side, coming down town.

Q Did you get to the barber shop? A I did.

Q About what time? A I should judge about half-past six.

Q How long did you remain there? A I remained there about fifteen or twenty minutes awaiting for my turn to get shaved.

Q Did you get shaved? A No, sir.

Q Why not? A Because there was two or three people ahead of me.

Q Then what did you do while you were waiting? A I was standing by the window looking out.

Q What window? A The front window.

Q Where was the door to that barber shop? A On the side.

Q And on which side of the window as you looked out? A To the right of the door.

Q And which way were you looking when you were looking out of the window? A Directly across to Norfolk street.

Q How long had you been looking out? A About fifteen or twenty minutes.

Q Did you see anything? A I did.

Q What did you see? A I saw Captain Cordano coming out of an alley chasing a young man with a blue suit.

Q Are you familiar with the buildings and the locations on the corner of South Orange avenue and Norfolk street? A I am.

Q Will you look at the map and tell me whether you are familiar with the locations as indicated on the map? A This here is the Transfer house (indicating).

Q Yes. A Right back in here there is a little alley; this is the alley here.

Q You point to the opening at the rear of the Transfer house? A Yes, sir.

Q What did you see take place there? A That is where I saw Captain Cordano come out chasing a young man.

Q Had you seen either Captain Cordano or the young man before? A I did not.

Arthur Marasco, direct.

Q Whom did you see first? A I saw the young man first.

Q Can you give us a general description of the young man you saw? A He had on a dark suit; short, stocky built, the same as myself.

Q Where did he go? A Across the street and down South Orange avenue, followed by Captain Cordano.

By the Court.

Q You mean toward the Court House? A Yes, sir.

Q That is east? A Yes, sir.

By Mr. Bernhard.

Q How far away was Captain Cordano? A I should judge it must have been at least fifty feet.

Q Did you see anything else? A A few seconds later I saw Lieut. Ryan coming out of the same alley having ahold of the man.

Q Will you describe just exactly what you saw as they appeared from the alley? A They took the same position across the street as Captain Cordano did.

Q You say you saw Lieut. Ryan? A I did.

Q Had you known Lieutenant Ryan? A I had a casual acquaintance.

Q What was he doing? A He had ahold of the prisoner.

Q How? A One hand by the neck and one by the wrist.

Q Which wrist? A Right.

Q Prisoner's wrist? A Prisoner's right wrist.

Q With what hand did Lieut. Ryan have ahold of the prisoner's right wrist, if you know? A Right hand.

Q What course did they take as they came across Norfolk street? A Why, sort of diagonal.

Q Diagonal, in which direction? A To the opposite side of Norfolk street.

Q Do you know the location of the alley well enough to tell the Court and jury what is directly across the gateway on Norfolk street; what is opposite the gateway? A There is a building on the corner and there is a moving picture, I believe, next to it.

Q Do you know which of those two buildings are opposite the gateway? A The moving picture, I should judge.

Arthur Marasco, direct.

Q What did you do when you saw Lieut. Ryan and the man that he had ahold of come out of the alley? A I was standing on the sidewalk.

Q When had you gone from the inside window, from inside the store to the sidewalk? A After I saw Captain Cordano chasing this man down South Orange avenue.

Q When you speak of the sidewalk what sidewalk do you refer to? A The left side, going down to the Court House.

Q How far from the doorway of the barber shop which you had entered a few minutes before were you standing? A Right at the door, the window was right at the door.

Q Then what did you see? A I saw Lieut. Ryan coming across the street with a man..

Q How were they coming across the street? A Well, Lieut. Ryan had ahold of him one hand by the back of the neck and one hand the right cuff.

Q From that point on won't you tell what happened? A Why, it appeared to me as though the prisoner was trying to make a getaway.

Q What do you mean by that? A He was kind of wrestling and trying to get away and the next thing I knew I saw a blue steel revolver placed against the stomach of Lieut. Ryan.

Q The wrestling that you speak of occurred at what spot, if you know? A The northeast corner.

Q And how far from the place where you saw the blue steel revolver placed against the stomach of Lieut. Ryan? A Why, just from one curb line to the other.

Q Who had the revolver? A The prisoner.

Q How far were you away from the prisoner at the time you saw him first have the revolver? A Well, the width of the street would be about twenty-five or thirty feet.

Q How was your view of him? A Side view and front view.

Q How was the light? A Clear.

Q When did you first see the revolver? A When they got close to the corner.

Q Where did it come from? A That I don't know.

Q In what position was the revolver when you first saw it? A Pressed against the stomach of Lieut. Ryan.

Q Will you be good enough to stand up? Can you indicate on your own body the relative position in which the revolver was

placed against Lieut. Ryan's body? Describe it. A It was placed against the right side of the body.

Q In which hand was it held? A Left hand.

Q In whose left hand? A The prisoner's left hand.

Q And about in what position as you have your hand indicating was it placed against the body? A I should judge about here (indicating).

Q Meaning what part of the body? A Right about there.

Q (*By the Court.*) On the left side at the waistline? A No, on the right side.

Q (*By the Court.*) On the man's right side at the waistline? A Yes, sir.

Q (*By the Court.*) What was he doing with his left hand?

Mr. Bernhard. He says he had his left hand in the position on the right-hand side of the body.

Q (*By the Court.*) Was there anything in the left hand? A The revolver was in the left hand of the prisoner.

Q In what position were they standing with reference to your view of them at that time? A Directly across.

Q What happened? A Why, I heard three shots.

Q Where did they come from? A From the revolver, I presumed.

Q Can you tell the Court and jury how the shots occurred, in what order? A Two shots in succession, then there was a slight pause and the third.

Q Who shot the shots? A The prisoner.

Q Did you have a view of him? A I did.

Q Would you be able to identify him? A I can.

Q Will you identify him? A Right there (pointing).

The Court. Indicating the defendant.

Witness. Right there between the two court officers.

Q By counting one, two, three, Mr. Marasco, is your recollection clear enough to indicate the time in which the revolver shots were fired? A The two shots were fired somewhat in rapid succession and there might have been a second or two between the second and third.

Q What happened after the first shot? A A second shot was fired.

Arthur Marasco, direct.

Q Was there any change in the position of either of the two men? A No, sir.

Q What happened after the second was fired? A A slight pause, and then a third.

Q Then what happened? A Lieut. Ryan kind of let go.

Q Won't you indicate what happened by words? A Lieut. Ryan let go of the prisoner.

Q How did he let go? A Well, this dropped.

The Court. Indicating the right hand.

Q From what? A From the prisoner's wrist, and the left hand that he had on the back of the neck also dropped.

Q What became of Lieut. Ryan? A He then walked over against the store.

Q In what way? A Directly to it.

Q Over how many feet? A I should judge the sidewalk was five or six feet.

Q Then what? A He was leaning against the window.

Q How? A His feet kind of out, his head down and his hands to his stomach.

Q What became of the man who fired the shots? A He run up South Orange avenue, cut a corner into Jones street.

Q Where were you when he did that? A Directly across the street.

Q How far from you did he pass as he cut across? A I should judge about twenty-five feet, twenty feet.

Q Where did he go? A Around South Orange avenue into Jones street.

Q What became of the revolver? A He still had it in his hand.

Q When? A The left hand.

Q When did he still have it in his hand? A After the shooting.

Q For how long a time? A Well, he held it in his hand all the time I chased him.

Q How long did you chase him? A Just a short distance.

Q What do you mean by a short distance? A I just got, I should judge, two hundred feet.

Q To what place? A Right around the corner of South Orange avenue and Jones street.

Arthur Marasco, direct.

Q Where did the chase end? A The chase ended after I had gone about two hundred feet.

Q And how far was the defendant from you at that time, after you had gone two hundred feet? A Well, I should say about thirty feet.

Q And at what point was he on Jones street? A I should say in front of about number 10.

Q And on which side of Jones street? A The left side.

Q Then by that answer he had not crossed Jones street? A He had crossed into Jones street.

Q Where did he go? A Through an alley.

Q Where was the last place that you saw the defendant after you saw him at the alley? A I saw him go through a house which is number 19.

Q Was that the last time you saw him on that chase? A Last time.

Q Where was the revolver when you last saw it? A In his hand.

Q Which hand? A Left hand.

Q How did he get in the position from which you saw him at the shooting to his disappearance in the alley at 19? A Running.

Q At what rate of speed? A I couldn't judge the speed; it seemed to be a pretty fair gait.

Q When you pursued him, how did you pursue him? A I started to run after him.

Q Then what did you do after the defendant disappeared in this alley? A After I chased him two hundred feet, I came back to where Lieutenant Ryan was.

Q Where did you find him? A Leaning against the window of this store.

Q Had or had not his position changed any? A He was leaning over a little more and they were ready to place him in an automobile.

Q Where was the automobile? A Standing at the curb.

Q Did you notice anything about the locality where he was leaning? A Against the window.

Q What kind of pavement is there there, or sidewalk? A A regular sidewalk.

Q What was Lieutenant Ryan's condition? A Well, it looked hopeless to me.

Arthur Marasco, cross.

Q What was the condition of his clothes and shirt? A Well, they looked kind of ruffled up.

Q How was the defendant dressed at that time? A A dark suit.

Q What else, anything? A Well, he appeared to have a silk shirt, to me.

Q Did you notice whether or not he wore a hat? A He did not.

RECESS.

Cross examination by Mr. Simandl.

Q You were in the barber shop? A I was.

Q Facing Norfolk street, were you not? A Facing Norfolk street.

Q And you were waiting for a shave, as I understand it? A Waiting for my turn to get shaved.

Q Where were you standing in the barber shop? A By the front window.

Q And which way were you facing? A Directly across to Norfolk street.

Q How long were you standing there before something happened which attracted your attention? A I should judge fifteen or twenty minutes.

Q You were standing in one spot fifteen or twenty minutes? A Looking out of the window; yes, sir.

Q Were you conversing with anyone? A No, sir.

Q Is there a cigar stand in front of the barber shop that you were in? A Not in front of the window; there is a little cigar showcase against the wall.

Q And you were standing there fifteen or twenty minutes? A Yes, sir.

Q In that one spot? A In that one spot.

Q Were you always looking at Norfolk street? A Looking out.

Q Were there a great many people out that day? A Not so many; people going home from work.

Q It was around the working hour? A It was between half-past six and seven o'clock.

Q That is a transfer point? A It is.

Arthur Marasco, cross.

Q There were a great number of people out there? A I couldn't say the number of people that were around.

Q Was there a crowd of people standing there at the corner of Norfolk street and South Orange avenue waiting for a car? A There may have been five or six people.

Q Then you saw something? A I did.

Q What did you see? A I saw Captain Cordano chasing a young man.

Q Do you know Captain Cordano? A Just by sight.

Q You don't know him well? A No, sir.

Q Did you know him when you saw him? A I did.

Q Did you know him as Captain Cordano? A I did.

Q How far away was he from where you were standing when you first saw him? A I should judge seventy-five feet.

Q Where did you first see him? A As he came out of the alley.

Q He came out of the alley? A Yes, sir.

Q Did you see him emerge from the alley? A I did.

Q How far away was the man he was chasing from Captain Cordano? A I should judge forty or fifty feet, anyhow.

Q He was forty or fifty feet away? A Yes, sir.

Q And then you saw the captain come out of the alley? A Saw the captain come out of the alley right straight.

Q And what course did the man take whom he was chasing? A Directly across from one side to the other and down South Orange avenue on the left-hand side.

Q Did he run along Norfolk street? A He came along Norfolk street, I should judge, about twenty-five feet before he turned into South Orange avenue.

Q Then how soon after Captain Cordano came out of the alley did you see Lieutenant Ryan come out of the alley? A Oh, I should judge, a minute or so.

Q Just a minute or so. Who did Lieutenant Ryan have with him, if anyone? A He had a young man, heavy, stout, dark-brown suit.

Q Did you notice anything that they were doing? A Well, I noticed the young man that he had kind of wrestled trying to make a get-away.

Q What do you mean by that? A Well, trying to free himself from Lieutenant Ryan.

Q How forcibly was he trying to free himself? A Just force enough to try to get away; I just saw him twisting.

Q What was Lieutenant Ryan doing at that time? A He was still holding on to him.

Q Was the man walking with him or was he being pushed along? A He was walking with him.

Q And Lieutenant Ryan was just holding on? A Just holding on.

Q Lieutenant Ryan was holding him gently? A He had a grip on him.

Q Didn't he urge him on? A No, sir.

Q Not a bit? A Not that I could see.

Q What way did they go? A Just exactly across the street from the alley to a pole at the hydrant and the pole there.

Q And which of the two were nearer to you, Ryan or the man he had? A The defendant.

Q The defendant was nearer to you? A Nearer to me.

Q And you were in the barber shop on South Orange avenue all the time looking out the window? A No, sir; I was on the sidewalk.

Q And did you get on the sidewalk? A After I saw Captain Cordano come out of the yard chasing this man.

Q What did you do? A I stood on the sidewalk.

Q Were you on the sidewalk when you saw Ryan emerge from the alley? A I was.

Q And then they reached what point when they stopped? A They reached—let's see, that would be the northeast corner, in front of the confectionery store.

Q And the defendant was nearer to you? A Nearer to me.

Q Was he facing you? A No; he was on the side of Lieutenant Ryan.

Q Oh, he was at the side of Lieutenant Ryan. Then what did you see? A Why, before they got to the store I saw a blue steel revolver placed against the stomach of Lieutenant Ryan.

Q How do you know it was a blue steel revolver? A Well, it was a very clear night, and I had a very good view.

Q Do you know steel by looking at it? A I can judge different kinds of steel.

Q By looking at them? A Yes, sir.

Q How far away were you when you were looking at them? A Twenty feet.

Arthur Marasco, cross.

Q Can you judge steel at a distance of twenty feet away? A I think I could judge blue from black twenty feet.

Q You were all across the street? A Right at the gutter line.

Q And you think South Orange avenue is only twenty feet wide? A Well, from where I was to where the defendant was with Lieutenant Ryan was not more than twenty feet.

Q You were at the gutter line? A Yes, sir.

Q And they were where? A Right over at the opposite side.

Q Were they past the sidewalk of South Orange avenue towards Central avenue? A No; they were right at the corner; they didn't even reach the sidewalk; they had not got to the sidewalk yet.

Q You think they were only twenty-five feet away? A That is all it seemed to me.

Q As a matter of fact, isn't South Orange avenue wider than twenty-five feet? A That I could not say; I have never attempted to measure the street.

Q With what hand did the defendant pull out this blue steel revolver? A I did not see the defendant pull out the blue steel revolver, but I saw the revolver in the left hand of the defendant.

Q Did he have his back turned to you? A No, sir.

Q Wasn't he alongside of Lieutenant Ryan? A He was.

Q What angle of vision did you have towards the pair? A I should judge two to three feet below them.

Q Were you below them? A Below them.

Q Nearer the Court House? A Nearer the Court House.

Q Will you pardon me for asking, but have you vision in both eyes? A No, sir.

Q You only have vision in one eye? A In one eye.

Q (*By the Court.*) How long have you had that? A Fifteen or sixteen years.

Q (*By the Court.*) Depending upon that eye for fifteen years? A The right eye.

Q You saw the blue steel revolver in the hands of the defendant? A I did.

Q Then what did you hear? A Three shots.

Q Immediately? A Two immediately and a slight pause, then a third shot.

Q How slight a pause? A I should judge a second or so.

Q Did Ryan release his grip immediately from the defendant? A After the third shot he did.

Arthur Marasco, cross.

Q After the third shot? A Yes, sir.

Q And then what did Ryan do? A He walked over about five feet to a window—store window.

Q He walked over five feet to a store window? A I should judge that is the distance from this gutter line to this window.

Q Was he facing the store when he was walking? A He was.

Q Then what happened? A Why, the defendant turned and started to run up South Orange avenue with a gun in the left hand.

Q How do you know that? A Because I saw it.

Q Was it the hand nearest to you? A It was.

Q Did the revolver gleam? A Well, it was kind of smoky.

Q Did it gleam—did it shine? A Yes, sir; it did.

Q Then it was not blue steel? A It certainly was blue steel.

Q Who have you talked to about this case? A No one at all.

Q Didn't you make a statement to anyone? A Made a statement at police headquarters.

Q When? A July 17th.

Q Have you seen any of the police officers since? A I have not.

Q Haven't you seen them in the court room? A I have in the court room.

Q Haven't you spoken to them? A Just to say good morning, how do you do; that is all.

Q Never spoke to any of them? A No, sir.

Q Did you volunteer to come here today? A I got a subpoena to come here.

Q Then after you saw the man run did you run after him? A I ran after him a short distance.

Q How far? A I should judge two hundred feet.

Q How far did you run to, what point? A To about 10 Jones street.

Q To about 10 Jones street? A Yes, sir.

Q How far away is that from where you were standing when you started to run? A Well, I don't think it is over two hundred feet.

Q How did you say the defendant was dressed? A Dark brown suit.

Q Did he have a tie? A Well, the tie was kind of loosened up.

Q What color? A It seemed white color, I believe.

Arthur Marasco, re-direct.

Q Did he have a hat? A No, sir.

Q Did you see Mr. Inlander in the barber shop; do you know Mr. Inlander? A I didn't know him until that night; I saw him in the barber shop; I didn't know him to speak to.

Q Did you discuss this case with him? A No, sir.

Q You ran two hundred feet and then you came back? A To where Lieutenant Ryan was.

Q Did you run back? A Yes, sir.

Q When you got back was Captain Cordano already there? A There was Captain Cordano and some other men putting Lieutenant Ryan in an automobile.

Q They were already there? A Yes, sir.

Q They were putting him in an automobile? A Yes, sir.

Q When you got there? A Yes, sir.

Q And you don't know how he was when you got back there? A He was up against the store window after the shooting.

Q That was the last time you saw him? A Until they placed him in the automobile.

Q And he was in the arms of someone? A He was.

Q Being placed in the automobile? A Being placed in the automobile.

Q Now, from that day to this have you ever discussed this case with anyone? A I have not.

Q Not even with your relatives? A No, sir.

Q Not with a soul? A Not with a soul.

Re-direct examination by Mr. Bernhard.

Q Have you told us all that you saw that evening? A Well, after all this confusion and everything, I returned to the barber's and got shaved; after I had got shaved I came out and met some detectives there.

Q And did you or did you not give your name to the detectives? A I did; gave it to three or four police officers.

Q And then you were subpoenaed to be here? A I was.

Q As you crossed the street did you hear anything said by either Ryan or the defendant? A I heard Lieutenant Ryan say that he was shot.

Q Where were you standing at the time you heard Lieutenant Ryan say he was shot? A Right at the gutter.

Q Where was the defendant at that time? A He had started to run.

Arthur Marasco, re-cross.

Q How far was he from Lieutenant Ryan? A About twenty-five feet.

Q Were you nearer to Lieutenant Ryan than he was or were you an equal distance? A I should judge about an equal distance.

Q Did you hear anything else? A No, sir.

Re-cross examination by Mr. Simandl.

Q When did you happen to think of this that you are telling us now? A Just as the question was being brought out.

Q Didn't remember it this morning? A I have not been asked about it at all.

Q You went back to get a shave? A I did.

Q Who did you meet? A I met different detectives.

Q What did you tell them? A Just gave them my name and address.

Q Didn't tell them any part of the story? A No, sir.

Q Why did you give them the name and address? A Well, as a citizen I deemed it a public duty to give my name and address to the officers and assist them in whatever way in apprehending the defendant.

Q When you gave your name didn't they ask you for it? A They didn't know that I knew anything at the time.

Q They did not? A No, sir.

Q Didn't they ask you what you knew? A Not that evening, no, sir.

Q Didn't you say that you had seen it? A I didn't say nothing what I saw or anything.

Q What did Ryan say in your hearing? A That he was shot.

Q How did he say it? A "Oh, I am shot."

Q Did he say anything else? A That is all I heard him say.

Q Nothing else, no other conversation? A No other conversation whatsoever.

Q How far away were you? A Twenty feet across the street; I should judge a distance of twenty feet.

Q Did he say it loud or softly? A Yes, sir; you could hear it clearly.

Bridget Ryan, direct.

By the Court.

Q You say this man held his hand how when the shots were fired? A This here will have to be the left-hand side (indicating).

Q That has got to be the right hand? A Right.

Q Did you say left or right? A The left hand was the hand the gun was in.

Q Now, show us that? A (Witness demonstrates.)

Q Did the man who had the revolver have a coat on? A He did.

Q Where was the right side of his coat with reference to the revolver? A The right side would be over this side.

Q And where was the right side of his coat with reference to the revolver? A To the right of Lieutenant Ryan.

Q Show us again how the revolver was held? A Lieutenant Ryan was on this side and the defendant on this side (illustrating).

Q You said that the revolver was held in the left hand? A Yes, sir.

Q And you are pulling your coat out? A Yes, sir.

Q Was the revolver outside or inside the coat? A The coat was open as far as I could see.

Q What trade or business are you engaged in? A Shipbuilder.

Q What kind of work do you do? A Riveter.

Q How long have you been a riveter? A Last two years.

Q Before that what did you do? A Machine adjuster.

Q What kind of machinery? A Automatic.

Q What kind? A Automatic screw machines, cutting out different parts of steel, different parts of metal.

BRIDGET RYAN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mrs. Ryan, where do you reside now? A 34 Chelsea avenue.

Q How long have you lived there? A Three years last June.

Q And who were the members of your family in July of this year, Mrs. Ryan?

Dr. John Vail Bisset, direct.

Mr. Simandl. I object, if your Honor please, how is that relevant?

A My son—

Q Just a minute.

The Court. What is the purpose?

Mr. Bernhard. To determine what time Lieutenant Ryan left home.

The Court. Objection overruled.

Q Who were they? A My daughter.

Q Will you give us her name? A Grace Ryan.

Q Who else? A My husband.

Q His name? A Michael.

Q And who else? A That was all.

Q Patrick Ryan, your son? A Yes, sir.

Q How old was he in July? A I think he was forty-six.

Q When was his last birthday, if you remember? A The 10th of May—the 13th of May.

Q Do you know what time Lieutenant Ryan left home on the evening of July 16th? A I couldn't tell you exactly the time, but I know he went after his supper.

Q Could you tell us as nearly as you now recall? A It might be a quarter-past six or half-past six.

Q How far is your house from South Orange avenue, about how many houses? A A block one way and it is more by Munn avenue.

Q Who were home when your son left? A My daughter.

No cross examination.

DR. JOHN VAIL BISSET, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q What is your profession, Doctor, medical physician? A I am an interne in the City Hospital.

Q How long have you been? A I came there the first of August, a year ago.

Q You are a graduate of what institution? A Cornell Medical.

Q When? A 1918.

Dr. John Vail Bisset, direct.

Q What were your duties in the hospital in July, this year? A I was house surgeon.

Q And your duty was what? A Looking after the surgical cases in Ward 7.

Q What time, any time? A Yes, sir; at all times I was in the building.

Q Did you know Lieutenant Ryan in his lifetime? A No, sir.

Q Did you have occasion to examine him on July 16th? A I did.

Q Do you recall the time? A I know it was early in the evening.

Q Whereabouts? A Ward 7, City Hospital.

Q In what condition of attire was he at that time? A I don't remember that he had any clothes on at all; he was just in bed.

Q Anyone present? A There were several people there in the ward.

Q Do you recall any? A No; the only one I know is the nurse.

Q What examination did you make of him? A He came in and I looked at him and he looked like a man very white, his eyes, when you turned the lids down, were white, and he was all in; I examined his chest and abdomen.

Q What did you find? A Three puncture wounds on the left side right up here (indicating).

The Court. What did you say?

Witness. I meant "right" and near the third rib and two in the abdomen on the left side.

Q Will you arise and point out where you found them? A There was one here and one there (indicating).

Q Where was the second one; what part of the body? A As I remember it, the one that was higher up was about two inches from where his ribs came together in the middle, and the third was about two inches below that, and they were to the left of the middle line.

Q Did you examine his general condition? A It was very bad.

Q What was his general condition? A I thought that he was dying at that time.

Dr. John Vail Bisset, direct.

Q When did he die? A He died a short time after that; I don't know how many minutes, but several minutes; I left the ward and came back and he died.

Q Who was with him when he died? A I was there when he died.

Q Did you have any conversation with him? A Yes, sir.

Mr. Simandl. I object.

Q Was it before or after you had determined his dying condition that you had the conversation? A I thought he was dying as soon as I saw him.

Q Won't you answer my question? Was it before or after that you determined his dying condition that you had this conversation? A It was after.

Q What conversation did you have with him?

Mr. Simandl. I object. I desire an opportunity to cross examine before any conversation can be brought out.

The Court. You have not connected the time to which this witness refers with the time to which Captain Cordano refers, and you have not shown by this witness a proper foundation. You have shown by this witness that if the fullest inference were drawn from his evidence that Ryan was in a dying condition, but you have not shown that he knew it.

Mr. Bernhard. I am trying to prove it by this very question and it is the only way I can prove it, and as far as Captain Cordano is concerned, he has been on the witness stand and testified that at the time he was present Dr. Bisset was also present and there was a conversation at that time.

The Court. Cordano said he did not know any of those people up there; he said, "I saw the doctor and nurse and I saw Ryan"; I do not recall his stating "I saw Dr. Bisset."

Mr. Bernhard. Oh, as to the identity of the doctor?

The Court. Yes.

Mr. Bernhard. Then I should like to have an opportunity to recall Captain Cordano.

Q (*By the Court.*) You made two visits to Mr. Ryan? A Yes, sir.

Dr. John Vail Bisset, cross.

Q Did you talk to him at all on the second visit? A I don't remember which visit it was I talked to him.

The Court. You may cross examine.

Cross examination by Mr. Simandl.

Q When you spoke to him he appeared to you to be in a dying condition? A Yes, sir.

Q You say his lips were white? A Yes, sir.

Q And his eyes were white? A The under part of the lids were white.

Q He was delirious, wasn't he? A No, sir; I don't think so; he was not delirious.

Q You think he had his faculties with him? A I think he knew what he was doing.

Q This man was dying, wasn't he? A I think he was.

Q And he was pale white? A Yes, sir.

Q And yet you think he knew what he was doing? A Yes, sir.

Q How do you base that opinion? A That is what I think.

Q In answering this question I do not want you to mention any of the conversation. Why did you think, in your opinion, that he had full use of his faculties? A From what he said.

Q And that is the only basis? A Yes, sir; from what he said to me.

Q Well, could not a delirious man have made the same statement? A It is possible that he could; yes, sir.

Q So that your opinion could or could not be right? A That is possible.

Q How shortly after you saw him did he die? A I don't know how short a time it was; it was not very long; I went out of the ward and came back and was with him when he died.

Q Was he delirious? A I don't think he was ever delirious.

Q Did he have all his faculties present? A I don't know what you mean by that; he could not sit up; he was not strong enough to sit up.

Q He couldn't see, could he? A He could see good enough to take a pen in his hand.

Q Wasn't his eyelids closed? A He opened and closed them; he had power enough.

Q They were white, weren't they? A The under side was.

Q They were decided white? A Yes, sir.

Dr. John Vail Bisset, cross.

Q And his entire body was lead white? A White; yes, sir.

Q And yet you are willing to say that the man had full charge of his faculties? A I said I thought he knew what he was doing.

Q Did you do anything to save his life? A No, sir; we did not save his life.

Q Did you tell him that he was dying? A No, sir.

Q You didn't say anything to him, did you? A I tried to get him to sign a paper.

Q Did you administer anything at all to him? A No, sir.

Q No drug to alleviate his pain? A No, sir.

Q Nothing whatsoever? A No, sir.

Q He was in a dying condition when he came to the hospital, when you first saw him? A When I saw him in Ward 7 I thought he was in a dying condition.

Q And you saw him afterwards? A Yes, sir.

Q And then you had this conversation? A Yes; I don't know whether I had the conversation the first time I saw him or the second time.

Q Did you recognize who was present? A There were people there; the only one I know was the nurse; there were other people who I do not know.

Q Did you give him any stimulant at all? A No, sir.

Q None whatsoever? A No, sir; none that I remember now.

Q (*By Mr. Bernhard.*) What did you say that you wanted him to sign?

Mr. Simandl. Just one moment.

The Court. Do you want to go into that or press your question?

Mr. Bernhard. I would rather press my question at this time.

The Court. What is your objection?

Mr. Simandl. Upon the ground first, from the witness' own statement, it shows clearly to my mind that this man was in such condition that his declaration at that time was not made by a man who had full charge of his faculties. The doctor says that he thought that from the statements that were made that the man had full charge of his faculties.

Dr. John Vail Bisset, further direct.

There has been nothing shown to show that Ryan knew that he was dying. I think that this cannot go in as a dying declaration.

The Court. That is the purpose of this question, the prosecutor says: Not to put in evidence what the decedent said as to the cause of his death, while death to him was impending, and in fact he did die shortly afterwards, but to show the very fact and to lay the foundation, namely, that at that very moment he thought that he was about to die.

Mr. Simandl. Well, I think, if your Honor please, the statement is apparently inaccurate by the witness, when he says that.

The Court. He has not been allowed to say what Ryan said yet.

Mr. Simandl. But the statement would be inaccurate.

The Court. Do you mean Ryan did not have sufficient control of his faculties to make an intelligent statement?

Mr. Simandl. Yes, sir.

The Court. Well, we will have to find out what he said. I will sustain your objection at this time on the ground that it opens the door too wide, and on the ground that there is not a sufficient foundation laid, but the prosecutor may ask this specific question of a leading character. Did Ryan say anything to you at that time with reference to whether or not he thought that he was about to die?

Defendant's counsel prays an exception to this ruling of the Court, and same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Witness. He did.

The Court. Answer that yes or no.

Witness. Yes, sir.

Further direct examination by Mr. Bernhard.

Q What did he say?

Mr. Simandl. I object.

Dr. John Vail Bisset, cross.

The Court. Upon what grounds?

Mr. Simandl. The same grounds.

The Court. Overruled.

A He said, "I am done for."

Defendant's counsel prays an exception to this ruling of the Court, and same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q That is all. That is all.

Cross examination by Mr. Simandl.

Q And from that statement you are willing to say that this man knew—that you knew that he had full charge of his faculties? A He made a true statement.

Q Wouldn't a delirious man be liable to make a true statement? A I don't know; he might and might not.

Q Wouldn't a drunken man, perhaps, under the same conditions, have said the same thing, if he was bleeding from a wound or something? A He might.

Q That is the only basis for your opinion? A That is the basis for my opinion, and what I saw from the examination and what he told me.

Q From your experience as an interne or any other medical experience that you have had, how many dying men have you seen? A I don't know.

Q Approximately?

The Court. What is the purpose of this. There is no doubt about Ryan being dead.

Mr. Simandl. I want to show his purpose.

The Court. I am asking the purpose of the cross examination. What is it?

Mr. Simandl. I am trying to show to the Court that the deceased could not be in a position to make any statement because he could not have had charge of his mental faculties.

The Court. Could not have control of his faculties?

Mr. Simandl. No.

The Court. All right; go ahead.

Q How many? A I don't know; I never counted them.

Q Approximately? A I don't know.

Q Would it be five? A Many more than that.

Q Ten? A More than that, yes, sir; I saw a good many people die up here last year.

REV. JAMES F. FLANAGAN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Father Flanagan, are you assigned to any particular church in the City of Newark? A St. Joseph's.

Q And that is located where? A Corner of Wallace place and Academy street.

Q How long have you been assigned to that church? A A little over three years; three years and seven months.

Q Did you know Lieutenant Ryan in his lifetime? A I did not.

Q How close is your church to the City Hospital? A Well, I should say approximately six blocks; small blocks.

Q Have you ever been there? A Why, it is included in our work to attend those places.

Q Do you recall whether or not you were called there on the evening of July 16th of the present year? A I do not remember the date exactly, but I remember being called to Lieutenant Ryan.

Q Do you recall the month? A It was in July.

Q What time of day or night? A I should say approximately five minutes to seven in the evening.

Q Where did you find him? A On the elevator, going to the ward.

Q And where did you go, anywhere with him? A I followed him to the ward.

Q Please do not repeat anything that was said. What did you do there? A At the ward?

Q Yes, sir. A I administered the Sacrament to him.

Q Whereabouts? A In the ward.

Q Where was he at the time—Lieutenant Ryan? A In bed.

Q Were there any other persons present? A There were a few people around.

Jacob B. Tuckman, direct.

Q Do you happen to recall having met any of them before this event, either before or after? A Well, I met a man after attending to Lieutenant Ryan and he made himself known to me as Captain Cordano.

Q Where were these folks at the time you were administering the confession? A They were outside the screen; I do not know where they were.

Q What screen? A They generally put a screen around the bed of a patient to give a little privacy in religious consolation.

Q Was that done in this instance? A Yes, sir.

Q Do you recall this gentleman as the man there that night? A Yes, sir.

Q Do you remember whether or not Dr. Bissett was there? A I do not remember him.

Cross examination by Mr. Simandl.

Q How long were you there? A I should judge no more than five minutes.

Q And that time was consumed in doing what? A Just in giving him the consolation of the church.

JACOB B. TUCKMAN, sworn for the State.

Direct examination by Mr. Bernhard.

Q You are a police office of the City of Newark? A Yes, sir.

Q For how long? A Sixteen years.

Q Connected in July 16th of this year with what precinct? A Fourth.

Q In what capacity? A Patrolman.

Q When did you report for duty that day? A Nine o'clock in the morning.

Q How long did you remain on duty? A Well, I was to get off at seven o'clock.

Q Did you get off at seven o'clock? A No, sir.

Q Where were you shortly before seven o'clock? A South Orange avenue and Norfolk street.

Q Is that a part of your beat? A No; I was sent there by the lieutenant.

Q What lieutenant? A The lieutenant in charge.

Q Of your precinct? A Yes, sir.

Jacob B. Tuckman, cross.

Q What did you do when you reached there? A I looked around at the point of the shooting; a telephone came in.

Q You received a telephone message? A Yes, sir.

Q Where did you go in your investigation? A I went to a saloon, corner of South Orange and Norfolk street.

Q What was the name of that saloon? A They call it the Transfer House; I couldn't say who runs it.

Q While you were in there what did you do? A I went in there looking for a hat.

Q Did you find one there? A Yes, sir.

Q I show you a hat and ask you whether or not you recognize that hat? A Yes, sir.

The Court. It is marked S. 10 for identification.

Q You looked inside? A Yes, sir.

Q Why did you do that? A To get my knowledge.

Q To help identify it? A Yes, sir.

Q Is this the hat you found? A Yes, sir.

Q Whereabouts? A In the saloon.

Q Whereabouts? A On a table or piano.

Q What time did you find it there? A I should judge five minutes to seven or seven o'clock.

Q What did you do with it? A I turned it over to Officer Sweeney.

Cross examination by Mr. Simandl.

Q Then you found that hat? A I got it in the saloon.

Q You found it on the piano? A When it was shown to me it was there.

Q Who showed it to you? A A man that was in the saloon.

Q Who was that man? A I don't know who the man is; there were several men there.

Q (*By the Court.*) Where was the man in the saloon who showed it to you? A There were several men there; I don't know the man's name.

Mr. Bernhard. I offer the hat in evidence.

Mr. Simandl. I object. I understand—

Mr. Bernhard. I withdraw the offer.

John J. Sweeney, direct.

JOHN J. SWEENEY, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Mr. Bernhard. I offer the witness at this time for the branch of the case relating to the hat alone.

Q You are an officer of the Police Department of the City of Newark? A Yes, sir.

Q How long have you been? A Seven years.

Q Were you detailed to investigate the shooting of Ryan? A I was.

Q In the course of your investigation did you meet Officer Tuckman? A At South Orange avenue and Norfolk street.

Q I show you hat marked S. 10 for identification and ask you whether you ever saw it before? A Yes, sir.

Q Where? A I saw it when Tuckman gave it to me.

Q When did he give it to you? A I should judge about half-past seven the night of the shooting.

Q Where? A South Orange avenue and Norfolk street.

Q What did you do with it? A I kept it in my possession.

Q How long? A Until after the arrest of the defendant.

Q Then what did you do with it? A It was marked for evidence and turned over to the prosecutor's detective.

Q Before it was turned over to the prosecutor's office did you show it to anybody? A Yes, sir.

Q To whom? A The defendant.

Q Whom? A Schilling.

Q When? A When he was at headquarters.

Q What time that night or the next day? A About 2 A. M., July 17th.

Q Was anything said when you showed it to him? A He identified the hat.

Q What did he say?

Mr. Simandl. I object.

The Court. Overruled.

Q What did he say?

Mr. Simandl. I object on the ground that it has not been shown—this hat has not been connected with the defendant yet.

The Court. Then how are you going to do it?

John J. Sweeney, cross—re-direct.

Mr. Simandl. There has not been any foundation laid.

The Court. He is trying to lay the foundation.

Mr. Simandl. I withdraw my objection.

Q Did you have any conversation? A I was present during the conversation.

Q About this hat? A Yes, sir.

Q What was said by Schilling? A The hat was shown to Schilling and he was asked if that was his hat, and he said it was.

Cross examination by Mr. Simandl.

Q Did you ask him? A No, sir.

Q Who did? A Inspector Corbally.

Q Then you gave it to Inspector Corbally? A Yes, sir.

Q Then you do not know what Inspector Corbally did with it? A I put it in Inspector Corbally's hands, and he held it up for Schilling to identify and passed it back to me immediately.

Q How soon after seven o'clock was this? A That I obtained possession of the hat?

Q Yes. A I should judge about 7:30.

Q When did you see the defendant? A When he was arrested.

Q Well, what time? A About 1:30 A. M., July 17th.

Q Was that when you showed him the hat? A No, sir.

Q When did you show it to him? A About 2 A. M., July 17th.

Q What was his demeanor? A In what respect; how do you mean?

Q Was he calm? A I presume he was.

Q You only presume so; do you know? A No; I don't know.

Q You observed him, didn't you? A Yes, sir.

Q Did he examine the hat? A He picked it up and looked at it.

Q Picked it up and looked at it? A Yes.

Q And Schilling said what? A He was asked was that the hat that he wore that night, and he said it was.

Re-direct examination by Mr. Bernhard.

Q When, then, with reference to the time he was asked, did you hand it to Lieutenant Godfrey, of our office? A Immediately

after the confession was signed I turned all evidence I had over to Lieutenant Godfrey.

Q What would you say was the difference in the hat at this time—at the time you saw it that night and the present time? A It is in the same condition, except that I marked it.

Q How? A "J. J. S."

Q Point it out? A (Witness does so.)

Q In what color? A In green crayon pencil.

Re-cross examination by Mr. Simandl.

Q Were there any marks on Schilling's face? A Not that I noticed.

Q Well, were there? A Flush; that is all.

WALTER GODFREY, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are now and have been for many years connected with the prosecutor's office as a prosecutor's detective? A I have.

Q I show you hat marked S. 10 for identification, and ask you whether you have ever seen it before? A Yes, sir.

Q Where? A It was given to me on the morning of the 17th of July last.

Q By whom? A Detective Sweeney.

Q What did you do with it? A Brought it to the Court House.

Q Where has it been ever since? A Under lock and key in my possession.

Mr. Bernhard. I offer it in evidence.

Marked Exhibit S. 10.

JOSEPH A. BRENNAN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q What is your business? A I am chauffeur, City Hospital.

Q How long have you been chauffeur at the City Hospital? A Since a year ago last April.

Q In his lifetime did you know Lieutenant Ryan? A I did.

Q Have you any other occupation except that of chauffeur? A No, sir.

Joseph A. Brennan, direct.

Q As chauffeur, what are your duties? A To go out on all calls requiring any ambulance service.

Q Did you work on the evening of July 16th? A I did.

Q Did you see Lieutenant Ryan? A I did; he came in a touring car; he had been shot.

Q Whereabouts? A In the receiving-room.

Q And the receiving-room is used for what? A Receiving patients.

Q Was that where he was received? A Yes, sir.

Q What did you see? A I opened the door, and as I opened the door I stepped into—Captain Cordano and he told me—

Q No conversation. A I helped carry the patient out of the car.

Q Did you recognize who it was? A Yes, sir; I helped take the patient out of the car, and took the patient to the bed; I removed his coat.

Q Where was his coat removed? A On the bed.

Q You are speaking of the bed in the receiving-room? A Yes, sir.

Q By whom was it removed? A By me.

Q Would you recognize the coat? A Yes, sir.

Q I ask you if you recognize this as being the coat? A That is it.

Q That is what? A That is the coat that was on Patrick Ryan that day.

Q Did you take it off? A Yes, sir; myself.

Q Did you take off any other clothes? A I removed his entire clothing; all but his shoes; I didn't remove his shoes.

Q I show you a shirt marked S. 9, and ask you whether or not you recognize that shirt as being the property of whom? A Yes, sir; that is the shirt.

Q What shirt? A Shirt belonging to Patrick Ryan that day.

Q Who took it from his body? A I did.

Q Did you notice its condition then? A Yes, sir.

Q What about it? A Full of blood on one side and three holes in it in front.

Q I now show you a pair of trousers, Exhibit S. 8 for the State, and ask you whether you recognize those trousers? A Yes, sir.

Q Where did you see them before? A I removed them from the body of Patrick Ryan that day.

Q What about their condition now? A The condition is just as they were at that time.

Q Did you remove anything else? A Yes, sir.

Q What? A His underclothes.

Q I show you one article and ask you if you recognize that? A Yes, sir.

Q What is it? A It is what we call a union suit.

Q Where did you see it before? A I removed it from the body of Patrick Ryan.

Q What was its condition? A Just as it is; the blood was then wet.

Mr. Bernhard. I offer the union suit in evidence.

Marked Exhibit S. 11.

Q What did you do after you removed this clothing? A I laid him down on the bed, and, as we do there generally, started to go through the pockets to find what is in them.

Q . What did you do in this case? A I started to go through the pockets.

Q Did you go through the pockets? A Yes, sir; I did.

Q What pockets? A The first article I took was the pants, because what I looked for was a pistol.

Mr. Simandl. I object; I move to strike it out as not responsive.

The Court. You cannot move to strike out because it is not responsive, because only the State can do that. The words, "I looked for a revolver" were the words you want out?

Mr. Simandl. Yes, sir.

The Court. Strike them out.

Q What was the first pocket that you looked in, if you can recall? A Well, I took it up and made the remark—

The Court. No remarks. What did you look for?

The Witness. I looked for—I put my hand down in the rear pocket.

Q Of what? A The trousers.

Joseph A. Brennan, cross.

Q Did you find anything? A I found nothing; a handkerchief, if I recollect right.

Q Did you find anything else? A Then I laid them down.

Q What did you do after you laid them down? A Then I picked them up, because he had said there was money in the pockets.

Mr. Simandl. I object.

The Court. Strike it out. Do not tell us what he said. The thing that you can tell us is what you did, but not why.

The Witness. I went through the other pocket and found $41 in bills.

Q We don't know what you mean by the other pocket? A The left-hand trouser pocket.

Q And did what? A Found $41 in bills; I searched the rest of it and found nothing of value; in the little pocket on the front of the vest the police lieutenant's badge.

Q On the front of what? A The trousers; I turned it over to the clerk, and then laid the article down; there was nothing more in it.

Q Did you take up the coat? A I took up the coat.

Q What did you do after you took up the coat? A I searched both side pockets and found a piece of paper in one; I didn't look at it; in the inside pocket I found some cards in it; I picked the coat up and looked at it, that is, its condition, and laid it down.

Q Have you told us all of the things you found in the coat and in the trousers? A Yes, sir.

Q He didn't have a vest, did he? A There was no vest; no, sir.

Cross examination by Mr. Simandl.

Q What is there about that underwear that was shown to you that is any different from any other underwear? A Nothing different; I said it was a union suit, and I would recognize it on account of the way it was there and the holes were in it.

Q You only recognize it because there was blood on it and because there were holes in it? A Yes, sir.

Q You don't recognize—it could have been any other union suit with blood on it and holes in it? A Yes, sir; but the condition of the holes seemed the same to me.

David Meyer, direct.

Q Did you take these clothes in and search them immediately? A Yes; right on the next bed.

Q What was Ryan's condition? A Well, he had a pallor.

Q He was white? A Yes, sir.

Q And were his eyes closed? A No, very much open.

Q Did you take him to the ward? A No, sir.

Q How soon afterwards was he taken to the ward? A After being received?

Q Yes. A About—well, I should judge about twelve minutes, ten minutes, ten or twelve minutes; something on that order.

DAVID MEYER, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You live where? A I live at 17 Baldwin avenue.

Q And your business is at? A 398 Springfield avenue.

Q What kind of business? A Haberdasher.

Q How long have you been in business there? A Going on four years.

Q Do you remember whether or not how late your place of business was open on July 16th of this year? A We usually—

Mr. Simandl. I object to that answer, so far as it goes, on—

Q I show you a cap and ask you whether or not you have ever seen that cap before? A Yes, sir.

Q What makes you say yes? A Well, because my name is in it.

Q Well, the Court and jury do not know that. Where? A Right in the center, "D. Meyer."

Q Do you know when it was sold? A Yes, sir.

Q When? A On July 16th, between seven and eight o'clock.

Q Do you know who sold it? A I did.

Q Where is 398 Springfield avenue? A On the corner—what do you call that—

Q Just take your time now. Well, is your store on a corner? A Yes, sir.

Q Is it on the same corner it has been on for three or four years? A Yes, sir.

Q And you don't just recall the name of the street? A I don't just recall it.

David Meyer, direct.

Q It will come to you in a minute.

The Court. The officers will maintain order in the court room. This is a very serious inquiry. There isn't anything which should occasion laughter or remark.

A Springfield and Fairmount avenue.

Q Would you mind telling us on which side? Suppose we go up Springfield avenue, on which side of Fairmount avenue is it? A It is on the right side going up.

Q And is it the first corner, or the opposite? A The first corner.

Q (*By the Court.*) Is that the northeast corner of Fairmount avenue and South Orange avenue?

Mr. Bernhard. Yes, sir.

The Court. Do you agree to that?

Mr. Simandl. I don't know it is South Orange avenue.

The Witness. Springfield avenue.

Q Do you know of your own knowledge where Fairmount avenue begins and where it ends? A I don't.

Q Do you know where the corner of South Orange avenue and Norfolk street is? A No, sir; I don't.

Q So that you cannot tell us, I understand, from your own knowledge, the distance from your store to the corner of South Orange avenue and Norfolk street? A No, sir.

Q What impressed upon your mind the fact that this hat was sold between the hours that you have stated? A I just remember at that time; of course, I was there all alone in the store between those hours.

Q Is there anything else in the hat that indicates that it was in your possession on that evening? A Well, I remember selling the cap on that evening; I remember selling the cap, because I identified the cap the next day.

Q Where did you see the hat? A I saw two detectives come in with the hat.

Q Do you know who the officers were who came in with the hat? A I don't.

Q When they brought it in did you do anything? A They simply asked me if the hat was bought here and I said yes.

Q Do you know to whom you sold it? A I don't.

John J. Sweeney, direct.

Q Would you recognize the person to whom you sold it? A I don't think I could.

Q What became of the person's hat who bought this one? A He had no hat with him.

Mr. Bernhard. I desire to offer the cap for identification.

Not cross examined.

Hat marked S. 12 for identification.

JOHN J. SWEENEY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Mr. Bernhard. I offer Mr. Sweeney on the proof of the cap.

Q I show you cap marked S. 12 for identification and ask you whether you ever saw it before? A Yes, sir; I saw that.

Q Where? A It was on Schilling and he was wearing it when he was arrested.

Q How do you know? A Because when he got down to Headquarters his effects were taken off him and among them was the cap.

Q How do you know that was the cap? A Because he had it on his head.

Q Any mark of identification on it? A Yes, sir.

Q Where? A In the sweatband.

Q Who put it there? A I marked it with my initials, "J. J. S.," with green pencil.

Q Are those the only initials now there? A The following day the man who sold the hat marked his initials there.

Q Where? A Alongside of mine.

Q How? A I can't decipher it.

Q What did you do with it after you got possession of it? A It was shown to Schilling.

Q By whom? A Inspector Corbally.

Q How do you know? A I was there.

Q Was there anything said? A Schilling was asked if that was the cap he bought.

Q Referring to what? A The cap.

Q This cap, S. 12? A Yes, sir.

Q What did he say? A He said it was.

Harry Tropp, direct.

Mr. Bernhard. I offer S. 12 cap as an exhibit.

Mr. Simandl. No objection. I realize that I should have asked the preceding witness a few questions on cross examination.

Hat marked Exhibit S. 12.

Not cross examined.

DAVID MEYER, recalled.

Cross examination by Mr. Simandl.

Q Do you remember the man you sold it to? A I do not.

Q What did he say when he came in? A He said he wanted a cap.

Q How did he act? A Well, he acted kind of cool.

Q (*By the Court.*) Did you use the word "cool"? A Yes, sir, I did.

Q He stood there picking out a few hats? A Yes; I showed him quite a few and he picked one out.

Q Did he pay you? A Yes, sir.

Q Walked out? A Yes, sir.

Q He wasn't excited? A No, sir.

Q Quiet? A Yes, sir.

HARRY TROPP, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Where do you live? A 64 Hunterdon street.

Q Married or single? A Married.

Q What is your business? A Hatter.

Q Whereabouts? A 17 Tenth street.

Q For whom? A Rosenberg & Company.

Q Whereabouts? A 17 Tenth street.

Q For yourself or for someone else? A For Mr. Rosenberg.

Q What do you do there? A Packing hats.

Q How long have you been there? A A couple of years—seven or eight years.

Q On the evening of July 16th, this year, do you remember where you were? A Yes, sir.

Q Where? A Going from home to Prince street.

Harry Tropp, direct.

Q And what route were you taking from home to Prince street? A Going through South Orange avenue.

Q Where did you go on South Orange avenue? Where did you get on South Orange avenue? A Got through Wallace street to South Orange avenue.

Q Then when you got to South Orange avenue which way did you go? A Straight down South Orange avenue.

Q Towards Newark; towards Broad street? A Yes, sir.

Q And on which side of South Orange avenue were you? A On the left-hand side going down.

Q Anybody with you, Mr. Tropp? A No, sir.

Q Did you notice anything on your way down? A I did.

Q What? A While I was standing on South Orange avenue with a friend of mine.

Q Who? A A party that used to work with me.

Q What is the name? A Name of Apple, and while we were talking we heard the noise of a gunshot.

Q Where were you? A I was on the sidewalk near the saloon.

Q What saloon? A On the corner of South Orange avenue and Norfolk street.

Q Go on. A We heard the first shot, that attracted my attention and we looked over.

Q Over where? A On the opposite corner; that happened on the opposite corner.

Q All right. A Then we started to run towards there.

Q Who? A I did; left my friend and started to run towards that corner to see where the shooting was going on, and the second shot was fired.

Q How far did you get when the second shot was fired? A I was in the middle of the street, between the tracks.

Q How did you get from the sidewalk to the middle of the street, walk or run? A Run.

Q Go on? A And the party that was shooting sprung around wild like and I looked at him.

Q Do you know who it was? A Yes, sir.

Q Who was it? A I took a good glimpse of him.

The Court. Who was he?

Q Who was he, can you identify him? A Yes, sir.

Q Where? A Right there between the two policemen.

Harry Tropp, direct.

Q Be more specific. A The second man in the second bench.

Q Referring to whom? A Schilling.

Q What did he do after he looked around? A He shot a third time; the third bullet I heard and then a fourth following.

Q Where were you when the third bullet was shot? A Turning around, backing up towards the corner.

Q Where were you when the third shot was fired? A Going back from the middle of the street to the corner.

Q (*By the Court.*) Going backward? A Yes, sir.

Q (*By the Court.*) Which way were you facing? A Facing the same way I did first.

Q Did you know the person who was shot? A I didn't.

Q What kind of a looking man was he? A I didn't know either one of them.

Q Where were they standing when the first shot was fired? A On the sidewalk, near the window, on that corner.

Q Did you hear it fired? A Only heard it, the first, I didn't see it.

Q Did you see any of the shots? A I did the three after the first.

Q And they came through what? A From a revolver.

Q How do you know? A After the second shot, when I noticed the revolver, the point of it, at least.

Q How do you know it was a revolver? A It looked like it.

Q Where was it? A In his hand.

Q Which hand? A Right hand.

Q Whose right hand? A The party that done the shooting.

Q Then what happened? A Then he turned around and he ran over South Orange avenue.

Q Was there anything said or more done before he started to run? A Nothing.

Q Did you hear any remarks passed between the two men? A No, sir.

Q What happened after the fourth shot? A He turned around and he ran over South Orange avenue, towards Jones street.

Q What happened to the man who was shot? A Well, I don't know what happened, because I was trying to chase after the party, and I got a little ways into Jones street and lost track of him.

Harry Tropp, cross.

Q How far? A A couple of houses.

Q What became of the revolver? A I noticed while crossing South Orange avenue he still had it in his hand.

Q Did you or did you not see the revolver after he started to run? A I did see it as far as I could see him.

Q How was he carrying it? A In this way (illustrating).

Q And your arm is extended from the elbow? A Yes, sir.

The Court. It was held in front of his body?

Mr. Bernhard. Yes, sir.

The Court. At the waist line.

Witness. Then I turned back to the corner trying to help out the man who was shot, and before I got there I saw a crowd, a lot of police, and all I could see was the party that was shot picked up by two or three men and put in a machine.

Cross examination by Mr. Simandl.

Q You were going to Prince street from your home? A Yes, sir.

Q And were just walking down on what side of South Orange avenue? A The left-hand side.

Q Coming down? A Yes, sir.

Q And how far did you get before you stopped? A The front of the saloon.

Q You were standing in the front of the saloon? A Yes, sir.

Q And what were you doing? A Talking to a friend.

Q How many people were around there? A Quite some.

Q Quite a number? A Yes, sir.

Q How many about? A I didn't count them; quite some people.

Q Was there anything to attract their attention that you noticed? A Nothing; I didn't notice.

Q Were they following anybody? A After those shots started they were following.

Q Before that time? A Before that time I didn't notice.

Q There were a whole lot of people around? A Yes, sir.

Q And then you heard a shot? A Yes, sir.

Q Was the first shot louder than the rest of them? A They were all alike that I could notice.

Nathan Wagman, direct.

Q How do you know they were all alike? A Well, I don't know any difference; they all seemed to me alike.

Q Thy all seemed to you alike? A Yes, sir.

Q Just say the figures, 1, 2, 3, 4, as near as you can to indicate the time which elapsed between each shot? A The first shot 1, 2, and then the party swung around a few seconds and then followed the third and fourth.

Q Did I understand you to say the man who was shooting turned around like wild? A The man after he fired the second shot when I was running toward him trying to grab him and he swung around with a gun in his hand and I got nervous; started to go back; I was scared; he looked to me that way.

Q He looked to you like wild, and he had his gun in his right hand? A Yes, sir.

Q Did you notice when Lieutenant Ryan let go of this prisoner? A No, sir; when I first noticed Lieutenant Ryan was already caving in holding on.

Q Did he walk over to the sidewalk? A There was no walking there; he was standing there.

Q You don't know what happened so far as Lieutenant Ryan is concerned? A That is the last I saw Lieutenant Ryan until he was taken away to the hospital.

Q But you ran after this prisoner? A Yes, sir.

Q How far did you run after him? A A couple of houses into Jones street.

Q Did the man who was doing the shooting have a hat on? A No hat.

Q You are sure about that? A Positive.

Q Do you remember whether he had a tie? A I don't know.

Q He might have? A I don't remember; I can't say.

NATHAN WAGMAN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Your business is what? A Cafe.

Q Where? A South Orange avenue and Norfolk street.

Q The Transfer Cafe? A Yes, sir.

Q How long have you been engaged in that business at that place? A Going on the fifth year.

Q Do you remember whether or not you were at your place of business on the evening of July 16th? A I am on every night, every evening.

Nathan Wagman, direct.

Q Were you there that night? A Yes, sir; I was.

Q Was your attention attracted to anything that night? A Nothing at all.

Q I show you a raincoat and ask you whether you ever saw it before? A That raincoat was found in my place.

Q How do you know? A That was about nine o'clock; a man went in the back room and found a raincoat—

Q Stop. You went into the back room? A I didn't; a customer of the place.

Q Where did you first see the raincoat? A A man brought it in to me from the back room.

Q Then you saw it in your saloon? A Yes; I saw it in my saloon.

Q What time did you first see it? A Nine o'clock in the evening.

Q This is the coat? A This is the coat.

Q When did you next see it after that night? A That is all I have seen it, only that night.

Q You have seen it today? A It was nine o'clock in the evening; I didn't see it in the daytime.

Q You see it now? A Yes, sir.

Q From that time to this have you seen it? A No, sir.

Q What became of it when it left your place? A I handed it to headquarters.

Q Who did you hand it to? A Two detectives.

Q Would you recognize them if you saw them again? A Yes; I think I would.

Q All right, do it. A I think I handed them to this man here.

Q This man that stands up? A Yes, sir.

Q And do you know the other? A There was two of them.

The Court. What is the name of the officer?

Mr. Bernhard. Gannon.

The Court. What is the first name?

Mr. Bernhard. William.

Q Do you recognize the other officer? A I couldn't recognize him.

Q What time did they come for it and take it away? A About half-past nine.

Nathan Wagman, cross.

Cross examination by Mr. Simandl.

Q How do you know that is the same coat? A How do I know it? Well, when the man handed it to me I examined it; I took the coat in my hands and I put it in the back room; there was a little office next to the saloon.

Q What is there about this coat that is different from any other one? A Well, the man that brought it in to me, I had it in my hand and I looked at it and found it had a back shawl.

Q (*By the Court.*) Is that what you mean, a kick? A Yes, sir; that is the reason I know that this is the coat.

Q Haven't you ever seen any other raincoats with that kick in it? A Well, I just held it.

Q You don't think this is the same one—you don't know whether this is the same one or not? This is the coat? A Yes, sir.

Q You only think so? A No; this is it.

Q Do you know that this is an army raincoat? A No.

Q Don't you know that there were four million of those made? A I know it.

Q And you were able to pick one of these out? A Because I had it in my mind.

By the Court.

Q You started in to answer a question. You said you received it from somebody and then you put it in a room in your saloon, is that so? A Yes, sir.

Q Where did you get the coat from that you gave to Gannon and the other detective? A I got it in the back room.

Q Was it the same or a different room? A No; it was a back room from the saloon.

Q Was it the same room you put the coat into? A No; I put it into the little private office.

Q Where did you get the coat from? A From the back room. Between the back room and the front saloon is a little space with a partition that I keep my clothes there, and when the man brought it in I put it in that little room.

Q Did you take it out of that little room to give it to the detective? A I took it out of that little room to give it to the detective.

Mr. Bernhard. I offer the coat for identification.

Thomas J. Corbally, direct.

Mr. Simandl. It hasn't been connected as yet with the defendant.

The Court. There isn't any objection to have it marked for identification?

Mr. Simandl. No.

Marked S. 13 for identification.

Adjourned until tomorrow, Wednesday, October 22, 1919, at ten o'clock A. M.

THIRD DAY.

ESSEX COUNTY COURT OF OYER AND TERMINER.

Wednesday, October 22nd, 1919.

STATE

vs.

PHILIP SCHILLING.

Continued pursuant to adjournment.

Present, counsel as before stated.

The Court. The stenographer requested a short recess, as he was slightly ill, and it was agreed by counsel, and approved by the Court, that a short recess should be taken.

In order that there might be no question as to the correctness of the minutes of the testimony, it is agreed that the witnesses who have testified this morning have been asked the following questions and have given the following answers and the objections of counsel and the rulings of the Court are as follows:

THOMAS J. CORBALLY, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are an inspector of police of the City of Newark? A Yes, sir.

Eugene Heller, direct.

Q (Showing witness coat.) I show you a raincoat marked S. 13 for identification and ask you if you ever saw it before? A Yes, sir.

Q When? A On the 16th of July, at 11:30 P. M.

Q Whereabouts? A At my office.

Q Did you do anything with it? A I had Officer Coakley put the tag on it.

Q (Showing witness paper.) Is this the tag? A Yes, sir.

Q Did you do anything else? A I took it upstairs, up in the Bertillon room.

Q What did you do with it there? A I showed it to the defendant.

Q Was anything said? A He said it was his coat.

Cross examination by Mr. Simandl.

Q How many people were around when you showed it to him? A There must have been a dozen men.

Q How soon after his arrest was that? A It was after a statement had been taken.

Q It was after a statement had been taken? A Yes, sir.

Q There was a statement taken from him? A Yes, sir.

Q How soon after his arrest? A About half an hour afterward.

Q Did you see any bruises on his face when you showed him this coat? A Well, the doctor examined him.

Q Did you see any bruises? A His face was red and I think scratched on one side.

Q Was there anything else visible on his face? A No, sir.

Q How did he appear to you to be? A You mean physically?

Q Yes. A All right.

Q Was he calm? A He was calm.

Q Quiet? A Quiet.

Q (*By the Court.*) What time did you say this was? A About three o'clock in the morning.

ENGENE HELLER, sworn in behalf of State.

Direct examination by Mr. Bernhard.

Mr. Bernhard. I think I offered the raincoat in evidence. If I did not I now do so.

The Court. Any objection.

Eugene Heller, direct.

Mr. Simandl. No objection.

Marked Ex. S. 13.

The Court. It will be marked Ex. S. 13 by striking out the words "for identification."

Q What is your occupation? A Police officer.

Q In what capacity? A Detective.

Q What rank? A Lieutenant.

Q How long have you been an officer? A Eighteen years.

Q What was your assignment July of this year, and where? A Doing detective work, from the detective bureau.

Q Night or day? A Day and night both.

Q Did you receive an assignment with reference to a matter that occurred at the corner of Norfolk street and South Orange avenue on Juluy 16th? A I did.

Q From whom? A Captain Kuhn.

Q What time? A About eight o'clock that night.

Q What did you do? A Went out trying to locate the man who shot Lieut. Ryan.

Q Where did you go? A Covered various sections of the city.

Q Will you detail it? A Covered the lower end of the city down through the Waverly section and we got over the Hill section.

Q Anybody with you? A I had Sergeant Gannon with me early in the evening and later I had Sweeney and Capadano, and around midnight we received some information which took us to the neighborhood of Wickliffe street.

Q What part of Wickliffe street? A Around 124.

Q Where is that? A That is a block and a half north of South Orange avenue.

Q And where is 124, on what side of the street? A On the east side of Wickliffe street.

Q Go on. A And we had information that this is where we would find Schilling. He was supposed to be with a friend of his named Jaglin.

The Court. That ought to be stricken out, although defendant's counsel does not move to do so. That is a conclusion of the witness. Strike it out, unless you object to it being stricken out.

Mr. Simandl. No, I do not object.

Mr. Bernhard. The words stricken out are to follow those after "we had information." I submit that "we had information" is proper evidence.

The Court. The statement "we had information" is hearsay. It may go out.

Q What time did you go to 124 Wickliffe street? A Around 1:15 in the morning.

Q Anybody with you? A Sergeant Gannon, Detective Sweeney and Capadano.

Q What place is 124 Wickliffe street? A Furnished room house.

Q What kind? A Frame house.

Q Describe it. A Well, there is a small stoop of three steps up the front of it.

Q Do you know its height? A I should say it was a three-family house. I wouldn't say for sure.

Q When you reached there what did you do? A I took up a position directly opposite the house, in an alley, and Sweeney and Capadano, they took up positions around the house.

Q Did you see the positions that they took? A No, but we agreed on it.

Mr. Simandl. I object. He said he does not know where they took positions, but they agreed on it. I move that the answer be stricken out.

The Court. Your motion is too broad. I will strike out everything after the word "No."

Q Did you see what positions they took? A No, sir.

Q Where were they the last time you saw them when you were in the alley? A Across the street from 124.

Q What did you do after you took the position which you have described? A I waited.

Q How long? A I should judge about five minutes, and I heard a door shut very softly from the direction of 124. I seen a shadow come down from the stoop, appeared to be a person's body walking down the three steps, and as they got to the sidewalk I recognized it as the form of a man.

Q How wide is Wickliffe street at that point? A About forty feet from curb to curb.

Q Any lights in that neighborhood? A No, sir.

Q Go on. A It appeared to be a person's form that came off the stoop; turned south on Wickliffe street, south on Wickliffe street, and as it started south I started south, staying on my side of the street, and when I got to the first electric light I was a little too far behind to recognize the man, and I wouldn't want to stop this person until we got to an electric light, and when we got to an electric light on a small street running into Wickliffe street, called Hampden street, the fellow was ahead of me, and I proceeded on this side of the street until he got to South Orange avenue. I called to the person to stop.

Q At the time that you called to the person to stop where were you with reference to South Orange avenue? A When I stopped him, called to him to stop?

Q Where were you when you called to him to stop, with reference to South Orange avenue? A I was on the northwest corner of Wickliffe street and South Orange avenue.

Q Where was he? A He was almost on the southeast corner.

Q Is that the person that you had previously seen? A Yes, sir.

Q What then did he do when you called to him to stop? A He stopped.

Q Whereabouts? A Right on the curbstone, southeast corner of Wickliffe street and South Orange avenue.

Q How far from you? A About twenty-five feet.

Q Then what occurred? A I crossed over.

Q How were you dressed? A I don't know whether I wore the one I have got on or not. I think it was a dark suit.

Q (*By the Court.*) Were you in uniform? A No, I was in civilian attire.

Q What did he say? A "I want to get a trolley; I have been to the market; you don't want to stop me." I recognized Schilling then.

Q What do you mean by that? A Why, I know him to see him. I recognized who he was then. I was close enough to get a look at him, so I told him he would have to come back with me over Wickliffe street.

Q What words did you use? A I simply said, "If you are going to the market and you are a good citizen you will not complain of my holding you up a few moments. You will have to

come back with me. I want somebody to look at you." So I felt around in his clothes to see if he had anything on him, and not finding anything, I walked over Wickliffe street with him.

Q What do you mean, you felt around his clothes? A Feeling to see if he had a revolver.

Q How did you do that? A With my left hand. I felt his pockets, his pants and his coat.

Q With what hand did you do the feeling? A My left hand.

Q Where was your right hand? A In front of him.

Q What was in it? A My revolver.

Q Did you find anything on him? A No, sir. I brought him back north on Wickliffe street to the corner of Hampden street; that is a small street that runs into Wickliffe, just north of South Orange avenue; and as I got to the corner Sergeant Gannon in the automobile came down east on Hampden street and Sergeant Gannon jumped out of the machine.

Q Who were in that machine? A Walter Byrne was driving and Sergeant Gannon.

Q What happened after Sergeant Gannon jumped out of the automobile? A Why, he grabbed Schilling's coat pocket.

Q Which pocket? A Schilling's right pocket, his right outside pocket, took a revolver from him.

Q Did you see that happen? A I saw that happen; yes, sir.

Q Would you recognize the revolver if you saw it again? A Well, it was a blue steel revolver, five shot.

Q What became of it? A Sergeant Gannon kept it.

Q He kept it? A I didn't handle the gun again.

Q As you approached Schilling on the corner in what position was he? A Why, he stood this way (illustrating).

Q This way, on the record, means with his hands parallel with his shoulders. A His right and left hands extended to the sides even with the shoulders.

Q In what position was he when you searched his left-hand pocket? A In that position (illustrating).

Q After Gannon took the revolver from him what was done, if anything? A We put him in an automobile and brought him to headquarters.

Q Was anything said by Schilling? A Yes, sir.

Q When and where? A On the way to police headquarters.

Eugene Heller, direct.

Q This automobile that you speak of, lieutenant, do you speak of the police automobile or the ordinary car? A It is a touring car attached to our detective bureau.

Q Where was he placed in this automobile? A In the rear seat.

Q Anybody else in the rear seat? A Sergeant Gannon and myself.

Q And you were how situated? A I sat upon the left of him and Sergeant Gannon sat to the right.

Q On the way down what happened? A I had a conversation with him.

Q I forgot to ask you what time it was that you caught him? A About 1:20 in the morning of the 17th.

Q When you went down to the police station what way did you go? A I went down Thirteenth avenue past the Court House to Broad and Market, turned south into Broad, into Green, and then to police headquarters in the rear of the City Hall.

Q How did the conversation start? A I spoke to Schilling.

Q What did you say? A I asked him why he had shot Ryan.

Q What did he say, if anything?

Mr. Simandl. I object. I think the prosecution should lay a foundation. This calls for a confession, and I think they should show affirmative proof that it was voluntary.

Mr. Bernhard. I disagree with the form of the objection made by counsel. It does not show a confession. It shows facts connected with the arrest of the defendant, and any facts that are connected with the arrest of the defendant I think may be admitted in evidence.

The Court. Do you offer to prove an admission, a mere admission of some collateral matter, not connected with the main issue?

Mr. Bernhard. I want to be careful in my answer to your Honor so that I can be fair to both sides. I think it is connected with the main issue.

By the Court.

Q Did you, or Gannon, or Byrne, or any other person hold out any hope or promise to the defendant that if he answered your questions or confessed that it would be beneficial to him? A No, sir.

Eugene Heller, cross.

Q You remained with him from the moment of his arrest up to the time that you entered the station? A Yes, sir.

Q Did any of you, as I have stated before, threaten him in any manner whatsoever? A No, sir.

The Court. You may cross examine on this.

Cross examination by Mr. Simandl.

Q You were a very dear friend of the deceased, were you not? A Oh, we were detectives together.

Q You were a friend, were you not? A I am a friend of all the men in the bureau.

Q I asked you a question. You can answer it yes or no. You were a friend, were you not? A Yes, sir.

Q Very dear friend? A I wouldn't say that.

Q You were very much shocked by your friend's death? A I was shocked when I heard a detective was shot.

Q You were very much excited? A No, sir.

Q You were not? A No, sir.

Q Absolutely cool and calm? A Yes, sir.

Q And when you met this boy you handled him as gently as possible? A Yes, sir.

Q Despite the fact that he had killed your friend? A Yes, sir.

Q Then the automobile came along; is that so? A Yes, sir.

Q Who was in the automobile? A Walter Byrne and Sergeant Gannon.

Q Is that all? A That is all I saw. They were in the front.

Q They were in the front? A Yes, sir.

Q Who was in the rear? A That I don't know, if there was anyone there or not I couldn't say.

Q You know that the automobile was full, do you not? A I do not; no, sir.

Q You don't know that to be a fact? A No, sir.

Q Were there any other detectives on that car after Schilling was placed on the car? A On the automobile?

Q Yes. A There were Walter Byrne, Capadano, Sweeney, Gannon, the prisoner and myself.

Q Then there were more than just you, Byrne and the prisoner? A I told you before that Capadano and Sweeney were with us.

Eugene Heller, cross.

By the Court.

Q You said the car came over Hampden street and Byrne and Sergeant Gannon were in it? A Yes, sir.

Q At that time where were Sweeney and Capadano, if you know? A I don't know.

Q When did they arrive? A About a minute after that.

By Mr. Simandl.

Q They got in the machine, too, didn't they? A Yes, sir.

Q There were detectives all through the neighborhood, weren't there?

The Court. If you know.

A I know that five of us were supposed to be there.

Q There were others got on that machine besides Sweeney, Capadano, yourself, Byrne and Gannon? A No, sir.

Q Are you sure about that? A No, sir.

Q Weren't there some detectives standing on the running board? A Are you talking about on the way to headquarters?

Q On the way to headquarters? A No, sir.

Q Didn't that machine have detectives on the running-board when it passed Broad and Market streets? A I didn't see any.

Q You were in front and you could have seen them and you deny that they were there? A I was sitting in back watching the prisoner.

Q You deny that they were there? A I say I saw no one on the running-board.

Q You could have seen them? A I didn't see any on the running-board.

Q There were no blows struck? A I didn't see any blows struck nor struck none.

Q Were there any marks on Schilling's face when you arrested him? A No, sir.

Q There were marks on his face when he got to police headquarters? A I didn't see any. I didn't see a mark on the boy.

Q Don't you know as a fact that every single one of the detectives struck this man with a blackjack? A I don't know that.

Q You know that you are on your oath? A I do.

Q And then when Inspector Corbally says there were scratches on this man's face you deny that?

Eugene Heller, cross.

Mr. Bernhard. I object to that.

The Court. Objection sustained. He cannot compare his evidence with Inspector Corbally or any other witness. He can state the facts.

Q Did he have scratches on his face? A I didn't see any scratches on his face.

Q Do you mean to tell this Court and jury that despite the fact that the deceased was your friend you placed this man in the rear of the machine and simply rode him down to police headquarters without doing anything to him at all? A That is what I wish to state here, yes.

Q Did you see him at police headquarters? A Schilling?

Q Yes. A Yes, I took him in there.

Q And you still reiterate there were no marks on him? A I saw no marks on Schilling's face.

Q Did you examine his face? A No, I didn't examine his face; I looked at it, looked at it all the way down.

Q You saw no marks at all? A No, sir.

Mr. Bernhard. I will press my question.

By the Court.

Q Was there any conversation, any answers made by Schilling, anything said at all excepting what you have told us—I mean, of course, to Schilling or with him while you were there up to this time of this question of yours? A We had quite a conversation on the way to police headquarters.

Q You said you asked him the question, "Why did you shoot Ryan"? A Yes, sir.

Q Up to that time had anybody talked with Schilling, or he with anybody, or did he say anything, or did anybody say anything in his presence to him? A No, sir.

Q So that you asked these questions and then he made a statement of some sort, he said something? A He answered me; yes, sir.

The Court. Why isn't that voluntary, Counsellor?

Mr. Simandl. Just one question.

By Mr. Simandl.

Q What was Schilling's appearance at that time—was he calm? A Schilling's appearance?

Eugene Heller, further cross.

Q Yes. A He was a little ruffled up, red in the face, like a man who was laboring under excitement.

Q Was he quiet? A What do you mean, physically?

Q Yes. A Yes, very quiet, gentle.

Q Was he calm?

The Court. You asked him that and he said he was excited, red, ruffled up. Why isn't that voluntary? A person asks another man a question and he answers it without any protest or fear or threat or compulsion. Why isn't that voluntary?

Mr. Simandl. I suppose I will have to submit that it is voluntary.

The Court. The question is, as I recall it, "What did he say?" You said, "Well, I asked him 'Why did you shoot Ryan?' " and then he answered something.

Further direct examination by Mr. Bernhard.

Q What did he say? A Why, he said, "I didn't want to be arrested by Ryan, because I knew that if I was taken in I had a long bit waiting for me. I have the consumption and I couldn't stand for a long bit, so I had to shoot him to try to get away."

Further cross examination by Mr. Simandl.

Q After you received your assignment you went directly to the Waverly section? A Covered that section, the southerly end of the city.

Q Down by the freight yards? A Frelinghuysen avenue.

Q You anticipated that he was going to run away, didn't you? You can answer that yes or no. A I figured if he did get away somebody should be there to apprehend him.

Q You thought he was going to try to get away? A I supposed he would try to get away; yes, sir.

Q You went up to Wickliffe street? A Later on.

Q Who went with you to Wickliffe street? A Sergeant Gannon.

Q Is that the only one? A No, there was Gaffney and Sweeney and the chauffeur, Byrne.

Q And they were all in there? A Yes, sir.

Q You were standing in one spot for five minutes when you heard the door open; is that right? A I wasn't standing; I was

Eugene Heller, further cross.

bending; I was in the alleyway directly across from 124 Wickliffe street.

Q Were you not scouring all through that neighborhood? A I was standing in the alley.

Q The rest of the detectives were scouring that neighborhood, weren't they? A I don't know.

Q They went away in the machine, didn't they? A No, sir.

Q Byrne and Gannon went away in the machine, didn't they? A That I don't know.

Q They were not near you? A No, sir.

Q Why didn't you immediately stop the form that was coming out of that house? A Because it was dark.

Q What—were you afraid? A Cautious.

Q You recognized the form? A Not then; no, sir.

Q You recognized the form on Hampden street, didn't you? A No, sir.

Q Now, as a matter of fact, you knew who it was, didn't you? A No, sir.

Q Why did you follow him? A To see who it was.

Q You knew Schilling, didn't you? A Yes, sir.

Q You suspected it was he? A I went to see if it was him.

Q You wouldn't have followed a man of my stature? A I would have followed any man I saw.

Q A man of my stature? A Yes, sir.

Q How far were you away from 124 Wickliffe street in feet when you heard that door close? A Wickliffe street at that part is between twenty-five and forty feet wide. The sidewalk may be possibly six feet wide, and I was in the alley about a foot.

Q And you heard the door close softly? A I heard the door open and close.

Q Then you got out to South Orange avenue? A Yes, sir.

Q The man was across the street? A He was on the other side of the street from the part I was on.

Q As a matter of fact, you caught him on Broome street? A On the corner of Broome street and South Orange avenue, which is a continuation of Wickliffe street.

Q He had gotten considerably over Broome street? A Right at the house at the corner.

Q And then you frisked him? A I felt if he had a revolver on him.

Q Felt in his coat? A Felt of his pockets.

Elizabeth Heffran, direct.

Q He didn't resist you any, did he? A No, sir.

Q Was he quiet? A Yes, sir.

Q Calm? A Yes, sir.

Q Now, if you knew Schilling why did you take him back over Wickliffe street to Hampden street? A I wanted to take him over to where my other officers were watching the house where he came from.

Q How long did you stand there at Hampden street and Wickliffe street? A I didn't stand at all. I just got there when the machine got on the corner.

Q Did anybody say anything when the machine came up? A Yes, sir.

Q You found no revolver on him when you searched him? A No, sir.

Q What was his talk when he was put in the automobile—was he quiet? A Yes, very meek and quiet.

Q He didn't resist the arrest any, did he? A No, sir.

By the Court.

Q Is Richmond street the first street east of Norfolk street and running parallel with Norfolk street? A Yes, sir.

Q And then Boston is the next street? A Yes, sir.

Q And then Wickliffe the next street? A Yes, sir.

Q And then Hampden street runs from Boston street to Wickliffe street, does it? A Yes, sir; one block north of South Orange avenue.

ELIZABETH HEFFRAN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Miss Heffran, where do you live at the present time? A 43 Eighth avenue.

Q How long have you lived there? A About two years.

Q What is your occupation? A Well, I take care of that house.

Q What do you mean by that? A That is a rooming house, but my sister and I take care of it.

Q How long have you been taking care of it? A A year and a half.

Q How many rooms are there? A Ten rooms.

Elizabeth Heffran, direct.

Q And in March of the present year do you know how many roomers you had? A The house was full.

Q And what sex were your roomers, male or female? A Mostly male.

Q Know the names of any of them? A Well, I knew them all, I think, but I guess I have forgotten them.

Q Do you see any of them in court? A The defendant.

Q To whom do you refer? A Will I point?

Q If you please. A (Indicating.)

Q Miss Heffran, where are you pointing to? A Between the two officers.

The Court. Indicating the defendant.

Q Did you say that he roomed at your house? A Yes, sir.

Q Do you remember when? A Well, he was about two weeks and a half there before—

Q Do you remember in what month? A March.

Q What year? A 1919.

Q And what name? A Harry Young.

Q Who gave you the name of Harry Young? A Philip Schilling now.

Q Where is Philip Schilling? A Between the two officers.

Q Do you remember what two weeks he was there? A It was the 17th of March that he held me up in the room.

Mr. Simandl. I object and ask that that be stricken out.

The Court. On what grounds?

Mr. Simandl. I do not see why this statement on her part is going to in any way affect this trial, anything he did then. That is a question to be determined by a separate trial, as to whether he did or didn't do a certain act.

The Court. Then your objection is that it is irrelevant. I do not know whether it is relevant or not.

Mr. Bernhard. The State assures the Court that it is necessarily relevant as to the reasonable ground for the deceased, Lieut. Ryan, making the arrest of Schilling, and that it is material because it furnishes a link in the chain of circumstances upon which the deceased formed the reason for having reasonable grounds for the arrest of Schilling, and it is a step in the procedure leading up to the next question.

The Court. You want to show that Lieut. Ryan had reasonable cause to suspect that the defendant was guilty of a felony and therefore he should be arrested?

Mr. Bernhard. And this particular felony. It is just a step, and we can only go a step at a time.

The Court. You have got to show that felony was actually committed, is that your theory?

Mr. Bernhard. No, we haven't got to show that a felony was actually committed. I do not want the Court to understand that it is the intention of the State to prove the act that occurred at the time; merely that something happened, and as a result of what happened, that that will lead to the next step of proof on the part of the State.

The Court. Your question was, "When was he there?" and she said, "It was the 17th that he held me up in the room." I think I will strike out "he held me up" as a conclusion.

Mr. Bernhard. I move to strike out the words as not responsive to my question.

The Court. Then it stands that the answer is "On the 17th of March."

Q When last did you see Schilling? A He came to the house the first of March; it must have been he was there two and a half weeks before the 17th.

Q When was the last time you saw him? A On the 17th.

Q After that did you do anything? A I went down to headquarters to the police station.

Q What did you do there? A Told the officers.

Q Then did you do anything? A I signed my name.

Q (Showing witness paper.) I show you a paper and ask you whether you recognize that as the paper to which you signed your name? A Yes, that is it.

Mr. Bernhard. I ask that this paper be marked for identification.

Marked Ex. S. 14 for identification.

The Court. What is it, the complaint?

Mr. Bernhard. Yes.

Q After you signed this paper did you go anywhere later? A I got a subpoena later on to go before the Grand Jury.

Q And did you go? A Yes, sir.

Q When was that, do you remember? A No, I can't remember the date.

Mr. Bernhard. I offer the complaint in evidence.

Mr. Simandl. I object until it has been shown that a foundation had been laid, that Ryan knew of the existence of this complaint. At this time it is misleading to the jury.

The Court. If it is connected it would be evidential.

Not cross examined.

JOHN J. SWEENEY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Officer Sweeney, do you know the last witness who was just upon the stand? A Yes, sir.

Q How long have you known her? A Since March, 1919.

Q Where did you see her? A 43 Eighth avenue.

Q What kind of a house is that? A Furnished room house.

Q Did you see her after that? A Several times.

Q I show you a paper that has been marked S. 14 for identification and ask you whether or not you have ever seen that paper before? A Never saw this paper.

Q I show you another paper and ask you whether or not you have ever seen that paper before? A I saw this one.

Mr. Bernhard. I ask that this be marked for identification.

The Court. What is it, the warrant?

Mr. Bernhard. Yes.

Marked Exhibit S. 15 for identification.

Q Do you remember when you first saw the paper marked S. 15 for identification? A Yes, sir.

Q When? A March 17th.

Q Where did you get it from? A Captain Connell gave it to me.

Q What did you do after you received it? A I had it recorded in the usual manner. That would signify that I was assigned to investigate that case.

Q Did you? A Yes, sir.

John J. Sweeney, direct.

Q How long were you on the investigation? A About three days.

Q Was anybody assigned with you? A No, sir.

Q What, if anything, did you do with the paper after you received it? A I didn't do anything outside of filling in a name, wrote an extra name on it.

Q Did you make any investigation as to the location of the defendant? A Yes, sir.

Q And did anybody help you? A I went over to New York alone.

Q At any time did anybody help you? A Yes, sir.

Q Who? A Detective Caffrey.

Q Anybody else? A Well, I showed the warrant to several of the other persons at headquarters.

Q Who? A Lieutenant Kuhn, Detective Caffrey; several more; I don't recall their names.

Q When? A It was after I established the identity of the man I wanted.

Q About how long was that? A Two or three days after the crime was committed.

Q (Showing witness paper.) I show you another paper and ask you whether or not you recognize that paper? A Yes, sir.

Mr. Bernhard. I ask that that be marked for identification.

Marked Exhibit S. 16 for identification.

By Mr. Simandl.

Q You never saw this paper before?

The Court. Referring to S. 16 for identification.

A I did see the paper before—he didn't show me the paper; he held it in his hand.

Q (*By the Court.*) The same one you saw before? A I saw that.

Q (*By Mr. Bernhard.*) Where did you get it from? A Lieutenant Godfrey.

Q Of the prosecutor's office? A Yes, sir.

Q When? A Some time in May, the first part of May.

Q What did you do with it, if anything? A I put it in my desk.

Q Anything else? A Around the latter part of June I had occasion to show it to Lieutenant Ryan.

Q Whereabouts? A Headquarters.

Q Whereabouts at headquarters? A The detectives' room.

Q Under what circumstances? A He showed me some correspondence he obtained recently and I in turn showed him that.

Q What did he do with it? A He took it and looked at it, read it.

Q Where were you when you handed it to him? A Sitting opposite to him.

Q How far away? A About a foot.

Q In what condition was it when you handed it to him? A It was a little cleaner than it is now.

Q I mean, were these papers as they are now except for cleanliness? A I don't understand—the condition?

Q Are those the papers that you handed to him? A Yes, sir.

Q When did you hand them to him, what time of the day? A It was in the morning.

Q What did he do with it? A He handed it back to me after he looked at it.

Q How long did he have it? A About a minute or two.

Q What were you doing when he was looking at these papers? A Looking at him.

Q What was he doing? A He was apparently reading it.

Q What was he doing, as far as you could see? A He was sitting down, holding the paper in his hand, and he looked at it, turned the pages over.

Q After he finished doing that what did he do with the paper? A Handed it back to me.

Q Answer the next question yes or no. Was there or was there not any conversation between you and Lieutenant Ryan after he handed the paper back to you? A Yes, sir.

Mr. Bernhard. I offer the paper in evidence.

The Court. It is your contention that a detective of the City of Newark, a police officer, has the same right of arrest as the sheriff or any constable in the state?

Mr. Bernhard. I think so, and the Brown case holds that as I read it.

The Court. What is the objection?

Mr. Bernhard. The objection may be this, that the original ought to be proven. If counsel insists upon my having the witness from the court, the clerk of this court, on the stand as a matter of form, I believe that may be raised.

Mr. Simandl. This is a copy. It doesn't show what it represents. It is simply a copy of some record and I do not think it should be put in evidence at this time.

The Court. As I understand the situation—perhaps we are going a little ahead—a police officer of the city has the same right to arrest as any constable, and a constable has a right to arrest any person who commits a crime in his presence or any person whom he has reasonable ground to suspect has committed a felony. Isn't that so?

Mr. Simandl. That is correct.

The Court. Then out of that comes a number of questions. If Ryan had a right to arrest Schilling because he had reasonable ground to suspect that he was guilty of a felony, then he had a right to use such force as might be necessary to retain Schilling in his custody.

Mr. Simandl. That is correct.

The Court. And, therefore, Schilling wouldn't have the right, I suppose the State will argue, to gain his release by force. Now, why isn't it competent to show that Ryan didn't have reasonable grounds to suspect that Schilling had committed a felony? In other words, a person who is lawfully arrested cannot resist and break away or secure or obtain his own release by force and violence. A person who is unlawfully arrested has that right. Is not that the law?

Mr. Simandl. That is right. In the first place, there is no proof that a felony was committed, merely what these papers assert there was. What impression was gained on Detective Ryan's mind from the reading of this paper, framed as it is, is not shown, nor can it be shown in this case of the accused, and therefore I think it should not be submitted to the jury.

The Court. Lieutenant Godfrey has been on the stand and he has sworn that he is a lieutenant attached to the prosecutor's office, or something to that same effect. He

takes a paper to Sweeney. Sweeney gives it to Lieutenant Ryan, and Ryan apparently reads it.

Mr. Simandl. True enough. This paper is drawn up in legal terms. It makes a statement that there was a certain thing done, and it denotes a certain man, from which a legal conclusion could be drawn either way in a layman's mind, and therefore the question is, did he think there was a felony committed, in his mind, and this paper would not help us in determining that proposition.

The Court. That is one theory on which it might be admissible. Another theory on which it might be admissible is that any officer has a right to arrest any person who is under indictment. Isn't that so?

Mr. Simandl. Yes, if he knew of the existence of it.

The Court. It might be admissible on the first theory, and, if it is, to make it admissible on the second theory, the original indictment would be the best evidence.

(Witness is temporarily withdrawn.)

JOHN H. SCOTT, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mr. Scott, you are the county clerk of this county? A Yes, sir.

Q And as such county clerk who has the custody of the indictments returned by the Grand Jury to this court? A I do.

The Court. As county clerk, he is the clerk of the Court of Oyer and Terminer of Essex County, is he not?

Q That is true, isn't it, Mr. Scott? A Yes, sir.

Q Was that indictment returned to this court? A Yes, sir.

Q Is there a record of the date on which it was returned? A Yes, sir.

Q Who has custody of the record? A Mr. McLleland.

Q And Mr. McLleland is what? A Is the deputy.

THOMAS McLLELAND, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mr. McLleland, have you the records of indictments returned to the Court of Oyer and Terminer in this county? A I have.

Thomas McLleland, cross.

Mr. Bernhard. I desire to have indictment No. 211 marked for identification.

Marked Ex. S. 17 for identification.

Q I show you indictment No. 211 and ask you if you can, by your record, tell us when it was returned into court? A April 29, 1919.

Q I show you Ex. S. 16 for identification and ask you what that paper is? A That is a copy of an indictment.

Q What do you mean? A A copy of the original indictment, No. 211, April Term, 1919, against Harry Young, alias Harry Schilling.

The Court. It is a copy of the indictment. Look a little further.

Witness. Also a capias issued.

Q By the Court, isn't it? A Yes.

Q Warrant of arrest, is it? A Yes, sir; capias attached.

Cross examination by Mr. Simandl.

Q This indictment is against Harry Young? A Yes.

Mr. Bernhard. I offer Ex. S. 14 for identification, being the complaint, in evidence.

Mr. Simandl. I object. The indictment and the copy of it show that there was the name of Harry Young on there only. What impression would Ryan get from reading a paper of that kind, where it is specifically set forth that Harry Young had committed this crime? How would he know that Schilling is the man who was wanted?

Mr. Bernhard. It appears by evidence in this case that the Harry Young who was mentioned in the complaint, signed and sworn to by Miss Heffran, is the defendant in this case. The evidence further shows that before Lieutenant Ryan was shot there was shown to him an exemplified copy of an indictment against Harry Young, apparently based upon the complaint which Miss Heffran had made, the evidence here showing that she had subsequently, after the complaint had been made, appeared before the Grand Jury. It appears here that an original indictment was found and exemplified copy given to Officer Sweeney, and Officer Sweeney showed that exemplified

copy to Lieutenant Ryan; that Lieutenant Ryan identified it. That furnishes the basis for Lieutenant Ryan's right, if he found, in his opinion—not in the opinion of the Court—a right to make this arrest, and it may result in a question of fact as to his right to make this arrest, and the State has shown that there was reasonable ground for Lieutenant Ryan to make an arrest of a man who was wanted on the complaint, and it does not make the slightest bit of difference under what name the indictment read or the complaint read, provided the defendant was the man whom Lieutenant Ryan should arrest.

Mr. Simandl. It is purely a question what Ryan's mind was when he reached a certain point, whether or not he was searching for a man with a warrant or not, and if the State is trying to convey to the jury that Ryan received his impression that Schilling was wanted under this indictment, there is nothing on this indictment that shows that Schilling was the man wanted by it. I say, it should be excluded until it can be properly shown that Detective Ryan absolutely knew from this warrant or these papers that Schilling was the man that was wanted.

The Court. As I understand the situation, the State is attempting to produce evidence to show, or what has the tendency to show, that the arrest made by Ryan—or rather that the conduct of Ryan as described in the evidence was an arrest, and that the purpose was to take Schilling into custody, and that the arrest was a reasonable and lawful arrest, because Ryan had reasonable cause to suspect that the defendant was guilty of a felony. I understand the defense to agree to the theory stated by the Court, one being that any police officer has the right to arrest where he has any reason to suspect that a person is guilty of a felony; and, secondly, that any person has a right to arrest where there has been an indictment. On the theory that there has been an indictment, it certainly cannot be that because the indictment is in the wrong name, if the right man is pointed out by the evidence, that it excludes that evidence; and, on the other theory, as to whether or not Ryan had reasonable cause to believe, the facts seem to be, as they are now standing, in other words, without any contradiction, that Ryan read a copy of this indictment,

that he saw the capias and warrant for arrest. Sweeney testified he got this paper possibly in May, 1919, and he showed it to Ryan the latter part of June, and then the next thing that the evidence discloses is that Schilling is arrested—at all events, attempting to take into custody this defendant, Schilling. Your complaint is that he did not know, because he read the indictment that the indictment referred to Schilling. The State overcomes this by showing that he was actually engaged in trying to arrest Schilling on the 16th of July. You will go around a circle this way.

Mr. Simandl. I understand, but I must force my objection. I think the facts should have been brought home to Ryan's mind that Schilling was wanted on this indictment before these papers are admissible, and there is nothing on these papers to indicate that, and it would be misleading to the jury if these papers were admitted at this time.

The Court. Suppose the State was unable to show that it was brought home to Ryan, but there was a reason for arresting Schilling, and he did arrest him, and then ask the jury to believe that that must have been the reason why he was arresting Schilling, would not that be proper?

Mr. Simandl. The State must prove a motive.

The Court. No motive. It is to show the arrest, to show the relationship of the parties. If a stranger comes up and takes hold of a man's collar and forces him from one place to another, that man has a right to release himself, but certainly not when he is under arrest. Therefore, it is necessary to prove that the defendant was under arrest.

Mr. Simandl. I reiterate my objection on that ground.

Mr. Bernhard. I will reserve my offer temporarily and ask the witness this question:

JOHN J. SWEENEY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Don't answer this question, please, until counsel has an opportunity to object. Did you or did you not talk to Lieutenant Ryan at the time that you showed him this copy of the indict-

ment as to the identity of Harry Young? Just answer that yes or no. A Yes.

Q What did you say and what did he say?

Mr. Simandl. I object.

Mr. Bernhard. It is perfectly apparent why counsel objects, because we have not shown how Ryan knew by either of these papers, and as soon as I anticipate it he objects.

Mr. Simandl. I object on the ground that the defendant was not present. It could not be binding on him.

The Court. That is not an exclusive test. I think the issue here is whether Ryan had reasonable cause to suspect that this defendant was guilty of a felony. The way to find out what a person knows is to find out what he says and what is said to him. Isn't that so?

Mr. Simandl. Yes, but that is not proper evidence, in my opinion, if your Honor please, where the accused had no opportunity to deny or affirm it. Here is something that is going to be said which materially relates to this man, and if he was present he could either deny or affirm it. He is not present. I don't think it is admissible.

The Court. I am perfectly willing to withhold my ruling if you want to submit authorities. I don't want to hurry either side into a situation that is irrevocable, but I confess that I do not see why, because the evidence is perfectly relevant in every respect, and does tend to create a condition which amounts to an issue, and it should not be excluded simply because it happened somewhere else other than in the presence of the defendant.

Mr. Bernhard. With your Honor's permission I will reserve that question and ask this one:

Q Did you do anything else at the time you showed the indictment to Lieutenant Ryan? A The picture of Schilling was in the indictment.

Mr. Simandl. I object to that. The question was, did he do anything else, and he answered that the picture was in the indictment. I don't think that is an answer to the question. It should be stricken out.

The Court. But you cannot object and move to strike out because an answer is not responsive. It is the sole

province of the examining counsel. Mr. Bernhard has the right to move to strike out this answer as not responsive, because he is the examining counsel. If you move to strike it out because it is not the best evidence, that is another ground, and it is a very good one. The best evidence is to produce the picture itself, or it should be accounted for.

Q What else did you do? A I consider something else by giving the picture also.

The Court. Strike that out.

Q Did you do anything? A I don't understand your question.

Q Were there any other papers that you handed him, or documents or anything of that kind? A No legal documents.

Q Were there any other? A There was a picture.

Q Where is that picture? A It is in my pocket.

(Witness produces picture.)

Marked Ex. S. 18 for identification.)

Q You have produced a picture marked S. 18 for identification. Where did you get it from? A Off of Mr. Schwartz, the Bertillon Bureau.

Q Do you remember when you secured it? A Yes.

Q When? A The 18th of March.

Q That, then, would be a day after— A 18th or 19th.

Q After you had received S. 14 for identification, the complaint? A No, the warrant.

Q What did you do with it? A I showed it to the men in the bureau, and they told me they knew—

Q They told you something; never mind that. What else did you do? A I brought it up to the complainant.

Q By that you mean whom? A Miss Heffran.

Q What did you do there? A Showed it to her.

Q Then what did you do with it? A I kept it in my possession.

Q How long? A Up until this time.

Q Do you know whether or not Lieutenant Ryan saw it? A Yes, sir.

John J. Sweeney, cross.

Q How do you know? A I showed it to him around the 18th. That is when the other men were grouped around.

Q 18th of what? A March.

Q Who is the picture a photograph of? A It is Philip Schilling.

Mr. Bernhard. I ask that it be marked in evidence.

The Court. Has Miss Heffran testified that she saw the picture?

Mr. Bernhard. No, sir.

(Marked Exhibit S. 18.)

The Court. What does the record show, that it was marked without any objection?

Mr. Bernhard. Yes. I renew my offer and the offer is strengthened by the fact that Lieutenant Ryan had not only seen and read a certified copy of the indictment, had a conversation with this witness, but further as to the identity of the defendant, he had seen a picture of the man whom subsequently he arrested, and he had seen that paper a day after his attention had been called to the indictment and warrant and complaint.

The Court. The record having been read by the stenographer, it shows that you made no objection to the picture. The record shows that counsel for the defendant made no objection.

Mr. Simandl. May I cross examine?

The Court. Yes.

Cross examination by Mr. Simandl.

Q You showed this picture to Ryan on the 18th of March? A Around that time.

Q That is the last time you showed it to him? A No, sir.

Q Sure about that? A Positive.

Q You kept it in your pocket all the time, didn't you? A That was attached to the copy of the indictment, folded up in the envelope.

Q That was lying on your desk. Don't you generally carry around pictures of the men in your pocket? A No, not usually.

Q How long did he look at it?

The Court. Which time?

Elizabeth Heffran, direct.

Q The first time you showed it to him? A Just glanced at it.

Q The second time? A The same.

By the Court.

Q When was this second time? A When I showed him a copy of the indictment.

Q That was in the latter part of June? A Latter part of June.

Mr. Simandl. I don't think this photograph in any way bolsters up the State's contention at all. The testimony shows he merely glanced at it. It does not show whether or not this man recognized him or whether he got an impression from the picture as to the identity of the man. If this picture identifies a man by the name of Harry Young it seems to me that there would be a confusion in the detective's mind from a mere glance as to who the person is.

The Court. How can that be when Detective Ryan gets out of the trolley car and goes out on the street? Miss Heffran has not said that she recognized the picture.

Mr. Bernhard. No, sir; but she said she identified the man.

The Court. What you are trying to do is to trace the picture. Do you want to recall Miss Heffran now?

Mr. Bernhard. Yes.

Mr. Simandl. No objection.

ELIZABETH HEFFRAN, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q I show you the photograph marked S. 18 and ask you whether or not you have ever seen that picture before today? A Yes, sir.

Q When did you see it? A About the 18th or 19th of March. Mr. Sweeney showed it to me.

Q Whose picture is that? A Harry Young, as he was known to me.

Q (*By the Court.*) Whom do you mean by "he"? A The defendant.

Elizabeth Heffran, cross.

Q (*By Mr. Bernhard.*) Who brought it to you? A Officer Sweeney.

Cross examination by Mr. Simandl.

Q What time of the day was it? A In the morning.

Q How long did you look at it? A A few minutes. I knew it as soon as I looked at it.

Mr. Simandl. I renew my motion on the grounds that I reiterated before.

The Court. I think you ought to repeat the grounds, because it seems to me that there is an identification here now. You can call a defendant John Doe, or Richard Roe, or John Smith or any other name. The question is, who is the defendant? Isn't this evidence sufficient to identify this defendant in this indictment?

Mr. Simandl. I don't think so, if your Honor please. Your Honor must weigh the evidence very carefully in admitting the papers in this case, and when Detective Sweeney got on the stand he said he merely handed him this paper, and then as an afterthought he thought of the picture.

The Court. He said the picture was attached to the papers.

Mr. Simandl. He said originally he showed these papers. He didn't say anything about the picture.

The Court. He said he showed the picture to Ryan when both papers were shown to Ryan.

Mr. Simandl. When he originally spoke of that, isn't it proper to presume that he would mention the picture and say there was a picture attached to it?

The Court. That is for the jury to say, whether or not he is telling the truth. The evidence shows that both were shown to Ryan.

Mr. Simandl. We withdraw our objection.

The Court. Exhibit S. 16 for identification will be admitted by striking out the words "for identification." Exhibit S. 14 for identification and Exhibit S. 16 for identification are admitted. The reason I reserve the offer on the picture is because of the memoranda on the

back of it, which are not evidential. The record on the back ought to be stricken out. The jury are not entitled to that.

Mr. Simandl. It was admitted in evidence just as it is. I want it admitted in evidence just as it is.

The Court. It was offered in evidence and received without any objection at all, just as it is.

Mr. Bernhard. So I understood. Now I understand counsel to say that he does not object to its going in just as it is, including the front and the back.

Mr. Simandl. If it was admitted in evidence it is in evidence now, and I don't have to reiterate what I said before.

The Court. I will consider the question, if you desire to be heard on it, whether or not the Court should, in view of the fact that this matter has been called to its attention, strike out what is on the back of the card or state to the jury that the card is only admitted as to the picture, and that any writing on the back thereof cannot be considered in anywise in evidence against the defendant.

Mr. Simandl. I am not prepared to argue that now. If your Honor will permit I will take it up after recess.

The Court. I will suggest another proposition, and that is whether or not the Court should say to the jury that the indictment and the complaint are admitted as evidence of the fact that there was a complaint and indictment, but not evidence of the alleged charge contained therein pertaining to the defendant.

Mr. Bernhard. Absolutely so.

The Court. The only thing now in evidence is S. 15 for identification.

Mr. Bernhard. Yes.

Mr. Simandl. I will look up the authorities during recess.

At one o'clock P. M. the Court took a recess of one hour.

John J. Sweeney, cross.

JOHN J. SWEENEY, resumes the stand.

Cross examination by Mr. Simandl.

Q You got this complaint off Captain Connell on March 17th, referring to S. 14, did you? A I don't know what it is that you refer to.

Q That complaint. A I got the warrant; not the complaint.

Q Then you investigated the matter a few days, didn't you? A Yes, sir.

Q Then you threw it in your drawer; is that right? A I placed it in the desk.

Q You forgot the matter, didn't you? A No, sir.

Q You knew that the man wanted in that complaint was at large? A I did.

Q And you didn't do anything more about it, did you? A I went over to New York.

Q When was that? A As near as I can think, it was the 26th, 28th and 29th of March.

Q That is the last thing you did toward investigating it directly? You threw it in your drawer, didn't you? A Didn't throw it in the drawer.

Q Well, you put it in the drawer? A Yes.

Q Left it there? A Yes.

Q Forgot about it? A I didn't forget about it; no.

Q Then you disposed of it? A The case wasn't closed; it wouldn't be disposed of.

Q You had a lot of cases of this kind? A I did.

Q You were not thinking of this particular one? A Not alone; no, sir.

Q And you want this Court and jury to believe that you did show this to Lieutenant Ryan? A Yes, sir.

Q Even after the time you had put it in the drawer and had forgotten about it? A Yes, sir.

Q And you know you are on your oath? A Yes, sir.

Q Is that the customary thing to do? A What.

Q Are you not a pretty busy detective? A No more than the usual man.

Q And there are a lot of cases arising every day? A Yes, sir.

John J. Sweeney, direct.

Q And when you once make an effort to get a man and don't succeed, you don't generally think about it afterwards, do you? A I do.

Q You do? A Yes, sir.

Q Constantly new matters are coming up, aren't they? A Yes, sir.

Q And they are occupying your attention, aren't they? A Yes, sir.

Q And still you insist that you showed this picture to Detective Ryan? A Yes, sir.

Q Why didn't you think of it when you first told Mr. Bernhard that you showed this one document to Detective Ryan only? A I told Mr. Bernhard that I showed the picture immediately after the man was identified as being Young. That was March, the early part of March.

Mr. Bernhard. I now press my question on direct examination.

By Mr. Bernhard.

Q What did Lieutenant Ryan say to you when you handed the picture over to him after you had showed him the picture and the indictment?

Mr. Simandl. I object. I still insist that any conversations in the absence of the defendant are not binding upon him and are not admissible at this time.

Mr. Bernhard. The object of the testimony is to meet the objection made by counsel himself. Whether that proposition makes it relevant or not I cannot tell, but I think the testimony stands upon its own feet, upon its legality and its admission into evidence. Under the case of State *v.* Brown it is proper for the State to show that the officer had reasonable grounds to make the arrest, and any testimony that goes to show that the officer had reasonable grounds to make the arrest is an exception to the hearsay rule and therefore admissible. How otherwise would it be possible, assuming that the State had not been able to produce the evidence of the photograph, to show that the man that Detective Ryan had in mind was the man who was named in the indictment as Harry Young, except perhaps in some way or another in a con-

versation with another officer he had indicated that he knew that man regardless of what that man's name was. I ask for its admission.

Mr. Simandl. The mere fact that the State has difficulty in presenting its facts, in presenting its case, there is no reason why this testimony should be regarded as an exception to the hearsay rule. The State must prove by testimony which is admissible, and I say that anything that is said in the absence of the accused is not binding upon him and should not be admitted.

The Court. The fact in issue is whether Ryan knew, or had reasonable ground to suspect, that this defendant had committed a felony, or had been indicted, and the best way to find out what a man knows is to find out what he says on that subject. At that time anything he may have said may have been said without any reference to what is now being tried.

Mr. Simandl. It is not relevant because of the fact that I think the only reason why dying declarations are made an exception to the hearsay rule are because of the fact that they are made under a sense of impending death.

The Court. That amounts to being under oath theoretically. That is a very fair example of what this situation now is. The question is whether or not a man had a certain thing in his mind. If Ryan knew that this defendant had been indicted as Harry Young and had seen his picture, the best way for him to find that out would be for Ryan to say that he knew, because that is the exposition of the mind. Now, in the case of State against Ready, evidence was admitted to show the state of the testator's mind as to the disposition of his property prior to the making of the will. That was upheld. The Court of Errors and Appeals held that it was admissible to show the state of mind.

Mr. Simandl. As to testamentary capacity and not to show any intent of his mind. It narrows down to a question of intent. What were his intentions when he went after Schilling? This is not a question of what his mind was or capacity was, but it is a question of intent.

The Court. Did he have reasonable cause to suspect?

Mr. Simandl. Yes.

The Court. Now, if he said on some occasions that "I know this, that and the other," and so forth, from which that inference may be drawn as to what his mind was, why could it not be shown? I think it is admissible.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WILLIAM P. MARTIN,
Judge.

(Question read.)

Mr. Simandl. May I ask one preliminary question?

The Court. Yes.

By Mr. Simandl.

Q Was the defendant present? A No.

Mr. Simandl. I object.

The Court. Of course, in answering the question you must confine yourself strictly to what, if anything, Lieutenant Ryan may have said about that particular subject matter, the picture or the indictment or the identification of the person indicted. We do not want any other things that he may have said on that occasion. Now answer.

Witness. He said, "That is all right."

By Mr. Bernhard.

Q Anything else upon that particular subject matter? A No, sir.

Q Those were his words? A He said, "That is all right."

THOMAS J. OWENS, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are a police officer in the City of Newark? A I am.

Q Assigned to what department? A Detective Bureau, Police Headquarters.

Q You have a desk there? A I have.

Q Where is it located with reference to the desk occupied by Officer Sweeney, if he has one there? A Next to him.

Q And by "next," which side do you mean? A He is on my left.

Q Did you know Lieutenant Ryan in his lifetime? A I did.

Q Do you know whether or not he had a desk there? A He did.

Q Whereabouts with reference to your desk? A That was on the opposite side.

Q (*By the Court.*) From Sweeney? A Right in back of Sweeney; just one desk east.

Q (*By Mr. Bernhard.*) How far away? A At that time they were about three feet away. Now they have moved them a little further.

Q Do you know anything about Officer Sweeney showing any papers to Lieutenant Ryan? A I do.

Q With reference to what? A A copy of an indictment.

Q Did you see it? A I did.

Q Would you recognize it again if you saw it? A I guess I would.

Q Who showed it to you? A I accompanied Sweeney to the Court House and he got it from Lieutenant Godfrey.

Q Then look at Exhibit S. 16 and see whether or not you recognize those papers. A Yes, sir.

Q Where did you see them before? A I seen Godfrey hand them to Sweeney in the Essex County Court House.

Q Did you ever seen them after that? A I did.

Q When? A Oh, several times.

Q Do you know whether anybody else saw them? A Lieutenant Ryan saw them.

Q How do you know? A I saw Sweeney hand them to him.

Q What did you see Officer Sweeney hand to Lieutenant Ryan? A That copy of the indictment and the picture.

Q Did you see the picture? A I did.

Q Would you recognize it again if you saw it? A I would.

Q I show you S. 13 and ask you whether you have ever seen it before? A I have.

Q Where? A At Police Headquarters.

Q When? A Several times.

Q How did you happen to see it? A Detective Sweeney showed it to me.

Q Do you know whether anybody else saw it? A Lieutenant Ryan saw it.

Thomas J. Owens, direct.

Q When? A About the latter part of June.

Q How do you know? A I saw Sweeney give it to him.

Q What happened, if you know, after Officer Sweeney gave S. 16 and 18 to Lieutenant Ryan? A After Ryan read the paper, glanced at the picture, Ryan said, "That is Philly Schilling; I know him."

Mr. Simandl. I move that the answer that "Ryan said, 'That is Philly Schilling,' " be stricken out.

The Court. Motion denied.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WILLIAM P. MARTIN,
Judge.

Mr. Simandl. I admitted only the picture in evidence. I don't desire to cross examine on the entire exhibit at this time. I think that was my admission at that time, if the stenographer will refer back.

The Court. What do you mean by that statement?

Mr. Simandl. I believe that Exhibit S. 18 is the picture, and it is marked on the back of it; I think that I admitted only the picture.

The Court. Exhibit S. 18 as now marked has not been shown to the jury. There is some matter on the back of that picture which you desire eliminated from the record?

Mr. Simandl. I don't desire it eliminated. I desire to reserve my right at this time to only examine in reference to the picture which I permitted to go into evidence.

The Court. The offer was of the picture. It shows the form of some person on one side and some information or some statement on the other side, and you made no objection, so it is all in evidence. Now what do you want the Court to do?

Mr. Simandl. I think I said the picture. I want to say that I don't want to cross examine in reference to anything else on this exhibit except the picture which is in evidence. I don't think the other articles are in evidence, and I think they are improper because of the fact that the

entire exhibit is marked S. 18, and I only permitted the picture to go in evidence. I think the proceedings are irregular.

The Court. You make a motion to have that eliminated so that the jury may not see it?

Mr. Simandl. I make such a motion at this time.

The Court. It will be done by pasting over the back of it so that the jury cannot read it.

Cross examination by Mr. Simandl.

Q What were you doing the morning that you saw Sweeney hand this paper to Ryan? A Sitting at my desk.

Q What were you doing? A Sitting down there.

Q Were you not busy? A Just before roll call in the morning.

Q Were you not looking up your own matters? A It was all completed, the notations I had to make in my book.

Q How do you seem to recall that instance so well? A That was an incident in line of other incidents of that kind that we can recall in police affairs.

Q You can recall them for convenience? A What do you mean, convenience?

Q (Question read.) A Yes; where there is a copy of an indictment, or possibly police officers have got to go out of town to make a search for an accused, we have them under consideration at all times and on our mind.

Q Why was this so different from any other? A It wasn't.

Q Wasn't? A No.

Q Did you take a look at the picture? A Several times.

Q How long did you look at it? A I had looked at it before that.

Q How long did you look at it? A Well, I may have looked at it twenty times previous to that.

Q You may have looked at it twenty times? A Yes.

Q Are you not only relying upon what your memory is in regard to the twenty times rather than what your memory was on that particular occasion? A No; I had access to Sweeney's desk at any time and I could look at that picture or any correspondence that he had there.

Q Why did you look at it? A I had looked at it.

Q Why? A Because Sweeney left it on his desk after Ryan handed it to him.

Q Are you sure about that? A For a second or so.

Q Then what did he do with it? A Put it in his pocket, naturally; it is customary at times to put the pictures in our pocket.

Q It is customary to put it in your pocket? A Yes, but I wouldn't testify at this time that Sweeney put that picture in his pocket.

Q You wouldn't? A No.

Q You wouldn't see what he did there? A I couldn't say whether he put that picture in his pocket or not.

Q In fact, you don't know whether he showed it to you? A I do.

Q You are sure about that? A Yes, sir.

Q How was this picture—did Sweeney take it out of his pocket? A It was in the copy of the indictment.

Q Oh, it was in the copy of the indictment? A Yes.

Q Didn't Sweeney put it in the copy of the indictment and throw it in his desk? A I didn't see that.

Q May have put it in his pocket? A He may have.

Q And he may have taken it out of his pocket? A He may.

Q So it wasn't in the copy of the indictment on his desk? A I don't know.

Q And you are not sure whether or not the paper was there, as a matter of fact? A I have seen it there, and I saw Ryan looking at the paper and I had saw him looking at the picture.

Q Was that part of your duty, to watch Ryan and these other men look at pictures? A In general conversation about police duties we take up matters of that kind with each other.

Q Do you remember what happened a month ago at police headquarters? A If you would state a particular case where it would be brought to my attention I would possibly remember of it.

Q When did this come to your recollection? A After I was assigned as a partner of Detective Sweeney; that was the 9th of April.

Q You talked this little matter over yourself, didn't you? A When?

Q You talked this little matter over between yourselves, didn't you? A What matter?

Q The matter of seeing this picture. A Different times.

Thomas J. Owens, cross.

The Court. What do you mean, talked it over between yourselves? Who do you mean?

Mr. Simandl. Between certain of the witnesses.

By the Court.

Q Whose partner were you on the 9th of April? A I was assigned by Captain Connell to be Sweeney's partner on April 9th and I am his partner up to today.

By Mr. Simandl.

Q What day of the week was March 18th? A I don't know about that.

Q Don't remember it? A No, sir; I do not. I wasn't his partner at the time.

Q When did Sweeney show this picture and indictment to Ryan? A Some time in the latter part of June.

Q Don't you remember when? A I could not remember the date or the day of the week.

Q Why can't you remember that? You remember everything else. A Well, I couldn't remember the day or date.

Q You couldn't? A No, sir.

Q Why don't you remember it? A There is so much business down there at times you cannot remember the days or the time.

Q There is a whole lot of business down there? A There is.

Q And you take up your particular cases as they come in? A We do.

Q And you devote your entire time and attention to these cases? A We do.

Q So what happened a month ago would be very, very dim in your memory? A No. It is customary for some of us to take up important cases of that kind, with more experience in the Detective Bureau.

Q How long have you been connected with the police force? A Fourteen years and four months.

Q So that you have had a lot of experience? A I did.

Q Did he take the matter up with you? A Who?

Q Sweeney. A He did.

Q Didn't you give him the information? A I did.

Q Just what did he have to refer to Ryan on? A Because I didn't know the defendant in this case.

Q I thought you said you gave the information. A To who?

Q To Sweeney. A I gave him all the information that I could.

Q (*By the Court.*) How long have you been in the Detective Bureau? A Seven years.

Q (*By Mr. Simandl.*) If you didn't know who this man was how could you give him information? A I gave him information in reference to coming up here, getting a certified copy of the indictment, and proceed to make an arrest if he could find the defendant.

Q He knew that, didn't he? A I don't know whether he did or not.

Q He knew that he had to have a certified copy to go over to New York? A I don't know whether he did or not.

Q Is that what he asked you about? You said you gave the information. A Yes.

Q That is the only information? A Yes; we talked about police matters every day.

Q As a matter of fact, aren't you merely recalling this incident for convenience? A I am not.

WILLIAM F. GANNON, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You live in Newark? A Yes, sir.

Q Whereabouts? A 70 Fourth street.

Q You are a police officer? A I am.

Q How long? A Eight years.

Q Did you receive an assignment in the Ryan case? A I did.

Q What did you do, briefly? A On the evening of July 16th, about 8 P. M., with Lieutenant Heller, I started out from headquarters with a picture of Phillip Schilling which we had obtained from the Rogues' Gallery and a description of Schilling that we had obtained—

Mr. Simandl. I move that that be stricken out.

The Court. Strike it out.

Q Before you started what did you do? A As the result of a conversation with Captain—

Q You had a conversation? A Yes, sir.

William F. Gannon, direct.

Q Then you did what? A Went to the Sixth Precinct section of the city, southern end of the city.

Q What did you do there? A Showed the picture of Phillip—

Q You showed something? A Yes, sir.

Q To whom? A Several detailed officers whom I had met.

Q Then what did you do? A Proceeded to cover the southern end of the city.

Q And finally, later on in the evening, landed where? A In the Fourth Precinct section of the city.

Q Any particular section, street? A Around South Orange, Wickliffe and Thirteenth avenue.

Q Any other officers there? A Three.

Q You reached that spot, how? A From headquarters in an automobile.

Q What time did you reach there? A About one o'clock.

Q What did you do after you reached the spot, personally? A Made an investigation and searched every furnished room house for a fellow named Jaglin.

Q Did you find Jaglin? A We did not.

Q Then what did you do? A Around 1.20 we received information that Schilling was in the block.

The Court. Never mind what you received from anyone.

Q You received information? A We received information.

The Court. Strike out all the answer to the previous question. There does not seem to be any objection to the question and answer now.

Q At that hour what did you do? A Sweeney, Heller, Capadano and I covered the block.

Q Go ahead. A I reached Howard street between South Orange avenue and Thirteenth avenue in the automobile, and I saw several other headquarters men, including Sergeant Donnelly, Colin, and a uniformed sergeant from the Fourth Precinct; I can't recall his name. I saw that section of the block was well covered. I jumped into the machine with Chauffeur Byrne and proceeded back Wickliffe street by way of South Orange avenue. As we turned into Wickliffe street from South Orange avenue I saw two men walking toward Milton.

Q How far away were you when you saw them? A Seventy-five feet.

William F. Gannon, direct.

Q Where is Milton street? A A short half block in from Wickliffe street.

Q Then what did you do? A I recognized Lieutenant Heller as one of the men.

Q How far away from you was he when you saw him first? A Seventy-five feet. I was sitting in the back seat, and when I saw him I got out on the running board, the side nearest the two men. As I approached them I noticed a fairly tall man with a cap on. I jumped off the running board and ran toward them, and by that time they had reached the electric light.

Q Where is the light? A Milton and Wickliffe.

Q Who were the men? A Lieutenant Heller.

Q Who was the other man? A Schilling.

Q How do you know? A Well, I recognized the features from the photograph under the electric light.

Q Hadn't you ever seen him before, to your knowledge? A I had never seen him before.

Q Did you do anything? A I went over toward him. He turned slightly to see, and I saw his right hand move slightly. I suppose it was instinct. I grabbed the pocket and grabbed his right hand and right pocket and pulled the right hand out of the pocket and felt a gun through the cloth on his right hand in my left, and twisted it and reached out and took the gun.

Q What did you do with the gun? A Put it in my pocket.

Q Would you recognize it if you saw it? A Yes.

Q Is this the revolver? A That is the gun I took from Schilling.

Q I notice you were just looking at it. A I placed a mark upon it when I turned it over to Acting Captain Kuhn.

Q What kind of a mark? A An X.

Q Who made it? A I made the mark.

Q Whereabouts? A Right here on the handle.

Q When? A At headquarters, about 1:20 A. M., July 17th.

Q Had the revolver been out of your possession from the time that you took it from Schilling until the time that you made the mark on it? A It had not.

Q What was the condition when you took it from his pocket? A It was fully loaded, five cartridges.

Q Do you know the calibre of that revolver? A 32. I removed the cartridges and turned them over to Acting Captain Kuhn at the same time I turned over the revolver.

William F. Gannon, cross.

Q I show you some cartridges and ask you whether there is anything on these cartridges to indicate whether or not those were the cartridges? A There are five.

Q Five what? A 32-calibre cartridges.

Q Where did you get them from? A From the revolver I took from Phillip Schilling.

Q How do you know those are the cartridges? A My mark is on them.

Q Who put it on? A I did.

Q There is another one there. Do you know where that came from? A I believe that was found in his pocket.

Q Do you know? A I am not positive.

Q You turned it over to whom? A Acting Captain Kuhn, at headquarters.

Cross examination by Mr. Simandl.

Q You went to the Sixth Precinct section first? A Yes, sir.

Q Why? A Covered the southern section of the city.

Q There are a lot of railroad yards down there? A Yes, sir.

Q You expected that he was going to get away? A We did.

Q Thought he was going to run away? A We did.

Q You went up to Wickliffe street? A I did.

Q Who was with you? A Lieutenant Heller, Detective Sweeney, Capadano and Chauffeur Byrne.

Q Who was with you after you got out of the machine? A I got out of the machine alone.

Q Where were the rest of the officers, if you know? A I had just left several of them on Howard street.

Q Who were they? A Sergeant Donnelly, Boles and Sweeney.

Q A great many officers up there, weren't there? A Quite a few; yes, sir.

Q So there wasn't only you three up there, that is, yourself, Heller, Capadano and Sweeney? A No.

Q There was at least a dozen up there, wasn't there? A There wasn't a dozen; there might have been eight or ten.

Q Do you know where Capadano and Sweeney went? A I had left Sweeney on Howard street.

Q And he didn't cover the house, did he? A The house?

Q Yes. A We all covered the block.

William F. Gannon, cross.

Q He didn't cover the house at 124 Wickliffe street, did he? A Not to my knowledge; no.

Q You never saw Schilling before? A I can't recall it.

Q Just got a look at the picture? A A good look at the picture; a good description.

Q And you say the first time you saw him after that was in custody of Lieutenant Heller at Milton street? A Yes, sir.

Q Not on Hampden street? A Milton street.

Q And he is wrong when he says it is Hampden street?

Objected to.

Objection sustained.

(Question withdrawn.)

Q Was it light or dark? A Dark.

Q Was it dark at the spot where you first jumped out of the machine? A I wouldn't say it was dark; it wasn't very light; maybe twenty feet beyond the corner where the electric light was, but it was brighter where Schilling and Heller stood.

Q And yet you were able to recognize Schilling from this dark spot; isn't that so? A Well, the electric light was shining right on him.

Q How far away from him were you when you saw his hand go into his pocket? A Perhaps ten feet.

Q Did his hand go into his pocket? A Very slowly. It was on the handle of the gun when I grabbed it.

Q He didn't thrust his hand in there? A No; he didn't.

Q Very, very slow? A Very slowly.

Q What did you do? A I grabbed both hands and the pocket at the same time, one with each hand.

Q You grabbed both hands and his pocket; what hand did you grab? A I grabbed the right hand with my left.

Q Where was Heller standing? A On his left side.

Q Oh, he was on the left? A Yes, sir.

Q Was he holding Schilling? A Seemed to have hold of him by the sleeve with his right hand.

Q Then you pulled the hand out? A I grabbed the hand and pulled it out, kind of twisted it, and it came out without any effort.

Q And he turned the gun over to you voluntarily? A He didn't.

Q There was a struggle? A No, there was no struggle.

Q How did you get it? A I pulled his hand out and put my hand in his pocket.

Q And you took it out? A Yes.

Q And he didn't give you any struggle at all? A No; he didn't.

Q Did you later drive down to Police Headquarters with him? A I did.

Q Where were you sitting in the machine? A On Schilling's right.

Q Where were you as you drove up? A I stood on the running board as I approached the two people in the street.

Q Then you were not sitting down? A No; I had got out of the back and stood on the running board.

Q You were not on the front of the machine? A No.

Q You were on the running board? A Yes.

Q How many men were around after you got there—how many other persons? A Well, we had nobody in the machine outside of Byrne and Heller.

Q Was he the only one that went down in the machine with you? A We picked up Sweeney and Sergeant Bell.

Q Where was Capadano? A Capadano wasn't there when we picked him up. We went down by way of Thirteenth avenue and they both got on the right of the machine. I believe Sweeney sat on the front seat with Chauffeur Byrne and Bell was standing on the running board.

Q Did you pick up any other officers? A We did not.

Q Isn't it a fact that there were a lot of officers on the machine? A There was Bell and Heller and Sweeney and Byrne; that is five. That is a lot of officers.

Q Why was Bell standing on the running board? A It was only a five-seated car, two on the front, three on the back, and there was no room for him.

Q And Capadano didn't take this man down to headquarters? A No, sir.

Q You are sure about that? A I am sure; positive.

Q Nor any other officers that were up there? A I didn't see them.

Q Donnelly? A No; not unless he got on the mudguard in front, and I couldn't see that.

Q He may have gotten on the mudguard in front? A Perhaps.

Q Why couldn't you see there? A Because I was interested in Schilling's conversation at the time.

Q Interested in the conversation? A Yes, sir.

Q And you can't tell whether there was anybody on the mudguard? A No.

Q Isn't it a fact that when you drove past the Four Corners the machine was just jammed full of men? A No; it is not a fact.

Q Weren't there men on it, standing on the running board, each side of the running board? A Jimmy Bell was on my right on the running board; that is all I saw.

Q That is the only one you saw? A That is the only one I saw on the running board.

Q When Schilling was standing on Milton street and Wickliffe street were there any marks on his face at all? A I didn't see any.

Q None visible at all? A Didn't see any.

Q Were there any marks on him when he reached police headquarters, do you know? A Didn't see any marks on him.

Q Any at all? A No, sir.

Mr. Bernhard. I offer the revolver in evidence.

Mr. Simandl. No objection.

Marked Ex. S. 19.

Mr. Bernhard. I offer the bullets in evidence.

Mr. Simandl. No objection.

Marked Ex. S. 20.

EDWARD A. SCHAUFFENBERGER, sworn in behalf of State.

Direct examination by Mr. Bernhard.

Q You live where? A 15 Jones street.

Q Your business is what? A Contractor.

Q Did you know Lieutenant Ryan, of the Police Department, in his lifetime? A Yes, sir.

Q Do you recall whether or not you saw anything of him on the evening of July 16th? A Yes, sir.

Q Whereabouts? A Corner of Norfolk street and South Orange avenue.

Edward A. Schauffenberger, cross.

Q What time was it? A About eight or ten minutes to seven.

Q Where were you? A Standing at the corner of Dark lane and Jones street.

Q Dark lane has not been mentioned before in the case. Where is it? Next to the drugstore? A Corner of South Orange avenue there is a drugstore and then comes the alley and then next comes 3 Jones street, going towards Springfield avenue.

Q Where did you first see Lieutenant Ryan? A At the corner of Norfolk street and South Orange avenue, apparently wrestling with Phillip Schilling.

Q You speak of Phillip Schilling. To whom do you refer? A The defendant.

Q Point him out. A Between those two officers (indicating).

Q Did you ever see him before? A No, sir.

Q When was the first time that you saw him? A At the headquarters, the next morning, and the night before running away from the scene of his crime.

Q You spoke of wrestling. What do you mean by wrestling? A Two apparently grappling and swaying from side to side.

Q Then you saw what? A Then I heard the report of a shot and seen the smoke, and then another shot, and then Lieutenant Ryan let go and Schilling apparently backed up and fired another shot, and then backed up toward the curb, and with his left hand put his gun into his pocket and ran toward me and the gentleman that stood with me.

Q Where were you then? A Standing at the same place I was when I came out and had remarked to him, "There is a fight."

Q Over what length of time did all of this take? A From the time I came out, do you mean?

Q From the time that you saw the wrestling to the time that you saw the defendant running away? A Perhaps for a minute.

Q Had you changed the position that you were in when you first saw the wrestling? A No, sir.

Q Until the man ran past you? A No, sir.

Cross examination by Mr. Simandl.

Q Where were you standing? A Corner of Jones street and Dark lane, known as number 3 Jones street.

Edward A. Schauffenberger, cross.

Q How far away from that is Norfolk street and South Orange avenue, the northeast corner? A About 200 feet.

Q That is on the opposite side of the street, isn't it? A Yes, sir; cat-a-corner across the same, as that alcove would be there.

Q Then it is on the opposite side of Jones street? A No; on the lower side of Jones street, on the northeast corner, and the corner of Dark lane is on the northwest corner.

Q Doesn't Dark lane run into the westerly side of Jones street? A It begins there; yes.

Q And between where you were standing on the westerly side of Jones street there is the easterly side of Jones street? A Yes, sir.

Q And there is about half a block to this point, the northeast corner of Norfolk street and South Orange avenue; isn't that so? A Yes, sir.

Q What were you doing there? A I came out with the man who owns this place, was a business associate of mine, and I had been talking over some business with him.

Q And you were standing there? A Yes, sir.

Q Did you recognize anybody, did you say who was wrestling? A No, not at the time.

Q Were they wrestling very much? A Yes, sir.

Q Pretty good wrestling match there, wasn't there? A Apparently.

Q What? A From what I seen there was.

Q And suddenly there was a shot? A Yes, sir.

Q And then there was another one? A Yes, sir.

Q How many in quick succession were there? A There were two, and then there was an interval, and from where I stood it seemed Schilling was backing up, and he fired another shot, backed up, walked towards the gutter, turned around and looked, and put his gun in his pocket and ran towards me and the man who had stood there.

Q And put his gun in his left-hand pocket? A From what I seen; yes, sir.

Q You are sure about that? A Yes, sir.

Q When he ran past you there was no gun in his hand? A No, sir.

Q He had both arms like this (illustrating)? A Yes, sir.

Q And they were not being held up like this (illustrating)? A No, sir.

J. Henry Clark, direct.

Q Nor were they held like this (illustrating)? A No, sir.

Q You don't know whether Ryan backed up or whether Schilling backed up? A I am positive it was Schilling, because then I seen Lieutenant Ryan laying against the window and holding his abdomen and sinking down.

Q But you are sure of two things, that there was a wrestling match? A Yes, sir.

Q And he put his gun in his left-hand pocket? A Yes, sir.

By the Court.

Q Did you notice how these men were dressed, either one of them? A I did; the man that did the shooting, the man that came towards me, and the coat that he has got on at the present time in my estimation is the same coat that he wore the day of the shooting.

Q How about headgear? A He had none.

Q Had no hat on? A No, sir.

J. HENRY CLARK, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are a police surgeon of the City of Newark? A Yes, sir.

Q Have you been a great many years? A Thirty-three.

Q On the evening of July 16th, or the early morning of July 17th, did you have occasion to go to Police Headquarters of the City of Newark? A Yes, sir.

Q While you were there did you see anyone? A Yes, sir.

Q Did you talk to anyone? A Yes, sir.

Q Did you talk to more than one person? A No; I talked principally to one person.

Q Who was that person? A Phillip Schilling.

Q How did you meet Phillip Schilling? A I was introduced to him by Inspector Corbally.

Q At what time? A Five minutes after two, morning of July 17th.

Q Do you remember in what room? A Bertillon room.

Q In whose presence, if anyone's, did you talk to him? A Commissioner McEnroe, Inspector Corbally, acting chief at that time; Lieutenant Harris, William McTague, Captain Cordano—

Mr. Simandl. Just a moment. Are you referring to a memorandum?

Witness. Yes.

Mr. Simandl. Can't you testify without that?

Witness. No.

Mr. Simandl. I don't see why he should use that memorandum. Why can't he testify of his own information?

The Court. Yes.

Q Doctor, are you able to testify from your recollection as to what occurred there that night without the aid of that memorandum? A No; not accurately and intelligently.

Q Did you make any memorandum? A I did at that time.

Q And who made it? A I made it personally.

Q And who put it down? A I did.

Q On what? A On this card that I hold in my hand.

Q The same card that you now have with you? A Yes, sir.

Q Are you able to testify accurately and intelligently without the aid of that memorandum? A No, I cannot, because I have not memorized it, and I have so many cases running I cannot memorize any one case. I have a card index system.

The Court. He does not say he cannot remember. He says he cannot testify intelligently and accurately. What we want is his memory. He can give us his memory first and then if he thinks of something else he can tell us. The doctor will put the card away and tell us his recollection first.

Q Have you any recollection of that conversation at all? A I will do the best I can.

Q Before the conversation was begun was there anything said about what use, if any, would be made of what Schilling said? A Yes.

Q By whom? A By me.

Q What did you say? A I introduced myself. I told him I was Dr. Clark, chief surgeon of the Police Department, and I was going to ask him some questions and I want replies, "And I want you to understand that the replies you make I reserve the privilege of using for the Police Department and make such use of them as may be necessary and possibly against you." And

he said, "I don't want to talk for the newspapers." I said, "I am not a reporter. I don't want this made public."

Q Who said that? A Schilling. I said, "I am only here to ask you questions, as it is my duty to do." He said, "I don't want my sister to know of this."

Q Who said that? A Schilling. And I said, "I don't expect to see your sister." "Then," he said, "go ahead and ask your questions. I will answer."

Q Any promise made by you in his behalf? A None.

Q Any threats? A None whatever.

Q Any force? A None whatever. He said, "Go ahead, I will answer your questions."

Q Did you go ahead? A I did.

Q In what way? A By asking a lot of questions, stereotyped lot of questions. I asked him—

Mr. Simandl. Before you go on I desire to cross examine.

The Court. Yes.

Cross examination by Mr. Simandl.

Q You said that you expected replies from him, didn't you? A I said, "I will ask you several questions and I expect you to reply to me."

Q I understood you to say on your direct examination that you expected replies. A I stated it in that way. "I am going to ask you several questions and I expect you to reply to them." And then he talked about the newspapers and about his sister and seemed satisfied, and he said, "Go ahead and ask your questions and I will answer."

Q Did you examine him? A Yes.

Q Were there any marks or bruises on his face? A A very slight scratch on his left chin, very slight, and a little red spot on his left forehead.

Q There was a red spot on his left forehead? A Very slight.

Q What could that have come from? A I asked him and he said, "Oh, I got that in the patrol wagon."

Q Did you ask him where he got the scratch? A I asked him about both and his reply to both was as I have stated.

Q He said he got them in the patrol wagon? A Yes.

Q Did he say patrol wagon? A He said that.

J. Henry Clark, cross.

Q Who were all present, do you remember? A Commissioner McEnroe, acting chief; Inspector Corbally, William McTague, executive clerk; O'Neill, a stenographer at headquarters; several detectives, Harris, Lieutenant Harris. Those are the names I recall now.

Q Doctor, did the defendant present a pair of bruised eyes at that time? A No, not at all.

Q There were none? A No.

Q How soon after his arrest did you take this alleged statement? A Five minutes after two the morning of the 17th of October—

Mr. Bernhard. What?

The Court. That is five days ago.

Witness. On the morning of the 17th, the morning after the occurrence.

Q Were these questions necessary for your diagnosis? A Yes.

Q What diagnosis were you attempting to make? A We want to ascertain three points—if he was under the influence of liquor, if he was injured in any material way, and if he presented any indications of insanity.

Q How long did your examination take, Doctor? A Half, three-quarters of an hour, maybe longer.

Q Aside from asking him these questions, what did you do? A Examined him in a general way, his body, his eyes, his tongue, in a general way.

Q That took you half to three-quarters of an hour? A Yes, on my examination in there—

Q I mean, aside from the verbal examination. I am referring merely to the physical examination. A Pardon me! You didn't say so. I presume I took fifteen, twenty minutes, for the physical examination.

Q How much of that was devoted to mental examination? A All the way through my whole examination, with that thought in my mind.

Q Did you suspect anything was wrong? A Not the slightest. It is my custom for me to examine for those three points in all cases.

Q Were the detectives all standing about? A No, we were sitting at a table, and it is a large room. They were in different positions in the room; they were not around us particularly.

Q They were not surrounding you? A Not at all surrounding me. I had ample room and I was alone at the table practically. The others were around some considerable distance.

Q Those were the only two marks you saw on his face? A Only two, and they were very slight.

Q Very slight? A Very slight.

Q Did he complain to you of anything? A No, not at all. I asked him if he had any injury, and he said "No." "Are you injured anywheres on your body?" and he said, "No." He said, "I got a little bruise in the partol wagon," placing his hands upon his forehead in this position (illustrating). He didn't call my attention to the little scratch. I noticed that and made no remark. He didn't make any remark concerning it. He only spoke in reply to my question, "Have you any bodily injury; are you injured in any part of your body?" And he said, "No, only got this in the patrol wagon," and put his hand up that way (illustrating).

Q As a matter of fact, wasn't the top of his head covered with bruises? A I say no.

Q What was the first thing you did to discover his mental capacity? A I asked his name, where he lived. Do you want the replies?

Q No, just what you did. A I asked him several questions and awaited his replies and got a reply to every one, and I judged from the clearness of his replies, his reasoning power and his judgment and his intelligence with which he replied to my questions in ascertaining his mental condition.

Q What were those questions? A Well, there may be fifteen or twenty; maybe more. It is very difficult for me to remember every question. I asked him what his name was—

Q Never mind about his answer.

The Court. What are you cross examining him on?

Mr. Simandl. I am trying to find out what examination the doctor made, and all the conditions, to find out whether this man was in a condition to make a voluntary statement.

The Court. That runs rather to the extent of the statement.

J. Henry Clark, re-direct.

Mr. Simandl. I will withdraw my question.

Re-direct examination by Mr. Bernhard.

Q What questions were asked and what answers were made, as near as you can testify without any memorandum? A "What is your name?" "Phillip Schilling." "Where do you live?" "I have a room in Newark—I live with my brother in Newark and have a room in New York, 158 Twenty-second street." "Where are you now?" "I am in Newark, New Jersey," "When did you come to Newark?" "Yesterday." "What did you come for?" "To see my friend, Jaglin." "Did you see him?" "No." "Why not?" "I didn't get a chance." "Why didn't you get a chance?" "Paddy Ryan saw me first. I was arrested." "Well, what happened?" "I was arrested." "Who arrested you?" "Paddy Ryan." "How did he arrest you?" "I was sitting on a stoop. He saw me. I didn't see him until he got near me. I ran and jumped over a fence. He got my leg and pulled me back. I resisted. I knew he wanted to arrest me. There was every reason why he wanted to arrest me." In reply to my question, "Why did Paddy Ryan want to arrest you?" "For that job up in Eighth avenue, but I didn't want him to arrest me." "Did you know Paddy Ryan?" "Oh, yes, we all know Paddy Ryan, and know him well. Every time he met me on Broad street he would search me." "What happened after he tried to arrest you?" "He was taking me out to the street; he had hold of my left hand and by the neck. I pulled my gun. I didn't intend to kill him, but I pulled it to shoot him." "Where was your gun?" "In my left pocket." "What pocket?" and he opened his coat and put his hand where I place my right hand now (indicating).

Q You place your right hand now where? A In my left-hand pocket. "Are you left-handed?" "No. I had my gun there. Paddy had my left hand." "Did you shoot him?" "Yes, I shot him; of course I shot him, but I didn't mean to kill him."

Q Any other questions that you recall, Dr. Clark? I asked him, "Are you injured, are you hurt? Have you any bodily injury?" He said, "No, I have none, only I got this in the patrol wagon." "When did you first go to school?" "When I was five years old." "Did you go to the kindergarten?" "Yes." "How old were you when you left school?" "Thirteen." "What did you do then?" "Why, I went to Edison's, worked in Edi-

son's for a short time." "What did you do then?" "I worked in Whitehead & Hoag's for nine months. Then I struck another job somewhere, but didn't stick to it. I got into bad company and I found it easier to earn my living to work with the boys. I got tired of work. I got into"—I think he called it—"a tough life and have been there ever since."

Q Is that the extent of your testimony, as far as your knowledge is concerned? A Yes, practically, as I can recall it in the absence of my notes.

Q I ask you again which pocket did Schilling indicate he had the revolver in? A The right-hand pocket.

Q You said the left. A Yes, I was wrong. Pardon me for the omission. I was wrong because the pocket which he indicated to me led to my question if he was left-handed, and I said to him, "Are you left-handed?" and he said, "No, but Paddy had my right hand," and when I stated the opposite I was wrong.

Q Were there any signs of liquor on him? A No, none at all.

THOMAS J. CORBALLY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Did you see Schilling the night that he was brought into the police station? A I did.

Q What time? A Between half-past one and two o'clock.

Q Whereabouts? A I saw him come in the door.

Q Where was he taken? A He was taken to the desk and from the desk up to the Bertillon room.

Q And then where? A Then he was locked up, after the doctor saw him and made the statement.

Q What statement? A It was a written statement.

Q Taken by whom? A By Officer O'Neill; he wrote the statement.

Q Where did he get the information from? A From Schilling.

Q Would you recognize the paper if you saw it again? A I would.

Q (Showing witness paper.) Look at the paper that I hand you and answer the question whether you ever saw it before. A Yes, that is the paper.

Q And it is signed? A Yes, sir.

Thomas J. Corbally, direct.

Q By whom? A My name first.

Q Do you know whether or not Schilling signed it? A Yes, sir.

Q Where is the signature? A (Indicating.) This one here.

Q How do you know? A Why, I signed right after he signed it.

Q When did he sign it? A Right after the statement was made.

Q Do you know whether or not it was read before he signed it? A Yes, sir; it was read.

Q Will you look at the statement and tell us whether or not there are any other signatures on it except on the last page? A Here (indicating).

Q On what page? A On the first page.

Q Whose signature? A Schilling's.

Q How do you know? A I saw him make it.

Q Go ahead. A The second page.

Q What? A Phillip Schilling. Third page, Phillip Schilling; fourth page, Phillip Schilling; fifth page, Phillip Schilling; sixth page, Phillip Schilling, and last page, Phillip Schilling.

Q How do you know the signature Phillip Schilling on these pages is the signature of Phillip Schilling, the defendant? A I was there when he made it.

Q Under what circumstances and conditions was this statement taken? A Well, after the doctor got through with him he was taken in—when the doctor left I introduced Schilling to all the police officers around that he didn't know; told him who I was. I asked him did he want to make a voluntary statement, and he said, "Yes," and I warned him that anything he should say would be used against him.

Q What words did you use, what did you say? A I said, "Anything that you shall say will be used against you." He said, "I understand that. I heard that before." So then I told him to start in from the time he left New York in the morning.

Q Did he start in? A From the time that he left New York.

Q Who wrote the statement? A Officer O'Neill.

Q Was any promise made to Schilling? A None whatever.

Q Any threat made to him? A No, sir.

Q Any force or compulsion used? A None.

Q Where was Officer O'Neill? A Sitting right opposite him.

Thomas J. Corbally, cross.

Q At what kind of a table? A At quite a large table, about that size (indicating).

Q About the size of the counsel table here? A Yes, sir.

Q Where was Schilling? A Schilling sat like where Lieutenant Godfrey is; O'Neill sat at the end, and I sat here.

Q And these men that you have mentioned sat around the table then? A Yes, sir.

Q Proceed.

Mr. Simandl. Just a minute. Is this all the foundation?

Witness. Yes; he started in from the time that he left New York; he came over the tubes—

Q He started in then to make this statement? A Yes, sir.

Q And after it was made what happened? A Then it was read to him.

Q By whom? A By O'Neill.

Q And then what happened? A Then he called for certain corrections and they were made—corrections—and then after everything was corrected, why, then he looked over it again and he said, "All right."

Q After he said, "All right," what did he do? A He signed it.

Q And the signatures that you have identified were made by him? A Yes, sir.

Q Did anybody else sign it? A Heller, Gannon, Cordano, Sweeney, Byrne, Acting Captain Kuhn and Lieutenant Godfrey.

Cross examination by Mr. Simandl.

Q What time did he reach Police Headquarters after his arrest? A To the best of my belief, around half-past one.

Q When was this statement taken? A After Dr. Clark got through with him.

Q What time? A It must have been after half-past two.

Q How did Schilling appear to you, that is, as far as his outward appearance was concerned? A He was very quiet.

Q Any marks on him? A He had a mark on his jaw.

Q Had a mark on his jaw? A Scratch on his jaw.

Q What was that mark, a bruise? A It was like a scratch on the left jaw.

Q There was a bruise on the left jaw? A I wouldn't call it a bruise; it was more of a scratch.

Q Any blood coming from it? A No, sir.

Q Did you notice a bruise on the head? A I did not.

Q Did you notice the scratch on the chin? A I did not; I examined him, too.

Q How did you introduce him to these officers? Just tell us what you said. A Why, the officers that brought him in, they knew him, and Lieutenant Harris and Commissioner McEnroe and all the witnesses that signed this thing, I told them, "This is Phillip Schilling, who was accused of shooting Lieutenant Ryan," and then I told him that if he wished to make a voluntary statement that we were here to have it, and anything that he will say will be used against him. He said, "I heard that before. I am satisfied to tell everything."

Q How many police officers were in this room? A Probably eight or nine.

Q And then there were some other officers present, were there? A Well, part of the time.

Q Just name who was down there, to the best of your recollection. A We stood in the back. Commissioner Archibald and Commissioner Cozzolino and, I think, City Clerk Egan were in there part of the time.

Q Who else was down there; what police officers were there? A Commissioner McEnroe, Harris, Executive Clerk McTague, Captain Connell came in; Heller, Gannon, Sweeney.

Q Go ahead; how many more? A Capadano.

Q In fact, the place was just packed with persons, wasn't it? A I wouldn't say packed.

Q Well, it was pretty full, wasn't it? A There was a lot of them. There were two men at the door to keep them out. All the officers who were interested in the arrest were allowed in.

Q What did you do—just led them up to Schilling? A He was used like the Mayor of Newark. The officer got instructions to use him right.

Q You were a good friend of Lieutenant Ryan? A A good friend of all the officers.

Q You deeply felt the shock of his death? A I did.

Q Well, yet you mean to tell this Court and jury that you were absolutely gentle in handling this prisoner? A Simply for that reason, too. The other officers felt the same as I did.

Q Otherwise you might have beaten him up? A No, sir; we don't do that.

Q Just for the purpose of getting this confession? A Oh, no; not a confession. On account of killing a brother officer wouldn't say this man would be used rough.

Q Because he had killed a brother officer you were very gentle? A More careful.

Q Oh; you were more careful?

Objected to.

(Question withdrawn.)

Q How packed was this room? A It was quite a large room. It is half as large as this room.

Q It was pretty well filled with police officers? A It was not.

Q You said it was filled before, didn't you? A I didn't say it was well filled; I said there was quite a good many officers there.

The Court. You asked him if it was packed and he said he wouldn't say that.

Q You told him that anything he said would be used against him? A Yes, sir.

Q And all he said was, "I will make a statement"? A He said, "I heard that before; I understand it."

Q Then he made this statement? A Yes, sir.

Q That was all there was to it? A That was all.

Q Nice, quiet party there? A Yes; he was cool and collected making the statement.

Q Did he do all the talking in this statement? A Well, he stopped and we asked him to go ahead, what happened after that.

Q He didn't complain of having been struck, did he? A He did not.

Q Sure about that? A Not in this statement; in the statement to Dr. Clark.

Q He didn't complain? A We asked him about the bruise in the face and he said that happened in the patrol wagon.

Q And he was handled, as you say, like the Mayor of Newark? A Yes, sir, and anybody else; that is, in my presence.

CHARLES A. O'NEILL, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Where do you live? A 346 North Fifth street.

Charles A. O'Neill, direct.

Q What is your occupation? A Police officer and stenographer at Police Headquarters.

Q Located at Police Headquarters? A Yes, sir.

Q Were you the stenographer on the evening of July 16th or early morning of July 17th? A I was.

Q (Showing witness paper.) I show you a paper marked S. 21 for identification and ask you whether or not you ever saw the paper before today? A I have.

Q Where? A At Police Headquarters, on the morning of July 17th, 1919.

Q Under what circumstances? A Why, Phillip Schilling, the defendant, was brought into headquarters about 1:30, approximately, and he was first brought to the desk, and I was downstairs when he was taken in. It seems to me he was recorded there, and then was taken upstairs into Acting Captain Kuhn's office, where—he was before the Acting Captain's desk, and some conversation passed there; I don't know just what it was, between the officers that were there, and then he was taken into the Bertillon room, where it would be larger and more quiet, and he sat there a while, and Dr. Clark came in and asked him many questions.

Q After Dr. Clark concluded, then what happened? A He sat down at the table and I took a statement.

Q Did you know that he was going to make a statement? A Yes; he was asked by Acting Chief Corbally if he would be willing to make a voluntary statement.

Q Do you remember what words the inspector used? A "Schilling," he said, "we would like to have you make a statement—a voluntary statement." And he said, "Of course, what you say will be used against you."

Q What did Schilling say? A Schilling said something to the effect—I don't just remember—"I know it is all right," and he went on to make his statement.

Q Who took it down? A I did.

Q On what? A On this form that we have at Police Headquarters for such statements as this.

Q Whose writing is this? A My writing.

Q Where were you when you wrote it? A In the Bertillon room at Police Headquarters.

Q From whom did you get this information? A From Phillip Schilling.

Charles A. O'Neill, cross.

Q How did you get the information? A As he said it I wrote it down.

Q And after you wrote it down what was done? A I read the statement off to him, and he made some slight corrections, and I asked him if he desired to read it himself, and I handed it to him, and he glanced at it. I don't know how long he took, whether he read it all, and he signed his name on each page.

Q You have said that he made some corrections. Who actually made the physical corrections? A He gave me the corrections verbally, and told me where they were wrong, and I corrected them myself.

Q Did Schilling sign it? A He did.

Q Where? A The bottom of each page.

Q Did anybody else sign it? A Everybody that was there saw him sign it.

Q Did you see him sign it? A I did see him.

Cross examination by Mr. Simandl.

Q You took this statement? A I did.

Q It was Captain Corbally who asked the defendant whether he wanted to make a voluntary statement? A Yes, he asked him.

Q Just show us how he asked him, the tone of voice.

The Court. How are you going to get the tone of voice on the record?

Mr. Simandl. Well, the jury can hear it.

A Inspector Corbally sat down at the table about the location where Lieutenant Godfrey is, and I sat where the prosecutor is; Schilling was in the position in which the gentleman next to you is sitting.

The Court. Indicating Mr. Unger, the associate counsel?

Witness. Yes; and the acting chief of police said, "Schilling, we would like to have a statement from you, a voluntary statement." And he said, "Anything that you say, of course, you know will be used against you; will be used at your trial; and we want it as a voluntary statement."

Q Yes; a nice, quiet way. A Positively so.

Charles A. O'Neill, cross.

Q Were there any marks on Schilling? A Yes, sir.

Q Where were those marks? A There was a mark, if I recollect correctly, on his left—over his left jawbone, just about there (indicating), it seemed to me.

Q Any other mark? A He had a little scratch. I noticed him closely, because I sat right opposite him all the time he made the statement.

Q Any other marks? A Not that I noticed.

Q All there was during the taking of this statement was that he sat down at the end of this table and Inspector Corbally asked him to make a voluntary statement, warned him that it would be used against him, and he said, "I heard of that before," something like that? A Something like that.

Q That is all there was to it, and then he made the statement? A Yes; that is all I know of.

Q And the room, did that have any other people in it? A Oh, there were many people there.

Q A pretty big room? A A very large room.

Q And there were a good many people there? A Yes, there was.

Q Most of them policemen? A About fifty; fifty, I should say.

Q They were all connected in some manner with the department, though? A Yes; in some way they were connected; city officials, and so forth.

Q Nobody made any threats to him? A Positively none.

Q Nobody said anything to him besides Inspector Corbally? A Dr. Clark had been talking to him.

Q He was the only one? A Myself.

Q Did you talk to him? A I did.

Q Aside from what is contained in this statement? A No; only when he sat down at the table I read the printed matter on that statement. If you will note, it said something about a voluntary statement. I read that to him, and then he proceeded to give that statement.

Q Nobody else made any remarks to him? A Not that I heard.

Q Promises? A Not that I heard.

Q How did he appear to be? A Very calm.

Q Was he unconcerned? A Seemed to be.

Walter Godfrey, direct.

Further direct examination by Mr. Bernhard.

Q From the beginning to the end of this statement were any questions asked? A Yes; he would hestitate at times, as though he was thinking, and the acting chief or myself would say—well, we would mention something, "Is that all? Don't you know any more?" or something like that, just to make him continue his statement, or ask him to continue it, rather.

Further cross examination by Mr. Simandl.

Q These words that you used in making that statement, are they your own or his words? A The defendant's words, as far as I had heard.

Q All of this? A I took the statement down verbatim, that is, I tried to; each word as he would pronounce it I would write it so.

Q But you asked him if he didn't know anything more? A Yes; as I said before, he would stop and I would say, "Is there anything further, I will put down here?" and so forth.

WALTER GODFREY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mr. Godfrey, were you present at the taking of this statement S. 21? A I was.

Q Will you please state the circumstances under which it was taken and if you recognize any of the signatures to it? A I arrived at Police Headquarters on the morning of July 17th last, about between two-thirty and three A. M. Inspector Corbally met me, told me that Schilling was there—

Q You found that he was there? A It was in his presence; the conversation was in the presence of the defendant; and that they were ready to take a statement from him.

Q And what happened? A Inspector Corbally sat down at the table, I should say, probably five or six feet, perhaps a little more than that, from the defendant, and asked Schilling to make a statement as to the occurrences of that night, starting from the time that he left New York.

Q What did he say about the statement? A He said it must be a voluntary statement, and that it could be used for or against him.

Q Did Schilling make a statement? A He did.

Q Who took it down? A O'Neill.

Q From whom did O'Neill get the information? A From the defendant, Phillip Schilling.

Q After the statement was completed, what became of it? A It was read and signed by Phillip Schilling and by the witnesses who were present and who saw the signatures made.

Q What about yourself? A I signed it as the last one.

Cross examination by Mr. Simandl.

Q Did you notice any marks on Phillip Schilling's face? A I didn't notice any marks on Schilling whatever.

Q Any marks on his head? A None from where I sat. I was not nearer to Phillip Schilling than, I should say, six feet. There were two or three sat between me and Phillip Schilling.

Q You are sure there were no marks on his face? A I saw none whatever, sir.

FREDERICK J. KUHN, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q How long have you been connected with the Police Department? A Twenty-five years.

Q And your present assignment is what? A Lieutenant of police.

Q And in July of the present year in what capacity were you acting? A Acting captain, in the early part.

Q Were you present at the taking of a statement from the defendant, Schilling? A Yes, sir.

Q Do you recall now whether you witnessed that statement or not? Look at Exhibit S. 21 and tell us whether you have ever seen it before. Is that the statement? A I was there when it was read to him. I wasn't there during the whole time that it was written.

Q Do you know who read it to him? A O'Neill.

Q Do you know what was done after the reading? A He signed it.

Q Did you sign it? A Yes, sir.

Q This is your name attached to it? A Yes, sir.

Cross examination by Mr. Simandl.

Q When you signed it how many men were present? A Gannon, Heller, Corbally, Sweeney, O'Neill, the man that wrote it,

and there was Commissioner McEnroe, Commissioner Archibald, Commissioner Cozzolino, and, I think, Donnelly and Connell were standing at the side.

Q They were all in the room? A Yes, sir.

Q Were there any others in the room? A There might have been. I had to go in and out and answer the telephone calls.

Q Did you see any marks on Schilling's face? A I didn't notice.

Q You didn't look at his face? A I looked at it, but I didn't notice any marks on him. He was brought up from downstairs into the office, and I invited him to sit down on a chair by the desk until I notified Dr. Clark, and when Dr. Clark came he was then taken into the identification room and there is where the conversation took place between him and the doctor.

Q You invited him to have a chair? A I told him to sit down.

Q You didn't hear the preliminary statements made by Inspector Corbally? A Some of it, and some of it I didn't. I was in and out until it was read.

Q How did the defendant act? A He acted calm.

Q Calm and cool and undisturbed? A Yes.

WALTER P. BYRNE, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are a member of the Police Department of the City of Newark? A Yes, sir.

Q In what capacity were you connected July 16th and 17th of this year? A Chauffeur, Detective Bureau.

Q Did you see Phillip Schilling that night? A Yes, sir.

Q I show you a paper and ask you whether or not you recognize the signatures, the paper being S. 21 for identification. A I do.

Q What is it? A A statement.

Q Where was it taken? A At Police Headquarters.

Q In whose presence? A In the presence of several detectives.

Q Do you recognize the signatures? A I do.

Q Is yours among them? A Yes, sir.

Q From whom was it taken? A From Phillip Schilling.

Q By whom was it written? A Frank O'Neill.

Joseph Cordano, direct.

Q Were you there during the entire time or not? A I was not.

Q What time were you there? A I was there just as it was being read to him.

Q Do you know who read it to him? A Frank O'Neill.

Q After it was read what did Schilling lo? A I don't understand what you mean.

Q After the statement was read to Schilling what did he do? A Schilling signed the statement.

Q Then what did the other witnesses do? A Each of the men that were there signed the paper.

Q You saw that, did you? A Yes, sir.

Cross examination by Mr. Simandl.

Q You were not present when Inspector Corbally made his remarks to Schilling that were testified to? A No, sir.

Q You were not present then? A No, sir.

Q There were no marks on Schilling? A I didn't see any.

Q None at all? A None at all.

Q Did you look? A Well, I didn't take particular notice.

Q The room was quite full of detectives, policemen? A Well, I would say there was about fifteen in there.

JOSEPH CORDANO, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Captain Cordano, I show you a paper marked S. 21 for identification and ask you whether you ever saw it before? A Yes, sir.

Q What is it? A Statement made by Phillip Schilling.

Q Under what circumstances? A Police Headquarters, July 17th.

Q Who took it down? A Frank O'Neill.

Q After it was taken down what was done? A It was signed.

Q By whom? A By Phillip Schilling and the witnesses.

Q Do you know whether it was read to him before it was signed? A It was.

Q By whom? A By Frank O'Neill.

Q Who asked him to make a statement? A Acting Chief Corbally.

Q (Showing witness paper.) Is that the statement? A Yes, sir.

Cross examination by Mr. Simandl.

Q What did Schilling say when he signed it? A Said he would sign it all right.

Q Is that all he said? A He was asked to sign it. He said, "Sure, that is all right."

Q He seemed very well pleased to sign it? A Well, he didn't seem to have no objection at all.

EUGENE HELLER, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q (Showing witness paper.) Look at this paper S. 21 and let us know whether you ever saw it before. A Yes, sir.

Q What is it? A A statement made by Phillip Schilling.

Q How do you know? A I was present when he made it.

Q Where? A Police Headquarters.

Q To whom was it made? A To Frank O'Neill.

Q How did it come about? A Free and voluntary.

Q How do you know? A I was present when he was asked to make it.

Q What was said? A Inspector Corbally asked him if he would make a statement and he said, "Yes." Inspector Corbally said, "It will have to be free and voluntary. Whatever you say in it will be used against you."

Q What did he say? A He said, "All right, I don't mind that, I am used to it."

Q Who took it down? A Frank O'Neill.

Q After it was taken down what was done with it? A It was read to him by Mr. O'Neill and a few corrections made.

Q Who read it? A Mr. O'Neill, and he signed it.

Q Who? A Schilling.

Q Where? A On each page.

Q And then what? A Signed by other witnesses, myself included.

Q Your signature is what? A Eugene Heller.

Cross examination by Mr. Simandl.

Q There were a great number of people in that room? A A few people, quite a few.

Q And he seemed quite pleased to sign, didn't he? A No, sir.

Q He seemed to be glad to get out of that room, didn't he? A No, sir.

Q Were you called in especially to witness this signature? A I was there as the arresting officer.

Q Wasn't there any introduction made by Inspector Corbally? A It needed none with me.

Q Was there an introduction made? A Inspector Corbally told the men, "This is Phillip Schilling, he wants to make a statement?"

Q Did you see any marks on Schilling? A I saw none; no, sir.

Q Did you look at him? A Yes, sir.

Q And you saw none? A No.

WILLIAM F. GANNON, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q (Showing witness paper.) Look at S. 21 and tell me whether or not you have ever seen it before. A I have seen it before.

Q What is it? A A written statement made by Phillip Schilling.

Q How do you know? A I was there and heard him make it.

Q Where? A At Police Headquarters, on July 17th.

Q To whom? A Frank O'Neill and several other witnesses.

Q Who took it down? A Stenographer O'Neill.

Q After it was taken down what was done with it? A It was read to him.

Q By whom? A By Frank O'Neill.

Q And then what? A He asked several corrections to be made in it.

Q Were they made? A They were made.

Q And then what? A It was reread to him.

Q By whom? A Frank O'Neill.

Q Then what? A Schilling signed it.

Q Where? A At the bottom of the several pages.

Q And then? A Several witnesses signed it.

Q By whom? A My name is there.

Q You saw it? A I did.

John J. Sweeney, direct.

Cross examination by Mr. Simandl.

Q You brought him to Police Headquarters? A Yes, sir.

Q How soon after you got him in was this statement made? A 1:30 when we brought him in; I believe the statement was made about three o'clock.

Q (*By the Court.*) You mean it was commenced to be made then or it was finished? A I believe it commenced quarter to three or three o'clock.

Q How long did it take? A An hour and a half.

Q (*By Mr. Simandl.*) During all of this time where was he, if you know? He was at Police Headquarters? A Police Headquarters, yes.

Q And when he made this statement he was cool? A Very cool and calm.

Q There were no threats made against him? A No, there was not.

Q Nothing said at all? A Nothing said in the way of a threat; no.

Q What was said? A He was spoken to.

Q By whom? A Inspector Corbally.

Q Is that the only one that spoke? A He is the only one I heard speaking to him.

JOHN J. SWEENEY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q (Showing witness paper.) Look at S. 21 and testify whether or not you have seen that paper before. A I did.

Q Where? A Police Headquarters.

Q When? A The morning of July 17th.

Q Under what circumstances? A It was during the statement given by Schilling.

Q To whom? A Stenographer O'Neill and witnesses.

Q What was done with it after the statement was given? A It was read to him.

Q By whom? A By O'Neill.

Q And then what? A A few corrections made.

Q By whom? A O'Neill.

Q And then what? A It was reread and the prisoner signed it and the witnesses signed it.

Q Did you sign it? A Yes, sir.
Q Your name is where? A (Indicating.) There.
Q John J. Sweeney? A Yes, sir.

Cross examination by Mr. Simandl.

Q A great many others in the room besides those who signed that statement, were there not? A About half a dozen others.
Q Just a half a dozen? A Yes.
Q You say there were some corrections asked for. What corrections were asked? A Schilling made the corrections. I didn't understand what they were.
Q What were they? A About directions that he took in his flight, whatever it may be, called streets that he went over.
Q Were those the only corrections that he made? A That is all I recollect.
Q You say there were corrections made. Do you know what they are? A In regard to the course he took after the shooting; that is all I recall.

Mr. Bernhard. I offer Ex. S. 21 for identification in evidence.

Mr. Simandl. No objection.

Marked Ex. S. 21.

RAFAEL CAPADANO, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q At the present time you are a member of the Police Department of the City of Newark? A Yes, sir.
Q Did you receive an assignment on the night of the death of Lieutenant Ryan? A Yes, sir.
Q Did you go anywhere? A Yes, sir.
Q I show you some empty shells and ask you if you ever saw them before? A Yes, sir.
Q Where did you see them prior to today? A At the southeast corner of the church, at the corner of Boston and Thirteenth avenue, on the ground.
Q Whereabouts on the ground? A Two feet away from the building, about two feet.
Q When did you find them there? A In the morning, about between ten and eleven.

Rafael Capadano, cross.

Q Was there anybody with you? A Officers Sweeney and Gannon.

Q How do you know those are the shells? A I marked them.

Q Where? A On the side, with a cross.

Q These are the four, are they? A Yes, sir.

Mr. Bernhard. I ask that they be marked for identification.

Marked Ex. S. 22 for identification.

Cross examination by Mr. Simandl.

Q You didn't find these in a sewer? A No, sir; on the ground.

Q You found them where? A Two feet away from the building, at the church, about two feet, at the southeast corner of the church.

Q Boston street? A And Thirteenth avenue.

Q You mean the southeast corner of Boston street and Thirteenth avenue? A No, sir; the building.

Q What is that? A It is the northeast corner of Boston street and Thirteenth avenue, where the street is.

Q The southeast corner of the building located at the northeast corner of Thirteenth avenue and Boston street? A Yes, sir.

Adjourned until Thursday, October 23, 1919, at ten-twenty o'clock A. M.

FOURTH DAY.

Thursday, October 23, 1919.

Continued pursuant to adjournment.

Present, counsel as before stated.

ABE LOUIS SILK, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Mr. Silk, at the present time what is your occupation? A Stenographer and clerk in the prosecutor's office.

Q And you have been there how long? A About nine or ten months.

Q How long have you been a stenographer? A About six years.

Q How old are you? A Twenty-three.

Q I show you a paper and ask you whether or not you recognize that paper? A I do.

Q Where did you see it before today? A I didn't see it today.

Q Before today? A The last time I saw it was when I made it up.

Q When did you make it up? A On the date in question, July 18th.

Q Where? A The prosecutor's office.

Q Under what circumstances? A Well, Mr. Schilling dictated this statement to me and I took it.

Q How did you take it? A As he dictated it.

Q How did you take it down? A In shorthand.

Q Did you preserve your notes? A I did.

Q Now, I show you two papers pinned together with a pin and ask you whether or not those are the notes that you took? A These are the notes.

Q Where did you get the information with which to take these notes? A I don't get the question.

Q Where did you get the information to take your notes? A I was directed by Lieutenant Godfrey to come in to take the notes.

Q Where? A In the prosecutor's office.

Abe Louis Silk, cross.

Q And who gave you the information from which you took those notes? A Mr. Schilling.

Q Who was present at the time? A Lieutenant Godfrey and Lieutenant Heller, Gannon and Capadano, I think it was.

Q What did you do after you had taken your notes stenographically? A I transcribed them.

Q How many copies did you make? A Two, I believe, or three.

Q I show you a carbon copy and ask you whether or not that is a copy? A That is it.

Q After you had transcribed them what did you do? A Why, I brought them into the office where Mr. Schilling and the other gentlemen were.

Q Then what did you do? A I believe Lieutenant Godfrey handed one of these statements to Mr. Schilling and he read one.

Q Who read one? A Lieutenant Godfrey.

Q And after he handed one to Mr. Schilling and he had read the other one, then what hapened? A Why, Mr. Schilling signed it.

Q How do you know he did? A Because I saw him.

Q Where is the one that Mr. Schilling signed? A This is it.

Mr. Bernhard. I ask that the statement just referred to be marked Exhibit S. 23 for identification.

(Marked Exhibit S. 23 for identification.)

Mr. Bernhard. I ask that the copy identified as the carbon copy be marked for identification.

The Court. Mark it S. 23A for identification.

(Marked S. 23A for identification.)

Cross examination by Mr. Simandl.

Q When was this that you took this statement? A On July 18, if that is the date on the statement. I don't remember.

Q What time of the day? A It was in the forenoon, around eleven o'clock, I think.

Q Who did you say were present? A Lieutenants Godfrey, Heller, Gannan and Capadano.

Q Was the prosecutor present? A No, sir.

Q Any of his office present, members of the prosecutor's staff? A Except Lieutenant Godfrey.

Q Then only one present? A Yes, sir.

Walter Godfrey, direct.

Q Did you notice anything with reference to marks on him? A No.

Q None on his face? A Not at all.

Q Not at all? A None at all.

Q How did he appear to be, calm? A Very calm.

Q Unconcerned? A Rather.

Q Was there anything said, if you know, before he made the statement? A Why, Lieutenant Godfrey introduced me to him and told him I was a stenographer and asked him to make a statement in his own words, and that is why I took it down in shorthand.

Q Is that all? A That is all.

Q Nothing else? A Nothing else.

Q And he voluntarily gave it to you? A He did.

Q Was he handcuffed? A He was not.

Q You say there were no marks on him at all? A None.

Q You didn't make any mistakes in transcribing your notes? A I did not; no, sir.

Q Didn't forget anything? A Didn't forget anything. I just transcribed what I had on my notes. I didn't rely on my memory.

WALTER GODFREY, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Look at Exhibit S. 23 and tell us whether or not you know what that is? A That is a statement taken from Philip Schilling on the morning of the 18th of July last.

Q Under what circumstances? A He was brought to the court house and to the prosecutor's office by three officers—four officers at the time—Gannon, Donnelly and Capadano and Sweeney. Sweeney had to leave to attend to some other business in the Detective Bureau. I spoke to Schilling and said, "Good morning," and asked him if he would make a statement for me in the prosecutor's office, and he said, "I have made one." I said, "I would like to have you make one. Everything is quiet and no one will bother you. Just sit down alongside of the stenographer and make a statement in your own words." He said he was willing to do so, and I took him into the stenographer's office and told him to take the statement in Schilling's own words, just as he related it, which Abe Louis Silk did, and

then after the statement was taken I read the original and handed a copy of the original to Schilling. I read it to him word for word. I asked if that was correct, and he said it was, and I asked him to sign it and he signed it, and after he had signed the witnesses who were present signed their signatures.

Q Any promise made to him? A None whatsoever.

Q Any inducement of any kind? A None at all.

Q Any threat or force used? A None at all.

Q How long did it take? A I think it was very close to an hour.

Q Do you recall with which hand he signed this statement? A My recollection is that he signed it with his right hand.

Cross examination by Mr. Simandl.

Q He came over from where? A I understood he was brought over from Police Headquarters.

Q That was July 18th? A On the morning of July 18th, about eleven o'clock.

Q What room in the prosecutor's office was he taken? A To the stenographer's room, which is directly next to my own in the prosecutor's office.

Q Was the prosecutor present at any time? A He was not.

Q Any of the assistant prosecutors? A No, sir; none of them were there.

Q And you immediately asked him in a quiet way to make a statement and he acquiesced in it? A Yes, just exactly as I have been talking now; yes, sir.

Q Just say once more, repeat once more, what you said to him before he made that statement. A I told Mr. Schilling I would like to have him make a statement for our office. He said, "I have made one." And I said, "I would like to have you make a statement in your own words, say whatever you see fit." He said he would do so.

Q You said everything was quiet now? A "Everything is quiet here in the office," and he could make a statement without being interrupted.

Q What did you mean by "everything quiet now"? A Everything was quiet in the office.

Q Did you say, in telling him, "Go on, no one is going to bother you, you'd better make a statement"? A No, sir; I did not; no, sir.

Q You didn't say that? A I did not.

Q You didn't say anything that he might get something similar to what he got before? A I don't know of anything that he got before.

EUGENE HELLER, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q When you were on the witness stand yesterday or the day before you told us to what street you had come on the automobile, I believe, did you not? A Yes, sir.

Q What street was that? A Why, I said it was—I thought it was Hampden street, but I described that it was the first street north of South Orange avenue on Wickliffe street.

Q What street is that? A It is Milton street. I made a mistake in the street.

Q Were you one of the officers that brought the defendant to the prosecutor's office on the morning of July 18th? A Yes, sir.

Q Do you know what he did there? A He made a statement.

Q Would you recognize that statement again if you saw it? A I would; yes, sir.

Q Will you look at Exhibit S. 23 for identification and tell us whether or not you recognize that statement? A Yes, sir.

Q Who signed it? A I signed it.

Q Anybody else? A Schilling signed it and different officers that were present.

Cross examination by Mr. Simandl.

Q Where did you take him from? A Police Headquarters.

Q Where was he in Police Headquarters? A Why, in a cell.

Q Did you go to the cell and take him out? A No, sir.

Q Who did? A I don't know. I was in the captain's office waiting for him.

Q What did he say, if anything, when he reached the captain's office? A Nothing.

Q How did you bring him up here? A Brought him up in an automobile.

Q Was there anything said in the automobile on the way up? A No, sir.

Q Nothing at all? A No, sir.

Q No conversation? A No, sir.

William F. Gannon, direct.

Q How did he act? A The same as he had been acting right along.

Q How was that? A Calm and collected.

Q What was his appearance? A The same as he is now.

Q No marks on him at all? A No, sir.

Q Not a single one? A No, sir.

Q Was he handcuffed? A Yes, sir.

Q You brought him up to the prosecutor's office? A Yes, sir.

Q Where did you put him? A Why, we all went into the prosecutor's office.

Q Anything said then? A No, sir.

Q Nothing at all? A No, sir.

Q Did Schilling say anything? A To me?

Q To anyone? A Why, he was talking to Lieutenant Godfrey.

Q That was the only thing said? A Yes, sir.

Q No conversation had with you all the way up in the machine? A No, sir.

Q Did you visit his cell at all? A Where?

Q At Police Headquarters. A I had been there a couple of times while he was incarcerated there; yes, sir.

Q Did you say anything to him? A No, sir.

Q What did you go there for? A Why, to let different witnesses look at him.

Q Never said anything to him? A No, sir.

Q Did you find him sleeping? A Oh, he was lying down every time you would go in there.

Q Was he sleeping? A I don't know whether he was sleeping or not.

Q He wasn't excited, was he? A No, sir.

Q Was he waltzing? A Well, no, when I was there he wasn't waltzing; any time I visited him he was generally lying down.

Q You didn't see him jigging? A No, sir; I said he was lying down every time I went there.

WILLIAM F. GANNON, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q Will you look at S. 23 for identification and tell me whether or not you recognize that paper? A I do.

William F. Gannon, cross.

Q What is it? A It is a statement made and read to and signed by Philip Schilling and myself and several other witnesses on the 18th of July.

Q How do you know? A I heard it read, saw him sign it and signed it myself.

Q Whereabouts? A In the prosecutor's office.

Cross examination by Mr. Simandl.

Q Where did you bring him from? A Police Headquarters.

Q Did you go down and get him? A I did.

Q Where did you find him? A He was in a cell.

Q What was he doing? A He was standing up. I said, "Good morning." I asked him how he felt and he said he felt a little better than he felt yesterday.

Q What was it you said to him? A "Good morning; how are you feeling?" I told him to put his clothes on, and I believe I got his collar and tie for him from the doorman and put it on, and handcuffed him and brought him to the captain's office.

Q You found him standing up? A He was taking a little walk; yes.

Q Was he waltzing? A Not at that time; no.

Q Was he jigging? A No, sir.

Q You heard him waltzing in the cell? A No, sir; I did not.

The Court. What was the word you used, "jigging"?

Mr. Simandl. "Dancing" is the word.

The Court. Did you answer the question in that sense?

Witness. Yes, sir; I did.

By the Court.

Q There was enough room to dance in that cell, was there? A Well, not waltz; he could do a little jigging.

By Mr. Simandl.

Q Did you take him up in the machine? A I did.

Q Did you talk with him? A I may have said one or two words, but we had very little conversation coming up.

Q What were those one or two words? A I can't just recall them. It may have been the weather or some little insignificant incident.

Q It wasn't about the statement he was going to make? A No, sir.

Q You didn't tell him what you were going to take him up there for? A No, sir.

Q Just spoke to him about the weather? A Perhaps; I can't just recall what the conversation was about.

Q How long was he at headquarters, if you know? A From 1:30 on the 17th, A. M., until perhaps 11 o'clock, 11:15, on the 18th, P. M.

RAFAEL CAPADANO, recalled in behalf of the State.

Direct examination by Mr. Bernhard.

Q (Showing witness paper.) I show you S. 23, a statement, and ask you if you recognize what that paper is? A Yes, sir; statement of Philip Schilling.

Q When was it made? A Made on the 18th of July.

Q Were you present at the time? A Yes, sir.

Q Was it signed? A Yes, sir.

Q Where? A At the bottom, by Philip Schilling, and other officers and myself.

Q Do you know with which hand Schilling signed it? A I believe with the right hand.

Q Do you know whether or not his both hands were free? A I believe his both hands were free at the time.

Q Coming up from the police station in what position were his hands? A I don't recall just now.

Q Officer Donnelly's name is on there as a witness, is it not? A Yes, sir.

Cross examination by Mr. Simandl.

Q What makes you think it was his right hand? A Why, I believe that is the way he writes, with the right hand. His both hands were free at the time.

Q Are you sure it was his right hand? A Well, no, sir; not positively, but I believe it is.

Mr. Bernhard. I said to counsel that Officer Donnelly, who is a witness to this statement, was assigned by the prosecutor's officer on a matter which necessitates his absence from the court room, and counsel admits that fact without my having to go on the stand and testify to it. That is correct, is it, Mr. Simandl?

Mr. Simandl. That is correct.

Mr. Bernhard. I now offer S. 23 for identification in evidence. Counsel has seen a copy of it.

(Marked Exhibit S. 23.)

Mr. Bernhard. I ask that Exhibit S. 23A be admitted in evidence.

The Court. It is the carbon copy.

Mr. Bernhard. The copy was shown to Schilling; Schilling had a copy in his hands at the time Lieutenant Godfrey read it to him.

The Court. Is that the copy that he read? Then he signed the original?

Mr. Bernhard. I believe that is the way the evidence stands.

Mr. Simandl. I do not see why the copy should go in evidence.

The Court. To show what he read. He read the carbon and signed the original, so that the carbon copy is not like the original in that respect.

(Marked Exhibit S. 23A.)

Mr. Bernhard. I offer the four shells that Officer Capadano said he found at Thirteenth avenue and Boston street.

Mr. Simandl. They have not been connected with the defendant. He said he found the shells.

The Court. There is a great deal of evidence in that has not been shown to the jury yet. I thought there was a reference in this alleged confession as to where he threw the empty shells.

Mr. Bernhard. Is there an objection to allowing these shells in evidence?

Mr. Simandl. I see there is a reference to them there, and I will admit them.

The Court. He said in his statement, "I took the shells out of my pocket and threw the empty shells on the street alongside of a church on Thirteenth avenue."

(Marked Exhibit S. 22.)

Mr. Bernhard. I offer Exhibit S. 18, which is the photograph.

The Court. Cover the back with something, and that will remind the jurors that they are to pay no attention to the back.

(Marked Exhibit S. 18.)

Mr. Bernhard. It will save time if counsel will admit that a copy of the written confession was transcribed in typewriting and furnished to Court and counsel by the prosecutor, if you will admit that it is a true copy.

The Court. Read from the copy and let counsel hold the original.

Mr. Simandl. That will be satisfactory.

(Mr. Bernhard reads Exhibit 21 to the jury.)

(Mr. Bernhard reads Exhibit 23 to the jury.)

STATE RESTS.

Mr. Unger opens in behalf of defendant.

JOSEPH F. REILLY, sworn in behalf of defendant.

Direct examination by Mr. Simandl.

Q What is your business? A Newspaper reporter.

Q And on July 17th where were you about 1:30 in the morning? A At Police Headquarters.

Q Did you see the defendant being brought into Police Headquarters by the officers? A I didn't see him being brought in; I saw him when he had been brought in.

Q What was his appearance, so far as his physical appearance was concerned? A I noticed a slight cut over his left eye.

Q Was there blood running from it? A There was a little blood on his face.

Q Did you see any discolorations? A Well, his eye appeared to be slightly swollen, slightly discolored, blue.

Q His eye was slightly swollen? A Yes, sir.

Cross examination by Mr. Bernhard.

Q What do you mean by slightly swollen—both eyes or one eye? A Just the one eye.

Q Which eye? A The left eye.

Q In what locality, in the locality of the jaw? A It appeared as though he had a high cheek bone.

Sarah Schilling, direct.

Q And where was this discoloration that you speak of? A Right on the cheek bone.

Q And not around the eye proper? A No, sir.

Q Then when you spoke of this discoloration you meant the discoloration around the scratch that you have told us about; is that what you mean, Mr. Reilly? A Yes, sir.

SARAH SCHILLING, sworn in behalf of defendant.

Direct examination by Mr. Simandl.

Q Mrs. Schilling, are you the mother of Philip Schilling, the defendant? A Yes, sir.

Q Just answer my questions and keep cool. When was Philip Schilling born? A In Elizabethport.

Q He was born when? A In August.

Q He was born in August? A I couldn't tell the date.

Q How old is he? A Now?

Q Yes. A August, twenty-nine, past August.

Q And he was born in Elizabethport? A Yes, sir.

Q Where in Elizabethport? A On Bond street.

Q Who was his father? A Morris Schilling.

Q Is his father living? A His father is dead. In July was nine years, the 13th of July.

Q Now, Mrs. Schilling, what kind of a baby was Philip when he was born? A When he was born he was a nice baby until he was nine months old—

The Court. She is not called upon for a scientific classification.

Mr. Simandl. She is called upon for a general classifition. I will change my question. I withdraw it.

Q What were Philip's action when he was born? A When he was born he was a nice baby, good baby.

Q Did anything happen to him while he was a baby? A When he was old nine months, when I left him for a minute by the washtub he fell down—

Mr. Bernhard. We cannot hear you.

Q Speak louder. A When he was nine months old I left him by the washtub and he fell down; it was stone floor—

Mr. Bernhard. She said when she left him; the inference being that he went away.

The Witness. I sat him down for a minute—

The Court. Objection sustained.

Q Just tell us what did you do with the baby? One question at a time. A When he fell down.

Q What did you do with him? A I put him on a washtub.

Mr. Simandl. Perhaps we had better have an interpreter.

The Court. How long have you been in this country?

Witness. I can't speak good because I don't know the language. I was married—

The Court. If you speak slowly I think we will understand you better than if we have an interpreter. I understand from what she has said that at one time when the baby was about nine months old she left him on a washtub.

Witness. For a minute I left him sit down.

Q You left him on a washtub? A I move one minute from that, and it is all done.

Q When you came back you found him lying on the floor? A Yes, on the floor.

Q And when you found him there what was his appearance to you? A He was like dead.

Q Were there any marks on him? A He had a big hole in that side.

Q He had a hole? A It was the floor.

Mr. Simandl. I think we had better have an interpreter.

Q (Through the Interpreter.) Now, just ask her this question: She left the child on the washtub, is that right? A Yes.

Q And what happened, if she knows?

Objected to.

(Question withdrawn.)

Q When she left the washtub did she go any place? A (In English.) No, I had to take something from the other room

and I was so far to this here, and I took five minutes and I find him on the floor.

The Court. Tell her to speak in Jewish.

Q (Through the Interpreter.) You found the child on the floor; is that right? A Yes.

Q How did that child appear to you? A I picked him up and he looked to me as dead.

Q Were there any marks on him at all? A He had a big lump on his head.

Q Hole or a lump? A Like a dead child.

The Court. The question is, did you see a hole or lump.

Witness. He had a hole. The blood flowed like water.

Q What did you do when you found the child? A I went upstairs to a neighbor of mine—

Mr. Bernhard. I object to what conversation occurred.

The Court. The conversation is not proper.

Q As a result of what your neighbor told you what did you do? A I put a piece of soft bread on his head to stop the flow of blood.

Q After that how long was the child ill from that fall? A I went after that to Dr. Mack in Elizabethport. He is dead now; he is dead a few years.

Q How long was the child ill? A He has always been sick since that fall, always used to cry.

Q Did the child nurse? A He was nursing, yes.

Q How long did you live in Elizabethport? A Six years.

Q Where did you move to? A Newark, in Broome street.

Q How old was Philip when you moved to Broome street? A Four years old.

Q When you got to Newark did you send him to school? A He was too young yet. (In English.) He was acting like a lunatic.

Q (Through the Interpreter.) When did he go to school? A Sent him to the Elighteenth avenue school.

The Court. The question is, when did you send him to school?

Witness. I don't know—five or six years old—I can't remember. That you can find out in the school.

Q Did he go to school? A He acted very badly in school.

Mr. Bernhard. I object to that and ask that it be stricken out as a conclusion.

The Court. Strike it out. She cannot tell us what happened in school unless she was there.

Q If you know, did he go to school? A He went to school, and he always came back that the teacher said—

Mr. Bernhard. I object to what the teacher said.

Witness. The teacher said that he is very bad.

The Court. Let us have the whole answer and I will hear your motion to strike it out.

Witness. He went to school and he came back that the teacher said, "Call mother, call mother—"

The Court. What is that? Went to school and what?

Witness. But he always came back that the teacher told him to say, "Call mother to school," he don't want to learn anything.

Mr. Bernhard. It is hearsay evidence and I move to strike it out.

The Court. The motion is too broad. The fact that he went to school is competent. As I understand, this little boy came home from school and said the teacher said to "Call mother, that I don't want to learn anything." That is the substance of what she said. You offer that as evidence of the incapacity of his mind at the time, do you not?

Mr. Simandl. Yes.

The Court. I do not think it is competent. Strike it out.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q How did he learn, if you know? A He didn't want to learn anything. He always ran away from school.

Sarah Schilling, direct.

Q Did you move to Bank street? A Yes.

Q How old was Philip when you moved to Bank street? A About eleven years, I think it was. In Bank street he was a bigger bum; he didn't want to know anything.

Q On Broome street did he sleep home at night? A Very often at night he used to run away and he used to sleep in Spruce street in the stables.

Q How old was he when he was sleeping in the stables? A About nine or ten years.

Q Did he ever take anything away from your home?

Mr. Bernhard. I object to that as leading.

Mr. Simandl. Your Honor can appreciate the difficulty I am under with this witness, a witness who has never been in court before, and I am attempting to bring out facts from this witness. I have been very lenient with the prosecutor and he should show me the same courtesy.

Mr. Bernhard. The State's rights have to be protected.

The Court. She says he did not want to learn anything, that he ran away from school.

Mr. Bernhard. She doesn't know that, but I interposed no objection to that.

The Court. It is a very general kind of a statement, if Philip ever stayed away one day from school when he ought to be in school; that is a very general proposition. We ought to have details, facts; as far as they can be given, you ought to try to get them. I think this is a very leading question.

Q Where were you living when Philip was four years old? A Broome street.

Q Did anything happen to him while he was living there? A He had another accident.

Q What happened to him?

Mr. Bernhard. I object unless it appears that she saw it and testifies to it from her own personal knowledge.

The Court. Objection sustained.

Q Ask her whether she saw this which she is about to relate. A People came to tell me that "Your boy come down and was very badly—"

Sarah Schilling, direct.

Mr. Bernhard. I object and ask that it be stricken out as hearsay evidence.

The Court. Strike it out.

Q As the result of what somebody told you, did you go out into your yard one day on Broome street? A Yes, I ran downstairs; I took him upstairs.

Q What did you find? A You know how it is, the child was suffering. I put cold water on his head.

Q What did find? Did you find a child there? A Where? I took him upstairs from the yard myself.

Q What was the matter with the child? What did you find was the matter with the child when you got him upstairs? A He hollered, "My head, my head," and I placed cold water on his head

Q Do not volunteer anything; tell her to answer questions as nearly as she can yes or no. Do you know whether your son, Philip Schilling went to school? A One day he went, one day he didn't.

Q Did Philip Schilling ever take anything, steal anything, from your home?

Objected to as leading.

Objection sustained.

Q If you know, will you tell the Court and jury how did he act toward other children? A He always fought with them; he always called them names.

Q Did you punish him? A I punished him enough.

Q Did you try to treat him kindly? A Yes, sir; I tried to.

Q Do you remember when he went into the City Home? A Yes, at sixteen years.

Q Who put him into the City Home? A I, myself.

Q Why did you place him in the City Home? A He used to steal a whole lot from the house. He made me poor.

By the Court.

Q Was that in the Newark City Home in Verona to which you refer? A Yes.

By Mr. Simandl.

Q Just tell us what steps you took to place him in the City Home.

Mr. Bernhard. I object to that as immaterial, what steps she took.

The Court. What difference does it make?

Mr. Simandl. I want to bring out a certain fact as to why and how she had to place him in the City Home.

The Court. She has told us. Why are you asking her for the steps, the procedure, by which she put him in the City Home? What is the fact? That she made a complaint before the Juvenile Court and he was sent there?

Mr. Simandl. No, she made a complaint that he was stealing from her and the Court wouldn't take that complaint, and so she had to tell the Court that he was stealing from others.

The Court. The best evidence of that is the complaint, if it is accessible.

Q How did he act after he came out of the Home? A In one week's time he was just as bad a boy.

By the Court.

Q How long was he away? A The first time he was six months, and then I sent him back and he had been in there six months again.

By Mr. Simandl.

Q After he came out the second time, do you remember what his conduct was, if you know? A The second time he came out I lived in Montgomery street and he stole a coat next door. That is the first thing he has done.

Q Do you know what happened to him for stealing this coat? A I don't know what they done to him, but they arrested him.

The Court. How does she know that he was stealing something? How can she testify to those things? I do not know of any rule of law which gives a person the right to characterize matters generally.

Q What happened at the time of this incident with reference to the coat? Just tell us how you know he stole the coat? A The neighbors' boys did—

Mr. Bernhard. I object to what the neighbors' boys did.

The Court. Strike it out.

Sarah Schilling, direct.

Q Did they find the coat? A Yes, they found it in Canal street.

Q And was the coat later found on someone, if you know?

The Court. How does she know?

Mr. Simandl. She does know, but I can't drag it out of her; I know she knows it.

Witness. Sold the coat for two dollars.

Q What was his condition at meal times, if you know?

The Court. When?

Q From the time he was a baby what was his condition at meal times?

Mr. Bernhard. I object. It is not specific. It is a very remote question to ask this witness to testify for the benefit of the defendant before this jury as to what his conduct was. It is a leading question and it is too remote to any issue that is raised here.

The Court. Call the witness' attention to a particular time, but in answering the question only refer to the things that you saw yourself and fix the time.

Witness. He was bad at all times.

Mr. Bernhard. I ask that that be stricken out as a conclusion.

Q Do you remember an incident on Bank street at meal time when Philip was about seven years old? A On Bank street he has been thirteen years old and he was very bad; he used to steal and didn't want to go to school.

Mr. Bernhard. I ask that the answer "he was very bad; he used to steal and didn't want to go to school," be stricken from this record.

Mr. Simandl. On what ground can the prosecutor ask that it be stricken out?

The Court. On the ground that it is incompetent and calls for a conclusion.

Mr. Simandl. I realize how it is incompetent.

The Court. I will strike out the answer except "he didn't want to go to school." I think the mother may say that her boy did not want to go to school at that time.

Sarah Schilling, direct.

Q Do you remember an incident at dinner time when you were living on Bank street when Philip was about thirteen years of age? A Yes; he used to come in, always hollered "dinner" and never used to be satisfied with what I have cooked.

Mr. Simandl. Is that a correct interpretation of what she said?

Interpreter. Yes.

The Court. Read the question.

(Question read.)

Witness. I told you he was very bad; he acted like a lunatic.

Mr. Bernhard. I ask that the words, "He acted like a lunatic," be stricken out as a conclusion.

The Court. Motion granted.

Q What particular incident happened on Bank street at dinner time? Tell us in deail. A He was never satisfied; he used to come in for dinner; ask for money; he wanted to spend it.

Q What happened when he started to shout, "Dinner," on that particular occasion, as you have said before? A When I wasn't home it was all right, but when I was home he hollered always. I was ashamed.

Q Was there dinner on the table this day on Bank street?

The Court. You had better ask her if there was any incident.

Q Was there an incident on Bank street at dinner time which you can recall to your recollection? A What should have happened? He was bad.

Mr. Bernhard. I ask that the answer be stricken from the record as a conclusion.

The Court. Motion granted.

By the Court.

Q How high was this tub down in Elizabethport when you left him on the washtub and came back and found him on the floor? How high was this tub from the floor? A As usual, the height of most of the washtubs as they go.

Q Hold your hands up and let us see how high. A (Illustrating.) It was just like that table from the floor.

Livingston S. Hinckley, direct.

Q You left him there so that he could roll off, did you? A I just left him there for one minute. I wanted to reach out for something, and he fell down.

Q Were you in the room when he fell? A As soon as I have heard the fall I turned around and I was right in there. He was a good boy until nine months.

Q He was nothing but a baby at the time that you refer to? A Yes, sir; he was a nursing baby.

Not cross examined.

LIVINGSTON S. HINCKLEY, sworn in behalf of defendant.

Direct examination by Mr. Unger.

Q You are a practicing physician in the State of New Jersey? A Yes, sir.

Q How long have you been a practicing physician? A Forty-two years.

Q Where is your office at the present time, where you practice? A 33 Halsey street.

Q How long have you maintained your office at 33 Halsey street? A About four years.

Q Previous to that time did you maintain an office? A 182 Clinton avenue.

Q Doctor, from what medical school did you graduate? A Bellevue Hospital, Medical College.

Q When? A 1878.

Q Did you hold a position in any of the local institutions at any time? A I was superintendent.

Q Superintendent of what? A Of the Essex County Hospital for the Insane.

By the Court.

Q Overbrook, you mean? A No, South Orange avenue.

Q When it was up there? A Yes, sir.

By Mr. Simandl.

Q When were you superintendent for the Essex County Hospital for the Insane? A I was there from 1884 to 1901. I was formerly acting superintendent of Blackwell's Island Lunatic Asylum.

Livingston S. Hinckley, direct.

Q Doctor, have you ever seen the defendant, Philip Schilling, before? A Yes.

Q When? A About seven years ago.

Q Where did you see him? A When he was brought into my office for examination.

Q He was brought to your office? A Yes, sir.

Q Do you remember what you did at that time? A What he did or what I did?

Q What you did. A I listened to the long story of his evil habits that had been unable to be corrected, of his inveterate cigarette smoking and of a peculiar acting child from early childhood up to the time that I examined him, when he was about twenty-one years of age, I should judge.

Q You examined him? A I did.

Q What did you examine him for? A I looked him over for the physical defects of degeneration which was spoken of by Lombroso. I questioned him, and he was retiring and rather sullen, unwilling, in fact, to answer questions to any great extent. He seemed to want to get out of the office as soon as possible.

Q As a result of your examination, and as a result of the information you received, did you pronounce any opinion as to his mentality? Answer that yes or no. A Yes.

Q What was that opinion?

Mr. Bernhard. That is objected to. The opinion was apparently based on certain facts which do not now appear were actual facts, certain statements made to the doctor without the slightest foundation; in fact, as far as this proceeding in this court is concerned. I do not think his opinion is competent evidence.

The Court. Your objection does not run to the extent that no foundation has been laid for his opinion until after he states what he found. What was said to him by somebody in the presence of the patient as to the patient's history and condition would be legal evidence under the case of the State against Koccis.

Mr. Bernhard. I am familiar with that case, but the doctor has not testified to what that is.

Livingston S. Hinckley, direct.

By the Court.

Q Who told you this history? A His sister.
Q Where was he? A He was in the office with her.

The Court. What is your point about the history?

Mr. Bernard. The history does not appear. We are entitled to know it.

The Court. He says it was a long story of evil habits that were unable to be corrected, excessive cigarette smoking, and he said he looked for the physical facts of degeneracy which Lombroso describes, but he does not say whether he found them or not.

Mr. Bernhard. The facts upon which he bases his opinion do not appear.

The Court. I will sustain it on that ground. He has not told us what he found.

Mr. Simandl. That is what I am asking him.

The Court. You are asking him to express an opinion.

Mr. Simandl. I am asking whether he expressed an opinion at the time.

The Court. That does not make any difference. You have not had him tell us what he found then.

Q What did you know, Doctor, as to the various facts of history and examination that you determined from this boy?

The Court. You cannot ask him that until you have ascertained what was stated to him and shown to him and what he found. You cannot ask him what he knew.

Q What did the sister who brought him there say to you?

Mr. Bernhard. I object to what the sister said to him. Assuming that what the sister said to him formed a part of his opinion, still it would not be legal evidence, because it does not yet appear that what she said to him were the true facts of the case.

The Court. If a person goes to a physician for the purpose of being treated and makes a statement, under the Koccis case, as I understand it, what is stated to that physician is made, under circumstances which the law permits to go in evidence. You have not brought out the

nature of this examination, whether it was done on the order of the Court or whether it was done for the purpose of seeing the patient or what it was for.

Q You were at your office the day that this defendant came there, were you not? A Yes, sir.

Q Who brought him there, if you remember? A His sister.

Q As a result of what the sister asked you to do what did you do? A I looked him over carefully.

Q Did you make a diagnosis, Doctor? A Yes.

Q On what did you base the diagnosis? A Both on the history and on what I saw of the case.

Q What was the history, Doctor? A A long period of wrong-doing on the part of the accused.

Mr. Bernhard. I object. That is a conclusion. It might or might not have been a period of wrong-doing. The witness' conclusion from what was said to him, it is not for him to say whether it was right or wrong. The facts will tell.

Mr. Simandl. The prosecutor wants to know on what this man bases his diagnosis. The doctor tells us that he bases it on personal history and a personal examination. I ask him what is that history, complying with the prosecutor's request, and the doctor answers it. I don't see anything irregular about that.

The Court. Why should this witness characterize a long series of wrongful acts? You have got to bring out facts.

Q You refer to a long series of evil acts. What were those acts, if you remember, Doctor, what was told you? A I don't remember exactly the violations of the law which he was accused of, but he had been under arrest several times and sent away for different periods.

Q Anything else? A Nothing that I can remember now, exact conversation that occurred at that time.

Q Then you say, by referring to a long series of evil acts, you mean his incarceration in prison several times—

Mr. Bernhard. Just a minute. I object. The doctor has not said anything like that at all. The doctor said

under arrest, which is entirely different from a long period of incarceration in jail.

The Court. I want to hear the whole question before I rule on the question.

Q —his arrest several times and his evil habits, if I remember you said? A Yes, sir.

Q That is all included in the term "history," which you used before; is that right?

Objected to.

Objection sustained.

Q When you said "history" before in your examination, what did you mean, Doctor? A What?

Q When you said that you diagnosed this case on the history, what did you mean? A Upon the history that was told me and his general condition at the time I examined him.

Q Did the history include that which you stated before in reference to his being incarcerated and arrested and so forth? A It included, that, yes.

Q Did it include anything else that you assumed was history for the purpose of your examination?

The Court. Was he treating Schilling or was he appointed my some court or other authority to examine Schilling? You have not brought that out yet.

Q You were not appointed by a court to examine Schilling, were you? A No, sir; he was a private patient only.

By the Court.

Q For what purpose? A Why, the sister wanted to know what to do, whether I could suggest anything could be done for him. My deductions were that—

Mr. Bernhard. I object to your deductions.

The Court. Objection sustained.

Q Doctor, the defendant came into your office, as I understand it, with another party whom you call the sister, is that right? A Yes.

Q And she asked you for an opinion; is that right? A Yes.

Q What did you do in order to render an opinion? Just tell us in detail, if you can, Doctor, what did you do in order to

render that opinion? A I told you I looked him over and asked him several questions which he did not give direct answers to. He was sullen and rather morose about being questioned at all and seemed to be anxious to get out of the office. He answered questions in monosyllables.

Q What were those questions, if you remember? A I don't recollect those; it is seven years ago. I remember the deductions that I made from the case, but that is all.

Mr. Simandl. I think, if your Honor please, this witness should be permitted to tell at this time what he found or what he rendered as an opinion at that time, after he has stated to the jury what he did. He has stated very frankly what he did at that time, and I think he should be permitted now to answer the question. What was that opinion?

The Court. He says he gave an opinion upon a certain state of facts which he says constituted the history, and then he says, in addition to that, "My opinion is based upon my examination of him." He says he does not remember about his examination except that he was sullen and morose and refused to answer fully and only answered in monosyllables and he was very anxious to get out. You haven't got your history in legally before the jury.

Mr. Simandl. I don't think that history is necessary.

The Court. He says it is. He says that his opinion is based upon that history and upon his examination. Now, if his opinion is based upon those two props we cannot tear one out from under him and leave his opinion.

Q What was the history, Doctor? A I have told you that three times, I think.

The Court. He says it was a history of a long story of evil habits, cigarette ssmoking and breaking of the law.

Mr. Simandl. Doesn't that answer the question as to the history?

Mr. Bernhard. I object that it does not because the premise that he raises is an illegal premise and a conclusion.

Mr. Simandl. He has told the Court what the history is.

The Court. You did not move to strike out that answer.

Mr. Bernhard. I did move to strike it out for the reasons that I have just reiterated.

The Court. Did you move to strike it out when it was given? If it is in evidence it may make a different situation.

(Testimony read.)

The Court. It appears that you did not move to strike it out.

Mr. Bernhard. That is true, but it does not make any difference as far as my objection now is concerned.

The Court. Why did you not move to strike it out?

Mr. Bernhard. I insist that I had a right to hear his answer, because no witness is permitted to give an answer based on illegal testimony. No illegal evidence becomes proper on which to form an illegal premise and on which to form an improper opinion.

The Court. I am inclined to hold at this time that whatever is in should stay, and that he may now base his opinion on the statement. I want to ask the Doctor this question: If, upon an examination of Schilling, all that you learned was that he was sullen and morose, refused to answer questions except in monosyllables, and acted as you have told us he acted, you could not base any opinion on that, could you?

Witness. I based—

The Court. I ask you if you could base any opinion on that alone?

Witness. No.

The Court. Then you cannot ask for his opinion yet because he must tell us what he found.

Mr. Simandl. I submit that he ought to be entitled to answer as to his opinion on what evidence there is in the case. He told the Court and he told the jury that he rendered an opinion on the history.

The Court. The Court has ruled with you on this. Now, if he has said anything as to what the history is, the history that he obtained, that is before the jury, unless there is some way to get it out, and at the present time there is not. On the other proposition, how can the doctor say that this man is suffering from pneumonia or scarlet fever, or whatever it is? Why hasn't he got to tell us what he found, and then say, "In my judgment, from my examination, based on the things that I have found, I do think that he has scarlet fever."

Mr. Simandl. As I understand it, his opinion is based upon two props, as your Honor stated before. One is the history which is in evidence; the other is his examination. If I bring out the facts that he had made an examination and describe what that examination is, it seems to me he is ready to give an opinion.

The Court. He has not described the smyptoms to us, excepting in so far as the Court asked him, and that was that he was sullen and morose and answered questions in monosyllables, and he wanted to get out of the office as quickly as he could, and he swears that he could not, on that alone, base any opinion.

At one o'clock P. M., the Court took a recess of one hour.

After Recess.

LIVINGSTON S. HINCKLEY, resumes the stand in behalf of the defendant.

Direct examination (continued) by Mr. Simandl.

Q Doctor, you have told this Court and jury that you made an examination of the defendant? A Yes, sir.

Q Just tell us in detail what that examination was. A I made a physical examination, looking over the face, looked at the arch, looked over the arch and the palate, his eyes and his ears, the positions of them, conditions of his teeth; the usual examination that is made in any case.

Livingston S. Hinckley, cross.

Q Is this examination, coupled with the history which is already in evidence, sufficient for you to form an opinion as to this man's mentality? A Yes.

Q Was it at that time sufficient? A Was it what?

Q Was it at that time sufficient? A Oh, yes.

Q What, Doctor, was your opinion?

Mr. Bernhard. I object. The situation has not changed the slightest from what it was before recess. The doctor as yet does not say what the history was. He says that it is a necessary accompaniment of the opinion which he formed, and he has not yet told us what it was.

Mr. Bernhard. The doctor says that in addition to making a physical examination he heard a history. The history which he heard he is now giving us in terms amounting to a conclusion, without telling us whether or not the things which he heard were narrated to him at the time by either the defendant or the sister.

The Court. He says they were narrated to him by the sister.

Mr. Bernhard. Yes, but he says he doesn't remember them.

The Court. He says he doesn't remember the details.

Mr. Bernhard. If your Honor feels that is sufficient to go to the jury on the weight of the doctor's testimony then I will submit.

The Court. You may cross examine as to the history that he had, any symptoms that he found.

Cross examination by Mr. Bernhard.

Q Did you keep a record of what was said to you that night? A No.

Q You didn't think it important enough to make a record of it? A No, sir.

Q Then there is no record? A It was merely an office call.

Q Was it the only time that you saw the defendant? A That is the only time.

Q How do you fix the date? A Why, I fix the date by meeting the sister and comparing notes.

Q What do you mean by that, she told you what date it was? A No, she didn't know.

Livingston S. Hinckley, direct.

Q Did you look it up yourself? A No; I don't know.

Q Then you don't know whether it was seven or seventeen years ago? A Yes.

Q How do you know? A Excuse me. It is about six years ago; my memory is quite good enough for that.

Q What month? A I couldn't tell you; it was in the spring of the year, I think.

Q Do you remember what she told you? A I don't remember in detail; I have given you all that she told me, as far as I could gather from her.

Q How long did it take? A My examination?

Q Yes. A Half an hour.

Q Did you examine his blood? A Certainly not.

Q Examine his ears? A No, sir.

Q Use any instruments on him at all? A No.

Mr. Bernhard. I press my objection.

By the Court.

Q Do you mean to tell us that from a mere statement of evil habits, excessive cigarette smoking, being arrested and breaking the law, as a history, an examination of a person in which you find that he is sullen and morose, answers in monosyllables and is anxious to get out of the office, and an examination of the face, arch and palate, the eyes and the teeth and the ears, are alone sufficient upon which to base an opinion as to mental capacity? A A mental expert with years' experience can tell that.

The Court. Your question is too broad. You are asking him for his opinion about his mental capacity, are you not?

Mr. Simandl. I am going to ask him this question.

By Mr. Simandl.

Q What did you tell the defendant?

Mr. Bernhard. I object to what he told the defendant.

The Court. Objection sustained.

Q What did you tell the person who was with him?

Mr. Bernhard. I object to that.

The Court. Objection sustained.

Livingston S. Hinckley, direct.

Q What opinion did you render as to his mental capacity?

Mr. Bernhard. It has not appeared that he rendered any opinion. I object.

The Court. Objection sustained.

Q Did you render an opinion as to his mental capacity? A I did.

Q What was that opinion?

Mr. Bernhard. Objected to. It is immaterial.

The Court. That is immaterial. That is given without being under oath. Let him tell us now what his opinion is of those conditions which he then found.

Mr. Simandl. I desire to state the belief that under the statute of 1919 this jury has a right to know what transpired seven years ago, as to whether it had any effect on the man's mentality which would in any way mitigate or alleviate the punishment of this crime, and therefore I think that on that theory it should be admitted.

The Court. How does the doctor's opinion affect the situation, an opinion seven years ago? Why don't you ask him now, at the present time, what is his opinion of his then condition? That is the objection of the prosecutor, or at least that is the objection that the Court bases its ruling on. You are asking what he then said about him. Ask him now, under oath, what he now thinks it is.

Q Seven years ago, at this particular time, you told us you rendered an opinion, did you not? A I did.

Q Doctor, would that opinion have any bearing upon this man's mental state? A I think so.

Q Now, Doctor, what was that opinion rendered seven years ago?

Mr. Bernhard. That is objected to.

The Court. Objection sustained.

Mr. Simandl. I ask that an exception be noted.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Livingston S. Hinckley, further cross.

The Court. You may ask him what his opinion now is of his condition then.

Q What is your opinion now of his condition then?

The Court. That is, of course, relating to his mentality.

A Why, there was no chance for improvement in his condition. I considered him a case of defective intelligence.

Further cross examination by Mr. Bernhard.

Q That is all your opinion is, merely defective intelligence—that is what I understood you to say, is it? A Yes; came into the world with it.

Q Will you answer my question? A Yes, sir.

Mr. Bernhard. I ask that that be stricken out as not responsive.

The Court. Strike out "came into the world with it."

Q (Question read.) Is that correct? A Yes.

Q Your office is where? A Now?

Q Yes. A 33 Halsey street.

Q Are you practicing any particular brand of medicine at the present time? A Nervous and mental diseases.

Q Consisting of what, along what lines?

Mr. Simandl. I object to this as immaterial. The witness was permitted to testify, but I don't think at this time it is proper.

The Court. It runs to the weight of his evidence. He may be qualified to answer the question. It may be that his answer is not helpful, if it can be brought out. I do not know what the purpose is beyond that. Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q Along what particular lines of nervous ailments are you practicing now? A Mental nervous diseases.

Livingston S. Hinckley, further cross.

Q For what defects of the nervous or mental system? A I beg pardon?

Q For what defects of the mental or nervous system are you— A Mental and nervous.

Q I understand you. What particular nervous defects are you treating for? A What particular nervous defect?

Q My question is not clear to you? A Anything that comes under the heading of nervous diseases.

Q Any particular part of the nervous system? A No, sir; generally speaking.

Q Treating narcotics, are you? A No, sir.

Q Not at all? A Not a particle.

Q Treating people who are affected with the morphine habit? A No, sir.

Q Treating people who are affected with the heroin habit? A No, sir.

Q And have not been? A And what?

Q And have not been? A Oh, yes; I did it to a certain time.

Q Made a specialty of that branch for the last few years, did you not? A I did not; no.

Q What did you find about the defendant's teeth which led you to form the opinion that you have now given us? A The defendant's what?

Q Teeth. A I can't remember now as to whether his teeth were defective or not.

Q What did you find about his eyes? A I looked for the usual signs.

Q I didn't ask you what you looked for; I asked you what you found? A I can't remember that.

Q What did you find about the ears that led you to draw the conclusion that you have now drawn? A I can't remember that, either.

Q What did you find about the physical features of the man that led you to draw the conclusion that you have now just given us? A Nothing that I remember.

Q What did you find about the so-called history that you gleaned that led you to give us the opinion that you have just given us? A What did I find about the history?

Q Yes, what did you find about the history? A The history of the case shows that the boy had been in trouble, hard to manage ever since he was born, practically.

Q Was that sufficient? A Well, it was sufficient for me.

Q Then it wasn't necessary if that was sufficient in itself, to make a physical examination of him? A Not to discover any mental defect.

Q Why did you do it? A Because we have the marks of degeneracy as spoken of in some of the works on mental diseases.

Q What marks of degeneracy did you find in his teeth? A Don't remember.

Q His eyes? A Don't remember.

Q And his ears? A I don't remember.

Q In his throat? A I don't remember.

Q You didn't even try treating him until his sister spoke to you about it, did you? A I didn't treat the boy.

Q You said he came to your office for one treatment, I understand you. A He didn't; he came for an examination and an opinion.

Q You didn't remember the examination until the sister called it to your attention, did you? A I was sitting in my office expecting the patient to come in from the next room and they came.

Q Now then, I will ask you again: Until the sister called your attention to the visit made seven years ago you had no recollection of it, had you? A I know nothing about the case before it came—

Q How do you know that you made an examination of the teeth? A I told you I didn't remember a few minutes ago.

Q You don't remember making an examination of his teeth? A I don't remember, I told you.

CHARLES A. ROSEWATER, sworn in behalf of defendant.

Direct examination by Mr. Unger.

Q Doctor, are you a practicing physician? A I am.

Q In the State of New Jersey? A I am.

Q How long have you been practicing as such? A About twenty years.

Q Have you an office at the present time? A I have.

Q Where is your office? A 47 South street, Newark.

Q What college did you graduate from? A The College of Physicians and Surgeons, New York City.

Charles A. Rosewater, direct.

Q State your qualifications. A I am graduated from the College of Physicians and Surgeons, graduating in 1899, and then served on the house staff of the Mt. Sinai Hospital, New York City. I then went to Europe and spent one year doing post-graduate work in Europe. I then returned to this country and opened my office. I have, for the past fifteen years, devoted practically all my time to the study and treatment of alcoholism, drug addiction and nervous and mental diseases. In 1908 I was appointed by Governor Fort a member of the Crime and Dependency Commission of this state, in which capacity I made a study of criminology in New Jersey, and feeble-mindedness, alcohol and drug addiction, and allied subjects. I have been a member of the committee appointed by Mayor Gillen to investigate the subject of habit-forming drugs in Newark, and I was the chief organizer of the narcotic clinic for the study of drug addicts of Newark, New Jersey. I have made surveys for the State Board of Health of Louisiana, and I am the author of the Narcotic Law of Louisiana. I made similar studies for the governor of West Virginia, for the State Board of Health of Virginia, for the State Board of Health of Georgia, and also for the Food and Drug Commission of Tennessee. I made similar studies for the Revenue Department of St. Louis, Missouri, and for the Revenue Department at Arkansas and Oklahoma. I cooperated with the committee of New York State in the investigation of the narcotic problem of that state. I entered the army about a year ago. I was commissioned a captain in the Medical Corps of the United States, and I was connected with the section of nervous and mental diseases. I was first ordered to Plattsburg, New York, the U. S. A. General Hospital No. 30, which was at that time a special hospital for the treatment of nervous and mentally sick soldiers. From Plattsburg I was ordered to Louisiana to do some work for the State Board of Health of Louisiana. From there I was ordered to Camp McClellan, Alabama, to examine the command for mental and nervous diseases. While I was at Camp McClellan I had charge for a time of the ward to which there was sent the insane soldiers and the defectives and epileptics and also nervous cases. While I was at Camp McClellan I was on the board that examined several thousand soldiers for mental and nervous diseases.

Charles A. Rosewater, direct.

Q What did you study in Europe? A I did some general post-graduate work, and I took a course of three months at the clinic of mental and nervous diseases at Munich, Germany.

Q To what medical societies do you belong? A I am a member of the Academy of Medicine of Newark, New Jersey; the Essex County Medical Society, Medical Society of the State of New Jersey, American Medical Association, and the American Society for the Study of Alcohol and Drug Neurosis.

Q Your work among narcotic addicts and alcoholics, is that allied to the subject of feeble-mindedness? A It is.

Q Have you made any contributions to the literature of medicine? A I have published articles in the leading medical journals and have read articles before leading medical societies. I have published articles entitled "Apomorphine in Acute Alcoholism"; "Drug Addiction, Causes, Acidosis and Responds to Alkaline Therapy"; "A Plea for the Establishment of Hospitals for the Rational Treatment of Inebriates"; "The Drink Habit and Its Treatment"; "The Liquor Problem: Some Suggestions for Its Solution"; "The Obliteration of the Craving for Narcotics" and others. I also drafted a bill for the establishment of a psychopatic hospital for the State of New Jersey, which was introduced in the Legislature about 1909.

Q You stated that you have been in the United States Army. You say you studied where? A I am a member of the—

The Court. He has told us all that.

Mr. Unger. I wanted to ask the doctor whether he treated any patients there.

The Court. He has told us two different camps.

Q Among those that you have examined in these various camps, how many defects were amongst them?

Mr. Bernhard. I object, because the term "defect" means nothing relevant to this case.

Mr. Unger. I will amplify the question by stating mental defects.

The Court. What has that got to do with the question?

Mr. Unger. To show the doctor's qualification. Is there any question about his qualification?

Charles A. Rosewater, direct.

Mr. Bernhard. A very serious question on the part of the State.

The Court. You call him as an alienist?

Mr. Unger. Yes, and also a psychologist.

Mr. Bernhard. I desire to cross examine on the first offer, and I object to the introduction of any testimony by any psychologist, so far as the second part of the offer is concerned.

The Court. This question now relates to his qualification as a psychologist?

Mr. Unger. I am not through, however, as to his qualifications.

The Court. Proceed.

Q What was the method of the examination at the army institutions?

Mr. Bernhard. I object to that. As to what examination.

Mr. Unger. As to the mental examination.

A In every case a history was made as to all the facts obtainable regarding that particular case. The soldier was then put through a complete physical examination and he was then put through a mental examination. If the mental examination revealed the necessity for further testing, he was referred to the psychological department for a psychological examination as to his mental capacity.

Q And who had charge of that psychological department? A Captain H. L. Hollingsworth.

Q Is he in court today? A He is.

Q Doctor, are you familiar with literature on the subject of feeble-mindedness? A I am.

Q Can you mention a standard work on the subject of feeble-mindedness?

Mr. Bernhard. I object to that as immaterial unless it can be shown that feeble-mindedness is part of the issue. The opening did not show that. The question is whether he appreciated the quality of the act.

Mr. Unger. That is what we are going to prove.

The Court. As I understand the law, the contention of the defense is that he was unable to understand the nature and quality of the act which he committed and that it was wrong.

Mr. Unger. That is it exactly.

The Court. Now you are talking about a defective intelligence, whatever that is, and you are also speaking of lack of intelligence. This is not going to your defense, is it?

Mr. Unger. It is in further qualification of the doctor, to show his experience in examining individuals who are suffering from feeble-mindedness, and my question whether he is familiar with any works is further and deeper qualifying the doctor upon that subject, that he may bring out his opinion and connect it up with this case. I think he is entitled to state it.

The Court. As I understood your opening, it was that this man was insane.

Mr. Unger. I have not used the word "insane."

The Court. You said that he did not understand the nature and quality of the act that he committed.

Mr. Unger. I remember saying that he did not understand the quality of his act. I have not used the word "nature."

The Court. No, you did not say nature.

(Question read.)

The Court. Are you going to show by a psychologist and his knowledge of feeble-mindedness that the defendant is not mentally responsible for the act?

Mr. Unger. Yes.

The Court. You say you can connect it?

Mr. Unger. I can.

The Court. Then I will have to let it in. Answer it yes or no.

Q Whether you are familiar with the standard works on feeble-mindedness? A I am.

Q Mention a few.

Mr. Bernhard. There is no evidence he is familiar with them.

Mr. Unger. Of course, if he would state them, mention the names of the authors, the next question would follow, whether he read them and studied them.

The Court. He has stated that he does know and has studied them.

Q Can this work of intelligence, such as you spoke of, be done by any ordinary man or physician? I refer now as to the test? A Psychological testing can only be done by a trained psychologist.

Q Doctor, does the medical science recognize psychology as a necessary science to find out the mental capacity of an individual?

Mr. Bernhard. I object. It does not appear that the doctor knows what the medical science is.

The Court. He is a graduate.

Mr. Bernhard. Not in connection with this subject. It must first appear that he knows.

The Court. He says he is a practicing physician. The State is entitled to know how he knows it. If a man is a practicing physician and a graduate of the College of Physicians and Surgeons, and has been an interne at Mt. Sinai Hospital and studied in Europe six months and practiced for twenty years as a physician—

Mr. Bernhard. Yes, but can the doctor speak for the medical science and say yes, that medical science does recognize psychology in this connection?

The Court. He is going to tell us what he, as a doctor, recognizes.

(Question read.)

The Court. I think that he could state his opinion.

Mr. Unger. I will reframe the question that way. In his opinion.

(Question read.)

A It does.

The Court. Do you say that you do as a physician?

Witness. I do.

Charles A. Rosewater, direct.

The Court. As a physician?

Witness. As a physician.

Q Doctor, is your opinion, is it absolutely essential to resort to psychological examination in certain cases of feeble-mindedness? A I didn't get that.

(Question read.)

Mr. Bernhard. I object to that. He is trying to qualify him as a psychologist.

Mr. Unger. Not necessarily. The purpose of my question is to qualify the doctor as an expert to give his opinion in this particular case as to the defendant's feeble-mindedness, and to my humble mind I think it is necessary that these preliminary questions he answered in the affirmative before the doctor can answer the main question in issue.

The Court. If you are going to qualify him as an expert, for example, as an alienist, a physician and surgeon, and so forth, the way to do that is to show what study he has made, not to ask him as a chemist or some other kind of scientist, if in that science he finds that he does not know enough, but has to branch out in some other way. You have presented evidence which tended to qualify him as an alienist, a student of mental diseases, a physician. Now, you are asking if, as a physician, he doesn't find it necessary to go into the realm of psychology. You have not told us what psychology is. We do not know that.

Mr. Unger. We will know it presently.

The Court. Let us know it now.

Q Will you kindly define psychology? A Psychology is the science which treats of the workings of the mind.

Q Well, then, in your opinion, Doctor, is psychology a recognized science within the purview of the medical term of science? A It is.

Q Can you, if you know, tell us what universities or schools teach nowadays psychology? A Columbia University has a department of psychology; Cornell University has a department of psychology and Princeton has a department of psychology. I know of those three definitely.

Mr. Unger. At this time I wish to withdraw the doctor, reserving my right to replace him back again, and I wish to put on another witness.

Mr. Bernhard. I object to any such procedure.

Mr. Unger. Mr. Bernhard can cross examine him.

Mr. Bernhard. The doctor is put on as an alienist and then he is withdrawn.

The Court. What are you going to ask him later on?

Mr. Unger. I am going to ask him later on whether he examined the defendant, what that examination consisted of, and the result, his opinion.

The Court. As a psychologist or as an alienist?

Mr. Unger. As an alienist.

The Court. Why do you not do it now?

Mr. Unger. I thought the other witness' testimony would dovetail in here, and I think it was done by the prosecutor in one or two of his witnesses. I think we are entitled to the same courtesy by the state.

Mr. Bernhard. The state does not ask for any more consideration than it will ask for the defendant. It became absolutely necessary and essential for the introduction of a paper to prove it according to law, and having proved it, then to call a witness and then offer the paper in evidence, and that is the only instance in which that practice was followed.

The Court. I think we will make better progress if you will ask him the question and finish with him. If you find you have omitted something later on you can take it up.

Mr. Unger. I don't like to deviate from the line of defense that we have prepared.

The Court. You may do it.

HARRY L. HOLLINGSWORTH, sworn on behalf of defendant.

Direct examination by Mr. Unger.

Q Professor, what is your present occupation? A I am associate professor of psychology in Columbia University.

Harry L. Hollingsworth, direct.

Q How long have you been such? A I have been associate professor since 1916. I have been teaching in Columbia under other titles, constant professor and instructor, since 1909.

Q Will you kindly state your qualifications, Doctor?

Mr. Bernhard. Qualifications as to what?

Mr. Unger. As a psychologist.

Mr. Bernhard. I submit that it does not make the slightest bit of difference what his qualifications are, unless it is shown for what purpose it is presented.

Mr. Unger. The professor was asked to examine the defendant at our request and he is here to testify.

The Court. The question is what relevancy that has as to this issue here.

Mr. Unger. The doctor is fully qualified, according to our contention, to relate to this Court and jury his finding of the examination to this jury, and will so inform the Court if he is given the opportunity.

The Court. Assuming what his finding would be, how is that relevant to the issue?

Mr. Unger. As to his low mentality, as to determining whether this defendant was able to know the quality of his crime.

Further, that this jury has the right to take all material and relevant facts in this issue and arrive at a just verdict, and we feel that that right is given to us, if your Honor please, by the 1919 statute.

Mr. Bernhard. I object. Up until recently, as far as the reports of cases in our state are concerned, there have been no reported cases indicating in the slightest way, if my recollection serves me right, that the testimony of a psychologist is relevant in determining the issue which is involved in a trial of this kind, namely, the testimony of a psychologist is not relevant to prove that the defendant knew the difference between right and wrong in committing the act which he committed, and it is not such an applied science, as I understand it, save for the testimony of an individual, such as Dr. Rosewater, paving the way for Professor Hollingsworth on the stand to submit in evidence the conclusion, and it is the conclusion, not

of a medical man who knows, but a physical man, of any human being, not a man who has by long experience and training and many cases, by experience, examinations, and detail the character of a man's mind which he had determined with association of many men's minds of the same kind, not such a science as an alienist has, but a new organization which simply claims the right, by some system which they have devised of indicating in their opinion the probable state of a person's mind according to a standard which they have independently and arbitrarily set and attempt to foist that system in a court of law, and in substance saying by an arbitrary system which has not become an applied science, has not yet apeared in any court, gauged by that system, one certain person's mind does not reach up to the standard that they have set, and I say that it is not recognized by our court or any court, as far as I have been able to determine, along the lines which it must be recognized in order to make it relevant to this issue.

The Court. How can you prove a new science? You cannot stop the wheels of progress by saying that you discover a new science and obtain new results. In the case of the State against Cercielli, in which it was proved for the first time in the State of New Jersey, that finger prints were an accurate, reliable, scientific, practical method of ascertaining the identity of individuals, that was done in this court, where experts were brought in, some from the New York Detective Bureau, the Bertillon system, and they testified that there were 10,000 lines in a square inch running in opposite directions on a person's hands and various forms, showed that in an examination of a million odd people, I think it was, that no two were alike. That evidence was given to the jury as some evidence of identification. As I understand counsel for the defense, they say there is a science knows as psychology which deals with the methods and processes of the human mind, and they contend also that it is an accurate science, and that from that science they propose to establish that this defendant is not responsible for his act. If they say they are going to do that, how can the Court rule that they are not going to do it and say psy-

chology will not do it. That assumes that the Court knows something about psychology, and it does not, on this evidence.

Mr. Bernhard. I appreciate all that your Honor said as to that case, where there was an actual, physical basis to admit that evidence, in view of the large series of experiments that had been made, but there is not anything before this Court and I don't know that any psychologist contends that simply because they can gauge the condition of a man's mind as to his intelligence, that they dare to say that that mind does not know the difference between right and wrong.

The Court. The defense offers to prove it. If they do it, how can the Court shut it out until I hear what it is?

Mr. Bernhard. I do not understand that they intend to prove that, as to whether he knows the difference between right and wrong. Counsel in his opening said that this man had the mind of a boy of twelve years of age, and certainly a boy of twelve years knows the difference between right and wrong. If they contend that Dr. Hollingsworth knows the difference between right and wrong it would be a different proposition, and if they do so contend, I desire to cross examine on that subject.

The Court. As I understand the offer of the defendant in its broadest sense, it is to show that psychology is a science; secondly, that it is accurate and reliable, sufficiently so to go before a jury in support of the contention that as the result of an examination under the science of psychology the defendant will be shown not to be responsible for his act. Suppose that they show that he could not commit a wilful, premeditated, deliberate act. Now you are asking the Court to rule on this question before the evidence is in. I cannot do that, that is where the trouble is, and I cannot hold the defense absolutely to its opening, unless it admits that is all there is in the case, because the defense now promises to go further. Objection sustained. You have got to prove what psychology is, first.

Harry L. Hollingsworth, direct.

Q What is psychology? A Simply as stated, psychology is the science of the mind.

Q Will you kindly define it? A Psychology is the systematic study of the mind.

Q Would you say that it was an accurate test of the mental condition of an individual? A I would say that its degree of accuracy can be known on any occasion where a measurement is made; not only can the result be known, but the accuracy of the result can also be determined.

Q Professor, what were you doing during the winter of 1918 and 1919? A From August, the late part of August, to about the first of February, I was captain in the Sanitary Corps, United States Army, in charge of the psychological section in United States Hospital No. 30 at Plattsburg Barracks.

Q What were your duties there? A My duties there consisted in part of the examination of soldiers from the point of view of their mental competence, with the problem of discipline and problem of disposal of recovered patients and problem of establishing the mentality of patients; the various types of occupation and work were in question in part. Also my work had to do with the actual handling of the men in an attempt to reconstruct them where that was possible by educational means. My examination became official part of the soldier's history and were recorded upon the records and sent to the Surgeon General of the Army.

Q How many psychological examinations have you made in the United States Army to determine mentality? A I made about fifteen hundred examinations.

Q To what medical societies do you belong? A To no medical societies.

Q Well, to what psychological societies do you belong? A I am a member of the American Psychological Association and I am a member of the executive council of that scientific body, have been for the past three years.

Q Have you published any works of your own upon the subject of psychology? A I have.

Q Will you name them? A I am author of nine books in the field, entitled "Inaccuracy of Movement," "The Influence of Occupation on Mental and Motor Efficiency," "Experimental Studies in Vocational Psychology, Advertising and Sale." I am a joint author of that book, and am joint author with Park-

enberger on a book called "Applied Psychology," and the same author on a book on "The Science of Taste." In addition to that I have published between forty and fifty articles in the scientific journals besides notes and reviews.

Q Will you describe to the Court and jury this department of psychology at the Columbia University?

Mr. Bernhard. I object. What difference does that make?

Mr. Unger. It may show us just how this branch of science is being worked in this university, just merely to enlighten us.

The Court. Why should we take the time? That does not make it legal. The question is, what does Professor Hollingsworth know of the science of psychology and what is it? What does it do? How is it accurate? What is the result of it? Why is it reliable?

Q Will you go into details, Professor, as to its reliability, what does it do and when do you use it, if at all? A There are so many different phases to psychology that it is very difficult to explain them all.

Q To the best of your knowledge, Doctor? A One of the most important phases of psychology, especially one that has been developed in the last twenty years, has to do with the exact measurement of human mental capacity. Such measurement of mental capacity proceeds by setting tasks which the individual is to accomplish. The measure of the skill which he shows in accomplishing those tasks shows the amount of ability that he has in various mental respects. It is possible in that way to measure, for an example, his observation, his memory, his judgment, his ability to limit, to retort his attention and his vision, and so on with all the various mental functions. That measurement is possible because for many years thousands of individuals have been tested in a definite, standardized fashion and records kept of the actual ability of individuals who are of different ages. For example, individuals who are socially and economically wrong show different degrees of competence, and individuals who are also suffering from one or another form of mental disorder, on the basis of those records which have been compiled, it is possible to say that in a given task to which an individual is set, his achievement for that—for

example, is equal to that of a six-year-old child, because it is given on the basis of study of six-year-old children, and the average performance of a six-year-old, and consequently it is possible to take one type of performance after another type of performance and submit the individual to those types of performances, measure him by taking his mental age in each of these types of work, and that is what we mean by measuring the mind. The mind is his ability to accomplish those tasks. Now, that is far from being all of psychology in which accurate methods are also used, as, for example, in determining the influence of drugs on the individual mental capacity. Methods have been developed through a number of years whereby it is possible to determine the effect of a given drug on a man's mental reaction by measuring precisely his reaction without the drug, his reactions when a controller dose is given, which does not contain the active ingredients and also measuring his reaction when the drug is actually in his system. Now a person of those three sets measures actions of active and quantitive expression of the effect of drugs, for example, on his conduct, that is to say, on his mind. This, I should say, was rather a simple way of scientific work in psychology. It is possible, for example, to know how many numbers a six-year-old can remember when they are read to him or how many numbers an eight-year-old can remember when they are read to him, or a ten-year-old. That gives you a unit of measure. If you find out a man's memory and find out what his mental capacity is you have a basis by which you can compare his achievement with other individuals with whose mental ability we are more familiar. That is only one way and illustrative of the theory of mental age. It is only one of the ways of measuring mind. It is also possible by making records of the performances of individuals who exceed the average intelligence of people to show what position they would occupy in their group. It is possible, for example, by examining a man whose mentality is greater than that which the average adult reaches, to say that if a hundred individuals were chosen at random and measured in this particular mental function or kind of work he would be the third or the tenth or the fortieth of the bottom man in that group of one hundred. There you measure him not by mental age at all, but by showing his position in the group chosen from the population at large. It is even possible to measure the mind of a normal in the same way.

If you set that normal on a definite task which he has to overcome in order to attain some end which he has in view, it is entirely possible to measure the mind of one normal as compared with the mind of another normal and to say that he is normal compared with another normal, shows a better ability to solve the situation, to do the task and accomplish his aim.

Q What test did you use in the army?

Objected to.

Q For instance, as to mentality.

Mr. Bernhard. I object. If it is a recognized test there is no objection to it, but one test in one place and another test in another, it is not necessary to go into every detail of his experience in order to make up that qualification.

Mr. Unger. You don't admit his qualification, do you?

Mr. Bernhard. As a psychologist?

Mr. Unger. Yes.

Mr. Bernhard. I haven't raised any objection as to his qualification as a psychologist. I assume that he is.

Mr. Unger. Will your Honor permit the question?

The Court. What for?

Mr. Unger. Whether they have a uniform system of psychology, what he knows about it, what he has done.

Q What system did you use in the army, Doctor, while being there? A I used the methods that were approved and adopted by the Surgeon-General's office of the army, the adoption of psychology which is a branch of the medical department under the Surgeon-General of the army, officially adopted and approved, a variety of types of mental tests for the purpose of the examination of intelligence. There were a series of performance tests, each of which was separately standardized on a mental age basis. There were nine or ten of those. They were approved the Stanford adoption of the Binet-Simon test, and then there were different sets of tests that were standardized for people who were unable to read and write. They were, on the main, those three types of test, all of which were officially approved, and in my work in the army I used those methods.

Q Professor, in your opinion, could you make an examination which would be accurate as to his mentality?

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Mr. Bernhard. I object to that form of question. The question is not definite enough.

Objection sustained.

Q Well, then, I would say, are you able by the science known as psychology to make a mental test of this defendant and now determine his responsibility? A It is possible to determine the intelligence of the defendant with an accuracy that is measured by a probable area of not more than one year—that is, the rating which actually comes from the test is known to be valid within the range of one year of mental age. For example, if he should be found to have the mental age of eight that would not be accurate in the same sense that you could say $12.50 was an accurate amount. There is a certain variability in all measurements of biological and human phenomena. You know the age, being eight years, the actual fact will lie between seven and nine when other tests are made on other occasions.

Q Now, Professor, do you know the defendant, Philip Schilling? A I have seen him but once. I recognize him.

Q When did you see him? A On the afternoon of last Friday, October 17th.

Q Did you have occasion to examine him? A I examined him for a period between two and two and a half hours.

Q And where did this examination take place? A In a large room which I was told was the infirmary of the Essex County Jail.

Q What did you examine him for? A For his degree of intelligence.

Q What did the examination consist of? A All three parts. First, it consisted of general conversation and asking of questions and listening to his answers and observing his general bearing in order to determine whether there was present a condition which would in any way interfere with the use of these methods of measurement, whether we could say he was deaf, whether he showed any other condition which would make his replies to such questions as I would give or his reaction to such tasks as I would set him invalid. That was the first part. The second part consisted in giving him the series known as the performance test, which was used in the army, each of which was standardized on the basis of mental age. Having completed that series, I then gave him an examination by the officially approved form of the Stanford revision of the Binet-Simon test.

Harry L. Hollingsworth, direct.

Q What else. A That was the extent of my examination.
Q Will you kindly go into detail as to the entire examination?

Mr. Bernhard. I object to the details of the entire examination for the reasons, which I have stated previously to your Honor. The doctor has not yet said that he made this examination or that he can testify as to the result of the examination that he made and the condition of the defendant's mind, as to the responsibility for his act, as to whether he knew the difference between right and wrong. The question of what his mental intelligence is is not a question relevant to this issue, and until it appears that he can so testify that testimony is not relevant.

The Court. Why cannot he prove that he is of a low grade intelligence and then argue to the jury that with the low grade of mental intelligence he may not be held up to as high a degree of responsibility as he might otherwise be? In other words, is it not testimony that runs to the question of his responsibility at the time the act was committed?

Mr. Bernhard. If it appeared anywhere that there was any basis for assuming that there was something wrong about his responsibility and his differentiation between right and wrong then I would not be making these objections. This is a new study and it must be something confined to the issue here, not whether he ought not to have the mind of a man of thirty years, but whether or not from the tests that the doctor made, he can now say that he can form an opinion as to whether or not this man did or did not know the difference between right and wrong. He was asked the question as to whether or not he could determine the mental responsibility of the man, and the doctor did not say that he could; he gave an answer that was not responsive. He says that what he did was to measure the mentality of this man. He didn't say that he measured the criminal responsibility.

The Court. He says he can measure the intelligence, and the argument, I presume, will be that if the intelligence is of such a low grade he cannot be held to be responsible.

Mr. Bernhard. Who determines that?

The Court. The jury.

Mr. Bernhard. It must first appear that this witness can qualify and determine whether or not at the time this crime was committed the defendant knew the difference between right and wrong. He has not said, and I don't know whether he intends to say so, and all that he has said is immaterial and irrelevant.

The Court. He says that with three different methods of delivering these tests he can state whether or not this defendant is of the mental age of thirty or twenty or six or eight or whatever it may be. Even though he might not be able to say all that might be the most helpful to the defense, why can he not say something that is partly helpful to the defense? In other words, if he can't say this defendant is unable to understand the nature and quality of the act and to know that it was wrong, but he is able to say that this defendant has the mental intelligence of eight years, that might be helpful. On what theory do you offer it?

Mr. Unger. I want to cite a case which was determined in the Supreme Court of New York, Criminal Branch, at Herkimer County, on May 28th, 1914. This person was indicted for murder and there the very same method was used and admitted in spite of the objection of the District Attorney. If it will satisfy the prosecutor I will put that question and let the professor answer it, but I believe that he has already answered that.

The Court. He has not said so yet.

Mr. Unger. As he will go along I will bring it out.

The Court. Go ahead and ask it.

(Question read.)

Q Will you kindly proceed?

The Court. I thought you were going to ask him whether or not he could by psychology, and the knowledge of it, state whether or not a person has the mental intelligence to understand the nature and the quality of the act and whether it was wrong.

Harry L. Hollingsworth, direct.

Mr. Unger. If your Honor will permit, I will make that question my own and ask the professor that question. (To the witness.) Please answer it.

Witness. As the result of such examination I would not be able to tell whether or not at the time the act was committed the defendant was aware of the nature of the act. I would be able to state whether he was at that time or now—I would be able to state the degree he was at that time, whether he was able to understand the quality of his act and the degree of his act and whether he knew it was right or wrong.

Mr. Bernhard. The professor frankly confesses he is not able to testify as to whether the defendant did or did not know at the time he committed this act that it was right or wrong.

The Court. I thought you did say that he could understand the quality of the act.

Witness. I distinguish between the nature of the act and the quality of the act.

Q Just restate your distinction? A I mean, by the nature of the act, the ability to describe what actually took place, as for example, what he did and what other people did at the time at which it was done and what the facts were which took place; that is what I mean by the nature of the act, whether or not at the time of the act the defendant was aware of his offense as having taken place, whether he was clearly conscious of himself as committing those things, I am unable to state on the basis of my examination, as distinguished from the nature of the act, meaning by that simply the facts as they occurred and would distinguish the quality of the act, meaning by that an understanding of the true nature and consequences and social basis of the rightness or wrongness of such an act if committed. I should not be able to state whether or not he knew the nature of the act at the time as the result of my examination. I should be able to state the degree to which he was then and now able to appreciate the quality of such an act.

By the Court.

Q Whether or not it was right or wrong? A I could describe the nature of his understanding of right or wrong, and

what the terms right and wrong would mean to a man of his degree of intelligence, or they would be merely verbally specific or would represent two understandings of those concepts.

Q Are you able to determine whether at the time of his alleged act he was then able to distinguish, to understand the nature and quality of his acts and to know that it was wrong? A I could state whether or not his intellectual capacity as such would enable him on a previous occasion to make such distinctions, whether or not at that particular time, other conditions, aside from his intellectual capacity, were present, I should be unable to state.

The Court. I think that almost comes up to the standard, Mr. Bernhard.

Mr. Bernhard. Perhaps I have not drawn the correct inference from what the witness said. He has certainly said that he is not able to meet the conditions that our cases require, that on July 16th, when Ryan was shot, that his mind was in such shape that he did not know the nature and quality of his act.

The Court. As I understood the latter part of his answer, he said that from his recent examination of this defendant he could then say that his mental intelligence was not of such a sufficient quality or grade to have understood last July the nature and quality of his act and that it was wrong. (To the witness.) Now, is that so?

Witness. Not quite, your Honor.

The Court. Then state it. I want you to state again so there will be no question about what you undertook to say.

Witness. I said, as distinguished between his intellectual capacity and any momentary experience which he might have been having at that time, whether or not at that time he was undergoing an attack of some form of insanity or a period of confusion, I am not competent to testify. My testimony would be concerning his intellectual status, his mental competence, which is a thing which does not change from period to period, but is a fixed quantity or capacity which an individual shows. I could say whether he has the intellectual ability to understand the nature of his act, but whether at that particular time his

condition was such that he was aware of the nature or he knew that he was doing this or that, whether he knew the identity of the individual and the time of day, I am unable to state, but whether his intelligence is such that unless some such additional factor were there he would be able to know the nature of his act I can state, and I can also state whether his intelligence is such that either at that time or now, I can state the degree to which he would be able to appreciate the quality of the act, meaning or the quality of the act, its rightness or its wrongness; so I would have to distinguish between his condition at that particular moment which I know nothing about since I hadn't examined him at that particular moment. He may have been asleep, for all I know, and his condition at the time of my examination, I would have to distinguish between the nature of the act simply as a series of events and the quality of the act, which would mean its moral nature and its rightness or its wrongness.

Q Perhaps you had better answer this question yes or no. Are you prepared to swear from your examination, under and in accordance with the science of psychology as you have narrated it, that you can state his present mental intelligence and whether or not he would understand the nature and quality of an act such as this crime he committed last July and to know that it was wrong? A I could answer that question, yes, sir.

Q You can say yes. Do you say yes? A I can answer the question. I probably ought to say something more than yes or no, because it doesn't tell the whole story.

Q If it doesn't tell the whole story it is no, isn't it? A If I should have to say yes or no, I should say yes. I should like to be able to explain why I say yes rather than no.

Q You had better explain it? A I say yes, because I would be able to state the degree to which he was able to understand the wrongness of his act. I should be unable to draw any sharp line and say that an individual of this degree of intelligence does know and an individual of a higher degree of intelligence does not know. Knowledge does not consist of those sharp differences of yes and no. Knowledge is gradual and knowledge of right and wrong has various levels and degrees in it, so if I could say that an individual does not possess that ability I could only mean by that that he falls short of fully understand-

ing the difference between right and wrong. In that sense I could say that an individual did not have that knowledge, meaning not being able to know right from wrong, not being able to know it by that degree of understanding shown by the average grown person.

Q As I understand it, you won't undertake to say what he did last July except that he may have been asleep or under the influence of some drug or something else intervened, but assuming that he had the same intelligence then as he has now, or when you made this examination, are you able to say that he could understand the nature and quality of the act and that it was wrong? A I could say how much he could understand.

Q Are you able to say that he could understand the nature and quality of the act and that it was wrong? A If by "understand" is meant understand fully, I could say yes or no—understand as an average grown person understands.

Q I didn't ask you that; I asked you if he could understand it, not whether he could understand it twenty per cent. or ninety per cent. or understand it a hundred per cent. I asked you if he could understand it. A If your Honor insist on putting the question that way I should be unable to answer the question.

Q Your answer is no, is it? A I have tried to express myself as well as I could, that I could state the degree of his understanding of the difference between right and wrong.

Q Could you state whether or not he was able to understand the nature and quality of the act and that it was wrong? A In the sense—

Q Answer that yes or no. A Yes.

By Mr. Unger.

Q What did you further do? A I first went in and was introduced to the defendant and heard him give a narrative account of events. I asked him general questions as to how he felt and whether he was comfortable here, and he attempted to make myself and himself at ease, and determined that he was calm and poised and co-operative and would make a futile attempt of recognition to the things that I intended to put to him. I determined that he could hear and see, and so on, and understand my language and speech. Then I gave him first a simple series of tests to see how well he could observe and remember what went on before him. I had a performance test, one of the

army tests, known as the cube imitation test. This test consists in executing a certain series of movements with a block on certain other blocks, four other blocks, and after I executed the series of movements, the defendant was asked to do just as I had done, and I began with an easy step, and then again repeated the same process by steps, which increased in difficulty until I reached the point where he was unable to comprehend and remember what I had done before him, so that he was unable to repeat the process. His rating I was able to determine how well he did in that, how old an average child would have to be in order for him to do as the defendant did in that test. Then having determined that I used a learning test in which there was a page containing a variety of simple geometrical forms, circles, crosses, triangles, square at top. There was a key with each of these forms that had to be remembered, and I instructed him, taking a pencil to write in each of the forms the number that belonged to that form as shown by the key. An individual that can do that quickly, who can learn quickly, soon masters the key so that after the first line or two on the page he doesn't have to refer to it. A person that does not learn quickly has to look at the key on the form; so his facility in completing that test, it is possible to determine the rate which he was able to learn that type of performance. So I found his ability in that respect and knowing what the children of different ages can do in that test, I could give his mental age on that kind of performance. Then I gave him a standard form of test known as the completion. There are a number of sentences expressing certain ideas and certain of the words are missing and in their places are blanks. An individual is required to write in each blank the words that are missing so that the whole thing will have sense. Such a test requires the ability to think and get meaning and understanding the meaning of a sentence as a whole so as to put in the ideas that are missing. That test is standardized so that I know what children could do from six years to a college freshman and I allowed him to work at that test as fully as he could and determined his mental age in that respect. Then there were three different types of performance tests which were to test his ability to handle things that were not verbal—materials.

Harry L. Hollingsworth, direct.

By Mr. Bernhard.

Q You call that a mental test? A Yes, a mental test. It is a form of board from which pieces have been taken and which had to be replaced in the places where they went; others where the profile of a man was made and certain pieces cut out and the test consisted in replacing these pieces so as to make up the whole. The others were simpler tests. They were each simply standardized tests, the normal age being known in all those three cases. I measured his memory by remembering numbers, first by repeating after me, which is an automatic kind of test. Then I also tested him to see what his ability was to do it backwards, which is a different kind of test, because he had not only to remember them and manipulate them, and I had him do that so that I could compare his performance with children of different ages. I let him read a paragraph of standardized material and after having read it told him to tell me all that he had read. He was able to read it in the satisfactory time and he was able to remember it, nine items of that account. The nine items mean the average which is remembered by a definite child of a known age. Then I tested his vocabulary, which is the other form of test, by giving him a standardized series of words. There are a hundred words in this list, and it is known how many of those hundred words that can be explained by the average six or seven or eight years old on up to the average adult. I gave him these words, beginning with easy ones, and had him simply explain to me the meaning of the words, the degree to which he could understand the meaning of these different terms, and by that method I was able to find how many words in the list he understood the meaning of and could express that meaning to me; I could then tell how old he was in that respect mentally. That I think completes the list of ten performance tests. Then I began with the standard revision of the Binet test and this is a series of a great many questions—

By Mr. Bernhard.

Q Binet is the man that invented the test. A Binet's name has been definitely identified with the test, but not in this form. This is a still more accurate form than that which was available in Binet's time. At six years of age there are a certain number

of things which the average six-year-old child knows or can do, that is found by preliminary investigation. Then at seven years there is another group of things, six to ten things which the seven-year-old is competent to do and understands and so on for eight and nine, ten and eleven, to a superior adult.

By the Court.

Q What age? A The age of eighteen.

Q There is not any test above the age of eighteen in the Binet-Simon test? A No, sir.

By Mr. Unger.

Q Go on. A The questions I am unable to remember since they occupy twelve pages of printed pamphlet, they are so numerous. I began with the six-year-old level and gave him all those different tests and questions and problems for the six year, and knowing whether he passed or failed to give the standard response. When I got up to seven and to eight and to nine and to ten and eleven, twelve and thirteen, which are in one series, and to fourteen, then to the sixteen-year level. It is not clear in my mind whether I should give my results at this time or merely describe what I did. I noted then whether or not he failed at each level, the degree of his success. It is possible then to determine what his mental age is by finding that point below which he can do all of the tests, and then if he succeeds in doing anything above that point and ages higher than that point, giving him credit for everything he is able to do and by that amount of credit to the point he can do everything. In those various ways, then, I determined his mental age. The performance tests were from the point of view of the special function and the Binet test is from the point of view of his intelligence.

Q Anything further? A I think that is a complete account.

Q As the result of your examination of the defendant what is the condition of his mind?

Mr. Bernhard. I object to that form of question. The professor has not yet said that he knows the condition of his mind.

The Court. Objection sustained.

Harry L. Hollingsworth, cross.

Q Well, now, as the result of your examination do you know the condition of his mind?

Mr. Bernhard. I object to that. It does not bring in the question that is involved in this case as to the mentality of the defendant and as to his ability to recognize the difference between right and wrong.

The Court. Why isn't that so?

Mr. Unger. Now that the doctor stated just what he did to the defendant I think that he is able, in his own opinion, to give us the result.

The Court. You are asking him if he knows the condition of the defendant's mind. The condition of his mind is not the topic that is being investigated; the condition of his mind as to a particular thing, that is the issue, isn't it? I think you had better narrow that question.

Q What, in your opinion, is his mental age? A His mental age is that of a child—

Mr. Bernhard. I desire to cross examine before the question is put.

The Court. You may cross examine.

Cross examination by Mr. Bernhard.

Q After the mental age of a subject has been determined do you, as a psychologist, say that having determined the mental age, you then can give an opinion as to whether or not that man recognizes the difference between right and wrong? A In the sense that I have said, yes.

Q I didn't ask you that. Is there any difference between right and wrong? A There is.

Q And there also can only be a difference between right and wrong, a distinction between right and wrong—there can be interweaving of one with the other? A Oh, yes, many degrees of difference.

Q Do you know the eighth commandment, "Thou shalt not kill?" A Yes, sir, I know that.

Q There can be no doubt about the right or wrong of killing? A There can.

Q How? A Depending on the circumstances and the degree of responsibility, the motive.

Q What do you mean? A I mean that all of us have been engaged in killing in recent years.

Q I am not talking about a section at the present time. According to the law of the state, do you think there can be any right or wrong in killing?

Mr. Simandl. I object. It has not been shown that the doctor knows the laws of the state.

The Court. Objection sustained.

At this point the Court took a recess of ten minutes.

Q How do you know that he did not answer your questions as quickly as he could? A There are various ways of knowing. That is, of course, the crucial point in the whole theory and method of measurements. If he didn't he would then be malingering.

Q How do you know that he is not malingering? A I was about to explain that it would require a perfect knowledge on his part of the expected ability in all of those cases in order for him to give false responses which would not be identified as such at once. The nature of the response which is feigned and does not represent the man's true ability can be recognized by the inequality of that amount of sham that shows itself from one test to another, so that if a number of tests are given lasting over such a long period it is perfectly possible for one who is experienced in the use of these tests to detect the presence on the part of the examinee, the performance which is voluntarily disguised.

Q How do you know that in a series of numbers, 1, 2, 3, 4, and so forth, that he did not purposely hesitate in making his answer? A If he had done that it would mean a general attitude on his part which would have shown itself all the way through, through different degrees, he would be able to make a degree which would be one year difference in that test, which he has no way of knowing the difference, and another test, there is no way of gauging the same degree.

Q The basis of all the tests is the adaptness of the answers, is it not? A He doesn't know whether or not the answer is similar to that which would be given by an individual of a certain age.

Harry L. Hollingsworth, cross.

Q Certainly it is, and therefore if he was backward purposely in answering that would lower the standard, wouldn't it, his standard? A It would, yes, sir.

Q How do you know that he didn't have that in mind? A Because from the nature of his performance I know that he is a natural naive, co-operative type of result. He has none of those characteristics which come from an individual who is at the moment insane or malingering or disguising his responses. There are definite ways of identifying that kind of response.

Q Any backwardness in making the replies would indicate a lower standard than if the person answered quickly and voluntarily, would it not? A Only in those tests which involved speedy action.

Q Do they not all involve speedy reactions? A By no means.

Q Which one does not? A A great many of them do not.

Q Filling in the words is one of them? A He had half an hour in which he might do that, and the individual who after having worked fifteen minutes has still fifteen minutes in which to go—in fact, it is almost always true that if they can't get any further than that in fifteen minutes he won't do any better the next fifteen minutes. Although it is not a time test, nevertheless he is allowed half an hour. It depends on his ability to understand meanings, to make comparisons of ideas and he has all the time he needs for his responses.

Q And consequently, if he hadn't sufficient learning to know the words with which to fill in those sentences that lowered his standard, did it not? A If he had not sufficient learning, that would have lowered his standard.

Q How can you say that has any relation to knowing the difference between right and wrong? A Because our understanding of all such ideas of right and wrong, propriety and impropriety, and justice and injustice depends on us possessing that degree of intelligence that allows us to know the meaning and relation involved in those concepts. It is not enough that one learns what name is given to a certain thing. It is entirely possible that a person may know that this is a thing which is called a wrong thing; he may know that as a wrong thing, but he has no understanding of the nature of its wrongness. It is simply learning to think of a certain word in connection with it.

Q Did you ask him his occupation? A I didn't.

Q Why not? A Because that has nothing to do with his degree of intelligence.

Q If you had learned that he was a teamster would that have anything to do with his intelligence, how long it took to hook up a team? A No, sir, it wouldn't.

Q Wouldn't it have made some difference if he had answered quickly? A Not a scintilla of difference.

Q Wouldn't it have made some difference as to the operation of his mind? A Not a difference which could be expressed accurately and scientifically.

Q It would have made some difference, would it not? A certainly.

Q Why didn't you ask him? A Because that has no standard, scientific value, and I was conducting a standard, scientific examination of his mentality. I was measuring his mind, and measurement can only go by the use of standard tools and implements.

Q Did you inquire as to what sports he was interested in? A I didn't.

Q Why not? A Because that has no standard and has no bearing at all.

Q Doesn't that indicate in some degree the facility with which a man may answer questions concerning things in which he is interested? A I think not.

Q It doesn't? A No, sir.

Q If you asked him the names of the players of the Cincinnati ball players, wouldn't you think that had something to do with the condition of his mind if he had been able to tell them? A I wouldn't have been able to say whether he was right or not.

Q If he had been right? A No, sir.

Q Why not? A Because it has no bearing on his intelligence above a very low level. A three-year-old child—

Q What you mean is in the subject which you examined him you gauged by those subjects that that is the standard of his intelligence; that is what you mean, don't you? A I didn't examine him in subjects; I examined him on his ability to solve things which did not turn on his previous learning, and which guides us as to the difference between person and person.

Q It did not involve his previous learning? A It involved his previous learning to the smallest possible extent. I should qualify it to that extent.

Harry L. Hollingsworth, cross.

Q Do you want to change that answer? A If you don't mind, I will let the first answer stand.

Q So you did include it in subjects which involved his previous learning? A Yes, sir.

Q Of course you did; and simply because he hadn't had the advantage of a college education along the lines on the subject which you examined him, you put him down at a lower figure or a standard than one who had those qualifications? A I did not.

Q If he didn't know the words with which to fill in these sentences because he didn't have the advantage of education, did that have an effect? A The words that I gave him are known by the average six or eight or seven-year-old child who has not had a college education.

Q A school education? A A school education; yes, sir.

Q And if he hadn't had it he couldn't come up to the standard? A In that particular test.

Q What has that got to do with his knowing the difference between right and wrong? A Because all of these measures taken together, and, in fact, even his ability to learn as a result of school training, is a function of his intelligence, and if I could in some way discover, by using all of these various tests, not relying on any one, using those which he could profit by his education, and using those which had no reference to his being in school or not, in that way forming a notion of his general intelligence, I have a way of knowing the degree to which he can understand abstract ideas, relations, high situations and duties and responsibilities, because that is a function of his degree of understanding.

Q Then your system was directed at his intellectuality and not at his morality? A Certainly.

By the Court.

Q Have you ever tested a large number of normal, ordinary persons from six to eighteen years of age? A Yes, sir, I have.

Q How many? A I do that as a part of my regular work for the last ten years. I suppose I have examined—

Q I asked you how many? A It is very difficult to say how many. Certainly not less than a thousand.

Q A thousand of each age? A A thousand all together.

Harry L. Hollingsworth, cross.

Q This Stanford revision of the Binet-Simon test has been how long in vogue? A Well, it began shortly after 1911, and in the present form, the form in which it is used, it has been in vogue for something like six years. That is the present revision I am speaking of.

Q Prior to that time the test was solely based on the Binet-Simon test? A Of that type of test, yes, sir, was based on the Binet-Simon test, but the performance test was in existence even before the Binet-Simon test.

Q They were recognized, were they, by psychologists? A By some of them.

Q By some psychologists, or some tests are recognized by all of them? A Some tests are recognized by all of them, but my test goes back as far as 1890. Gradually new tests have been added and some of those I used have been devised within the last five or ten years.

Q There is no satisfactory test that you know of by which to standardize the knowledge of a person, 19, 20 or 21 years of age, is there? A Yes, sir; there are many such tests, but that knowledge cannot be measured by the method of mental age, because intelligence does not increase with the advances of age beyond the age of sixteen years.

Q Answer that yes or no. I do not understand your answer. Is there any standardized examination to ascertain whether a person is nineteen years old? A No, sir.

Q And there is not any standardized examination to ascertain if they are five years of age, is there? A Yes, sir.

Q Four? A Yes, sir.

Q Three? A Yes, sir.

Q Two? A No, sir.

Q So that from three to eighteen years, inclusive, there is this standardized examination? A Yes, sir.

Q What I want to know is how many normal, ordinary persons have you examined of the ages of three to eighteen, inclusive, for the same kind of test that you applied to Schilling? A I haven't examined any below the ages of five and six. Between the ages of five and six and the ages of eighteen I have examined, as nearly as I can say, about a thousand people, all of the ages together. How they are distributed among the different ages, I wouldn't be able to state, but they have covered the whole range from five and six up.

Harry L. Hollingsworth, cross.

Q You don't take into account the education or occupation, environment, morality or the teaching of an individual in standardizing it? A In getting the original standard, you mean?

Q Yes. A No, sir.

Q You do not consider any of those things as a factor? A No, sir, because the attempt is to get the performance of the average individual for a given age.

Q You contend that a boy of ten years of age, with every advantage of wealth and education, health, surroundings and so forth, that he could obtain, is to be measured by the same standard as a boy of ten who has never been near a school, never had a father and mother to help him and never had any teaching at all? A In some tests, yes.

Q I am talking about these tests that you say you applied. A Yes, sir, but I applied many tests and some of them would be equally applicable to those boys.

Q You said that you examined Schilling by three separate kinds of examination which are recognized as standard to ascertain a certain mental age. That is so, isn't it? A Two types.

Q In connection with that you don't consider as a factor his education or environment, his discipline or whether or not he has had any training or any other thing except that examination, do you? A That is all.

By Mr. Bernhard.

Q Assuming that a subject had made an intelligent, consecutive statement concerning words that were not required in any of your tests, would that be a factor in the determination of the standard of his intelligence? A No, sir.

Q Why not? A Because there is no standard way of evoluting such a response.

Q You don't mean to say that if a normal man reads what appears to him to be an intelligent statement, that fact is not a criterion of the mentality of the man who wrote the statement? A Only in a very rough way. It would be far from satisfactory to a psychologist.

Q I suppose when Darwin enunciated his principles and you read his book you couldn't draw any conclusion as to the strength of Darwin's mentality under your last answer? A Only very roughly.

Q Then judging by his book alone it is practically no criterion of the standard of Darwin's mentality, is it—you mean to say that? A I mean to say simply that it is only a very rough indication.

Q An indication of rough mentality? A I wouldn't be able to say, for instance, whether his mentality was greater than anybody's else.

Q Haven't you read Darwin? A I have read all of Darwin but I wouldn't be able to say that his mentality was more or less than anybody's else, I am sorry to say—

Q Do you mean to say that if you were put in a position where you had to give an opinion on Darwin's mentality on his book alone, that you wouldn't be able to give his mentality? A I could give my opinion.

Q That is all you are giving now. A I am giving quantitative measurement now.

Q And the opinion would be based on what you had read? A On Darwin?

Q Yes. A If I should render such an opinion.

Q Would you hesitate to render such an opinion? A If it was understood that it was a vague, general opinion.

Q Having read his book it would be a vague, general opinion? A It would have to be.

Q On what theory? A Why, on the basis of fact, that I don't know anything about it. For example, I don't know if he wrote his book; he might have had a very competent secretary who stated his thoughts.

Q I said, assuming he wrote his own book. A It would still be a very rough test.

Q Then if you read a statement made by Schilling on the day after the State alleges that he committed this crime you wouldn't be able to form any opinion on that as to the standard of the mentality of the man who dictated that statement, would you? A Only a very rough one.

Q I don't quite understand the use of the word "rough?" A I mean to distinguish between the measure, such as I could form an opinion of the length of that table, but it would be a very rough one. I know it is longer than some other things, but I couldn't give you the measure of that table in any accurate sense.

Q That is the condition of any normal man's mind, isn't that so? A I don't understand.

Harry L. Hollingsworth, cross.

Q You said you could estimate roughly the size of this table? A Without a measuring instrument that is all I could do.

Q That is all that any man with a normal mind could do? A No, he could use the yardstick.

Q Of course he could. Looking at it from the position you are, your answer is yes, isn't it? A Yes.

Q Then it is a standard, isn't it? A No, sir, it's an opinion.

Q Suppose you read then from this statement and give us your opinion as to whether or not you think it is the statement of a normal mind?

Mr. Unger. I object. Does the prosecutor intend to prove that this statement was made by a normal mind on this cross examination?

The Court. I do not understand your ground. Do you object on the ground that the witness is incompetent to answer? It is presumed at this time that the statement was made by a normal mind. Now, this man says he is a psychologist and he says that by taking certain standards which other people have gotten up—he does not claim to have gotten them up, and which have been applied to persons of the ages from six to eighteen years—he finds that they have a normal intelligence, an average intelligence, and by applying those same standards to a person older or younger he can discover whether or not that person has the intelligence of any person within the range of three to eighteen years, and he says that he excludes all other things, age, occupation and environment, moral teaching, training, all the other things which apparently go to make up life he excludes. Now, he swears to that. Why can he not be cross examined and asked whether or not, nowithstanding his tests, if a man can make that statement, hasn't he got a certain amount of ability.

Mr. Unger. Not with the use of a confession which is in evidence and which your Honor has admitted. The defendant is presumed to have made it under a certain set of circumstances. This man has not been informed as to what the circumstances were or anything else. I do not think he is presumed to be a normal man.

(Question read.)

Harry L. Hollingsworth, cross.

The Court. The objection is that there is no hypothetical question there to show that it was made voluntarily.

Mr. Simandl. Voluntarily, and the set of circumstances it was made under. The prosecutor can't merely take a confession which is in evidence, made under a certain set of circumstances, and expect this man to say whether it is made by a normal mind or not. All the hypothetical points should be brought out surrounding it.

The Court. He can embrace that, assuming that it was made voluntarily.

Q Assuming that the statement was made voluntarily, prefix my question with those words, what do you say?

Mr. Simandl. I object to that. Voluntarily is a conclusion of law which the Court finds from a certain set of facts which should be placed in evidence.

Mr. Bernhard. The evidence in this case is that Mr. Godfrey asked this man to tell the State the story. If that is not voluntary I don't know what is.

The Court. Assuming that it was voluntary, is it the product of a normal mind. That is the question. Objection overruled.

Defendant's counsel pray an exception to this ruling of the Court and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Bernhard. I am showing the witness Exhibit S. 23.

Mr. Simandl. May I ask to have the question repeated again.

Q The question is this, assuming that Exhibit S. 23 was the voluntary statement of the defendant, is it the product of a normal mind? A On the basis of that document alone I would be able to infer only that it was not made by an individual of exceedingly low mentality.

Q It was not made by an individual— A Of exceedingly low mentality.

Q That is a negative way of saying it was made by a person of normal mentality? A Far from it. I didn't mean that.

Q Can you answer it affirmatively and not negatively? A Yes, I could do that. I should infer from such a document that it was made by a person whose mental age was seven or eight years, at least.

Q And will you point out why? A Because it involves the use of that degree of language and that consecutive description and observation of events which I should not expect from my general experience with children younger than that to find.

Q What criticism do you have to offer along the basis that you have just mentioned, that these words, "I left New York on July 16, 1919, between half-past eleven A. M. and a quarter to twelve for Newark, accompanied by James Jaglin??' A What criticism?

Q Yes. A I shouldn't expect such language from a very low grade individual.

The Court. Why don't you say what you think it is instead of what you do not think it is.

Witness. Why, I should be unable to say in a very definite way.

Q Why? A I have no way of comparing with any standardized performance. It is not a standard test. I can only say that that individual had—

Q What degree of intelligence is indicated by the words "I left New York July 16, 1918, between half-past eleven and a quarter to twelve accompanied by James Jaglin." What low degree of intelligence is indicated there?

Mr. Simandl. Objected to. Why should the prosecutor pick one statement from the paper and call upon the professor to answer on that?

(Question withdrawn.)

Q Point out any statement, consecutive or otherwise, upon which you base your opinion that it is made not by a person of low intelligence? A Well, the occurrence, for instance, of the word "whom," to me that is a person who appreciates such things—

Q It is a pronoun that has been in the English language ever since the Saxons came over. A Those are distinctions which are not picked up by very, very inferior men.

Q Certainly not, by persons of inferior mind. A Exceedingly inferior minds.

Q Consequently, to the contrary, it must be through a person of fair and normal mind? A Far from being so.

Q Won't you tell us what you mean? A I am unable to be more specific if only this document is offered in evidence.

Q Why do you think, if you are unable to so testify, that it is made by a person not of a low order of intelligence? A I simply give that as a general inference which I was requested to give, whether I could tell anything about that man's mentality. I could make that very general inference that this was at least a person who was able to talk.

Q What determines a man's mentality? A There are a great many things.

Q The standard set by grammatical expression is one of them, is it not? A No, sir.

Q Then grammatical expression has nothing to do with a system that psychologists such as you use, it is not a way of determining the mentality of a human being? A Grammatical expression, not by itself, no.

Q Then it doesn't make the slightest bit of difference how proficient a person may be in the use of the English language, rigidly adhering to grammatical rules and customs, in determining the order of his mentality; is that right? A Only roughly; it makes a difference which you could only judge in a rough way.

Q Do you mean to say then that psychology does not recognize in the standard of intelligence the operation of a man's mind which follows rigidly the well-recognized and well-defined rules of grammar; is that what you mean? A I couldn't say, simply taking that as a product, is no satisfactory measure.

Q Then take another instance of a person whose mind is well-schooled in arithmetic or algebra upon the same basis that you said, then that fact would not indicate the order of his mentality? A The whole thing depends on whether standard—

Q Is my question clear? A No, sir.

(Question read.)

Q Would it? A The question as stated seems to me has no meaning. I am unable to answer it.

Harry L. Hollingsworth, cross.

Q Assuming, then, that a crime had been committed and the person who is charged with the commission of the crime threw away the shells and ran away from the scene, would that fact indicate to you that he had done it to avoid apprehension? A I would be unable to pass judgment on it.

Q Isn't that a standard set by normal human experience? A No, sir.

Q What would you expect a man who had perpetrated a crime to do—stand by and be caught?

Mr. Simandl. I object. It calls for something that the professor can't answer.

The Court. That is the trouble. He says that all minds work the same under all tests. That is the trouble with the whole proposition.

Mr. Simandl. The prosecutor doesn't describe the man; he doesn't show any degree of mentality in the man at all. He might have been an insane man that did it. Would the prosecutor expect that to be a normal man?

The Court. You brought this man here to swear that he has a science known as psychology, and by that science, through the application of certain tests, he can systematize and classify standards of human minds if they fall between three and eighteen years of age. The prosecutor is trying to ascertain whether that is so, whether it is a broad field that covers all the possible factors or whether it is a narrow field that abrogates to itself a particular knowledge excluding all human intelligence. If you want to know if it is raining outdoors you look out of the window. The prosecutor is trying to prove that in order to ascertain whether or not, by a certain science, that it is raining outdoors, that factor is left out.

Mr. Simandl. When you ask a man whether or not a man threw some shells away that had committed a crime is evidence of knowledge of whether or not he knew it was wrong or right, I say at this time that the question is too broad. It cannot be answered.

The Court. Your objection is not well founded.

Harry L. Hollingsworth, re-direct.

Defendant's counsel pray an exception to this ruling of the Court and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q What would you say, according to the standard that you have set, of the quality of a man's mind who saw a police officer approaching, for whom the man knew the officer had a warrant, and he ran away, would that indicate anything as to the quality or abnormality of the man's mind? A No, sir.

Q Why not? A Because it is an isolated part of a much more complex series of events.

Q Do you mean to say that that would not indicate to the normal mind of the person that he saw the policeman approach and he attempted to escape? A I mean to say what it would mean to my mind.

Q Wouldn't it mean it to your mind? A Not necessarily; I wouldn't be able to interpret it.

Q You understand my question? A I think so.

Q And it would not mean anything to your mind? A Nothing definite.

Re-direct examination by Mr. Unger.

Q You told the Court, taking two boys, one is not educated and the other is, and by applying the standard test, didn't make any difference as to one boy's education and the other's non-education, or one boy's environment and the other not such a good environment. Now tell us the reason for that? A The reason for that is that intelligence is a thing which is not materially changed by environment or by education. Intelligence is something which is a thoroughly fixed constitutional characteristic of an individual. It is a thing that can acquire certain employment. It can be trained to use the German language or English language and it can get along without a language and talk through gestures. It can be trained to use one set of tools or another set of tools, to speak with or without an accent, but it is a more or less fixed constitutional characteristic of a person. Intelligence is something which is not materially changed by these external factors and it is possible to take types of performance; many of those which I used are such types which

involved only the man's experience to observe what is going on around him, to understand simple directions and to carry them out. It could be done very well in a man whose language I didn't understand at all, a man who had not acquired the language, a man whose language I had not acquired. The ability shown is that constitutional characteristic which men enjoy, and it has been shown this was a peculiar characteristic, that when a person is examined at six he is also found to have a certain amount of maturity. When he becomes older it is a thoroughly fixed and thoroughly unchangeable characteristic of that person.

Q Is it necessary that a person should have a certain amount of education in order to follow you with these blocks that you have tried to demonstrate previously. A In that case, no. In the case of some of the tests yes.

Q Are these blocks included in one of the standardized tests such as you related to the Court? A Yes, and many other tests of the same character which do not depend on education and the use of language.

Q From your examination of this defendant can you tell his approximate mental age? A I can.

Q Please state it.

Objected to.

Objection sustained.

By the Court.

Q How do you know that these thousand children that you examined were normal? A Chiefly because my examination agrees with the examinations in other parts of the world, persons who were also examined in large numbers, such a variety of places that the evidence is overwhelming.

Q You knew they were normal because they came up to your standard, not because your standards fitted them? A The standards previously gotten were by way of examining this large number of people.

Q You never tested these standards; what you were testing was the child; isn't that so? A I have done both.

Q You have never tried deliberately to ascertain whether or not your standards are right? A Yes, sir; we have.

Q Have you taken normal persons of six to eighteen years of age and applied these standards to see if this child could

perform the things that are required in the examination? A Yes, sir; I have taken a great many children at random and tried to compare their performance in these tests with their ability in other respects, their ability of living and keeping out of institutions for the feeble-minded and do these other things which we have characterized as being evidence of the higher degrees of intelligence.

Q How many children between six and eighteen have you examined all together, children and persons? A I would say about a thousand people.

Q A thousand of them were normal, you said. I am asking you all together, including every person between six and eighteen years of age, that is, inclusive of those ages? A Eighteen years of mental age or actual physical age?

Q I want to know how many persons between six and eighteen of physical age have you examined regardless of what the result was? A I can't tell precisely.

Q It would be a thousand, wouldn't it? A There wouldn't be a thousand.

Q How many would there be? A I think I have examined a thousand persons in the region that we call normal and outside of that I should think I have examined several hundred that were not within that range.

Q How many persons outside of Schilling have you examined to ascertain their mental age? A Probably between two thousand and twenty-five hundred.

Q And between six to eighteen inclusive how many have you examined? A Something like between a thousand and fourteen hundred, fifteen hundred. My work has been largely with grown people who are physically over eighteen, but mentally less. Most of my work has been with adults whose intelligence is low rather than children in school.

Q I am trying to ascertain from you the accuracy of these tests. You said that you examined a thousand persons from six to eighteen and you find they are normal and if you think the persons are normal you think the standards are normal for that reason. You didn't know that these persons were normal aside from an examination? A Only in a rough way, their ability to get along in the world, to do those things which we ordinarily call intelligent things. My confidence in the validity of the tests

has not been based on my own use of them, but based on results of agreement in various parts of the world.

Q That is hearsay; that you do not know? A That is printed reports.

Q You have never been around the world to see it applied? A No, sir.

Q Then there are fourteen hundred persons between six and eighteen years of age inclusive who were shown to be normal; isn't that so? A No, sir; I said that I examined about a thousand people between those limits who would come within the normal range, and in addition to that several hundred which I would call abnormal.

Q You have examined over twenty-five hundred other persons over eighteen years of age? A That is the total.

Q All together? A Yes.

Q You never examined more than twenty-five hundred? A I think not.

Q When did you begin to apply these tests? A About ten years or twelve years ago.

Q You are a graduate of Columbia? A I am a graduate of the Psychology School of Columbia. My degree was taken from the University of Nebraska.

Q When? A In April, 1906.

Q What did you graduate from? A Psychology at Columbia.

Q How long? A I was actually in residence two and a half years beyond my graduate degree.

Q How long did you study psychology in the graduate school of Columbia University? A Two and a half years.

By Mr. Unger.

Q Have you the degree of Doctor of Philosophy? A I have.

Q Will you tell us what you mean by the quality of a wrong?

Mr. Bernhard. I object because it does not appear that the doctor is any better qualified to know the quality of wrong than any other person in this room.

Mr. Unger. I would refer the Court to Laws on Expert Evidence of Physicians and Surgeons, page 136, the 4th paragraph.

The Court. What has that to do with your question? Why should this witness tell us what his idea is about the

quality of an act when the law fixes definitely the standard of the quality of the act?

Mr. Unger. The professor is qualified in his particular line, which is psychology, and from his standpoint of view I think that it would do no harm if the Court and jury is enlightened by his opinion on that.

The Court. The law fixes a certain, definite standard. It says that a person is presumed to have a certain degree of mental capacity, that if he commits an act which would ordinarily be a criminal act and desires to be justified or exonorated he must show circumstances which tend to prove that he didn't understand the nature and the quality of the act and that it was wrong. That is your purpose, as I understand it.

Mr. Unger. That is our defense and we are trying to show it.

Q Now, from your examination of the defendant, can you state whether or not he knew the quality of wrong?

Mr. Bernhard. Objected to.

The Court. Objection sustained. Ask him a hypothetical question including the facts in this case as you understand them.

Mr. Simandl. I ask for an exception on the ground that I believe under the statute of 1919 this jury is entitled to have every single bit of evidence, all of the evidence which would go to show the weakness of the mind which would go to alleviate this crime, which would go to mitigate this crime in any way whatsoever, and if this man didn't know that the act was wrong it seems to me that the jury should know it, and I think on that ground that all the evidence should be brought before the jury so that they can make a recommendation if they so desire, as a matter of fact.

The Court. The law, as I understand it, under the former statute, a defendant who was found guilty of murder in the first degree, wilful, premeditated and deliberate murder, or one committed by means of lying in wait or any of the other murders referred to in the statute, suffered the death penalty and neither the Court nor the

jury had any discretion. Then a statute was passed which stated that if the jury brought in a verdict of murder in the first degree that the death penalty should follow, but that if they brought in a verdict of murder in the first degree with a recommendation of life imprisonment then life imprisonment should follow, and in the case of *State* against *Martin,* tried here in this court, this Court stated to the jury in a way the facts as it understood them, so that the jury might draw the inference that they were restricted in their judgment, and the Court said no, that a jury could under any circumstances bring in a recommendation for life imprisonment on any theory they wanted to; but since that case, the act of April 12, 1919, has gone into effect, which provides that the jury shall by their verdict and as a part thereof, upon and after consideration of all the evidence, conclude whether or not they will render a verdict with or without life imprisonment. Is it your contention that that language, in view of the history of the cases, means that anything can be put before the jury?

Mr. Simandl. No, as I understand the case of *State* vs. *Martin,* the point was raised in that case that the jury could not refer to the evidence in making their recommendation; that they were not bound by the evidence; that it was entirely discretionary with them whether or not they were going to take all the facts in evidence, but as I understand the statute as it now stands, I believe the jury are in a position where they are to give a certain determination of facts based on all circumstances, and surely all the grewsome circumstances which are against the defendant can be counteracted by any circumstances which may mitigate the crime, and certainly, if we can show that this man had not enough mentality to know the quality of his act, it seems to me the jury should know that so that they in their deliberation, can find out whether or not they are going to bring in that certain fact.

The Court. Your contention is that the matter which you desire to go into may not be competent or relevant upon the strict issue as to the legal guilt of this defendant, but that it is a proper matter to be introduced before the jury on the question of what penalty should be imposed.

Harry L. Hollingsworth, re-direct.

Mr. Simandl. Exactly.

The Court. To make the situation a little bit clearer, suppose you offer to prove to the jury that a defendant had ten dependent children, would that be competent?

Mr. Simandl. No.

The Court. Why not? It is in their discretion to impose the death penalty or life imprisonment.

Mr. Simandl. As I understand the statute in this case, murder in the first degree must contain certain elements, and if any one of those elements can be proven to be missing, it seems to me that that mitigates the circumstances.

The Court. It seems to me that this last statute was passed to cover that one thing. I think the objection should be sustained.

Defendant's counsel pray an exception to this ruling of the Court and the same is allowed and is signed and sealed accordingly.

WM. P. MARTIN,
Judge

Harry L. Hollingsworth, re-direct.

Q Assuming that about August, 1890, there was a boy born, who was named Philip Schilling; he was normal until about the age of nine months, when he fell from a wash tub, striking his head upon a stone floor; that he was picked up by his mother looking like dead; that he was injured and that the wound on his head was dressed with cold applications and a bread poultice was applied to stop the bleeding; and that immediately thereafter his condition changed; assuming that he didn't nurse properly for days; that he became restless, cried incessantly, and his sleep was poor; that he became a very difficult baby to manage; assuming that about the age of five he was sent to school; that he didn't learn well; that he quarrelled with his teacher, with his friends, upon the least provocation, and gave vent to outbursts of temper; that about the age of six he fell injuring himself in this fall—

The Court. Where and how?

Mr. Unger. By falling from a pigeon coop—

The Court. Where?

Mr. Unger. Upon his head.

The Court. Striking his head.

Mr. Unger. Yes, sir. That, still being young, he remained away from his home at nights; that he would be found sleeping in wagons and outhouses, associated with low companions; and further assuming that as a young boy he would disappear from his home for days; that he stole money from his parents, from his neighbors; that his parents subsequently placed him in the City Home, Newark City Home, situated at Verona, New Jersey, for incorrigibility, where for the time being he was under good influence, which was a six months' period, altogether about a year; that subsequent to the leaving of this institution reverted to his former habits, and so on. Now, assuming that on the evening of July 16th of this year this defendant was sitting on a certain stoop on Norfolk

street in this city about 6:30 o'clock; that he saw approaching him an individual whom he knew to be Detective Ryan, the deceased; that he ran away from the direction in which the said Detective Ryan was approaching into a neighboring yard; and assuming that said Ryan caught the defendant and pulled him from the fence and grabbed him by the collar with one hand and by the wrist with the other; and assuming that there was a scuffle between the defendant and the said deceased; and assuming that the defendant made several efforts to break away from said deceased and appeared to be wild; during the scuffle defendant was seen to take from his pocket a revolver, and immediately thereafter shot the deceased; that he then ran away; and assuming that about one-half hour later he entered a store and purchased a cap after making a selection from several caps which were shown him; and assuming that when he purchased this cap he was calm and collected; and assuming that shortly after he went to the house of an associate within a few minutes' walk from the scene of the shooting; and assuming that about midnight he left the house and leisurely walked down this street; and assuming that he was armed with a loaded revolver and yielded to arrest without any resistance; and assuming that he was taken to police headquarters showing no evidence of excitement; and assuming that shortly thereafter he made a statement to a police surgeon concerning the shooting; and that shortly thereafter he made a confession to the police authorities; and assuming that during the examination by the police surgeon and the questioning of the police officials he remained calm and quiescent and readily answered all questions put to him concerning his conduct on the day of the shooting and the happenings during the shooting and immediately thereafter; assuming that he has continued from that day until the present time in a state of calm and quiescence; and assuming that the defendant has never shown any remorse for the crime; and assuming that about seven years ago he consulted an alienist as to his mental condition. Assuming that all the acts recited in this question to have been established by the evidence to be true, in conjunction with the examination made by you

of the defendant, Philip Schilling, and from your experience and your knowledge, in your opinion was Philip Schilling, at the time of the shooting of the deceased in such a mental condition as to know the quality of the act he was doing, or that the act was wrong?

Mr. Bernhard. I object to it on the ground that it includes a number of facts which are not shown by the evidence and also that the witness is not qualified to answer.

The Court. Objection sustained.

Defendant's counsel pray an exception to this ruling of the Court and the same is allowed and is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Unger. I have been very careful to put in only the facts obtained on the State's case. If I have included anything that the State failed to bring out, of course, I want to withdraw them. It seems to me I am entitled to know from the State what they are.

The Court. There is no question about that. I think the State ought to pick out specifically the defects in the assumptions of fact. Are you going to ask about the nature and quality of the act or confine yourself to the quality of the act and to know that it was wrong?

Mr. Unger. If your Honor will permit, I will include the nature and quality.

The Court. How could you say that a baby of nine months was a normal baby and that his conduct changed? The assumption of fact is that the baby was perfectly normal up to nine months and then it had some accident or some injury and that its conduct changed.

Mr. Simandl. The mother testified to that. It is in evidence.

The Court. It is now the hour of adjournment. I will have the stenographer transcribe the hypothetical question and submit a copy to counsel so that counsel may agree on the facts.

Adjourned until tomorrow, Friday, October 24, 1919, at 9:45 o'clock A. M.

FIFTH DAY.

Friday, October 24, 1919.

STATE

vs.

PHILIP SCHILLING.

Continued pursuant to adjournment.
Present, counsel as before stated.

HARRY L. HOLLINGSWORTH resumed the stand in behalf of the defendant.

Re-direct examination (continued) by Mr. Unger.

Mr. Unger. Before I put this hypothetical question, we had an argument last night in reference to including the word "nature" in the question at the bottom, "nature and quality." I respectfully submit to your Honor that the professor would be unable to answer this question if the two words, "nature" and "quality" are in, because these men learned in psychology to differentiate between the two words, and when the two words appear it makes it a compound question and he cannot answer it with a single answer, and they differentiate in this manner: While this man we allege is a high grade imbecile, he can say the nature of a thing, he probably understands the nature of a thing, but he does not and is not able to understand the quality of a thing, and if I may be permitted to illustrate to your Honor: He might understand that I wore a coat and that the coat is made of cloth; that is, according to scientists, the nature of the article, but he cannot understand the quality of it, which would require a person of a normal mind, or, if you please, a person of some experience, to tell whether it is wool, cotton, or some other ingredient that might be woven into it; or, in other words, if I take a handkerchief in my hand, that is the nature of the article; he is able to say this is

a handkerchief, but he is unable to give the quality of that article by explaining in his own mind that it is silk, cotton or some other material.

The Court. Then he is able to say whether or not the act of shooting a person constitutes a killing, but he can't say whether it is right or wrong?

Mr. Unger. Exactly.

The Court. Then all that psychology does is to measure intelligence.

Mr. Unger. And mentality.

The Court. No, he strictly confines himself to intelligence. He will not go into brain functions. Education has no part in psychology, according to the witness. You cannot draw out anything in a person who is educated and explain it. It has nothing to do with the notion of morality or depravity.

Mr. Unger. The professor said yesterday, for instance, that it doesn't make any difference, when I gave him a question, about the two boys, one having a certain quantity of education, and the other boy not. He said that wouldn't matter in order to place his test to those two boys, because the method which he uses upon these two boys would not devolve upon the learning of each boy or the lack of learning, but it would devolve absolutely on the quantity of the brain and mentality that he possesses and the development of it. Your Honor will probably concede that a man, although he may not have the opportunity to go to school and develop his mind with learning, he might nevertheless have the same rate of mentality as the other fellow who had the opportunity to go to school and receive a splendid education because he merely acquired it by learning. That does not make him, though, a man whose brain would be more weighty. His mentality might not be higher than the other fellow.

The Court. I think this statute of 1919 provides that the jury may, in their discretion, upon the evidence, recommend life imprisonment. I do not think that that statute, properly construed, means to turn an ordinary homicide case into a discussion of a number of outside extrinsic matters which have some more or less logical bearing on

what penalty, if any, should be imposed. Therefore, I have held that the door is not opened by the statute to introduce any such evidence. The test of the law has always been that an insane person is not criminally responsible for his act. That there are various degrees of want of knowledge or want of sanity. Some person may think that he is somewhat stubborn and that may be an entirely harmless delusion and he may not expose it except to some of his particular friends, and while he may be sane upon every other subject, and the subject concerning which a controversy might arise and he might be guilty of killing a person; so the law therefore restricts to a very careful test the exact degree of incapacity which a person must possess in order to be exonerated from criminal responsibility, and that test is, as I understand it, that he must have been in such a condition that he could not and did not understand the nature and quality of the act and know that it was wrong, and therefore that is the test concerning which you should make your inquiry. What evidence is there before us that he ever found out that these standards are correct? He says he has used these methods of examination.

Mr. Unger. He tells us that they were used in the United States Army, that is, that men of low mentality were put in the ward and he was in charge of them. He stated that he examined a thousand normal persons ranging between six and eighteen, and then he examined another twenty-five hundred perhaps between eight and twelve, and that these two standards which he named were the recognized standards in science that were being used and the facts that I have cited to your Honor in the Supreme Court in New York.

By the Court.

Q Did you ever testify in a court on the subject of psychology? A Not in a civil court.

Q This is a criminal court. A I have testified in court-martials, as distinguished from a civil court.

Harry L. Hollingsworth, re-direct.

By Mr. Unger.

Q I want to ask the professor if he is familiar with Goddard, if your Honor will permit him to answer. Are you?

Mr. Unger. I might state first that this man is in charge of one of our institutions in the State of New Jersey, at Vineland, and that this man's work is standard and recognized as such and he is a psychologist and not a medical man.

The Court. Psychology is nothing new, as I understand it. Nobody ever claimed any such authority as to measure exactly the human intelligence. It is a new application of an old science, is it not?

Mr. Unger. It is an old science. It is being developed into something useful.

The Court. The witness has testified that he has examined twenty-five hundred people; he found a thousand of them normal running in age from six to eighteen, tells us he has found people normal within those ages, the fifteen hundred being over the age of eighteen. How can he say that these people were normal and that the standards were right? He said that the standards are right because everybody says so in his science, and applied to those people he has found some verification or confirmation.

Mr. Unger. The professor said he found them to be right.

The Court. He did not say that. He said he examined these people and found them normal according to his standard.

Q Now, will you kindly tell us the correctness and accuracy of this science used in determining a mentality, if you know? A The accuracy of these results is determined and the result is determined—if any science is determined—normally by the consistency of investigators, which is the only test of accuracy in any science. All over the world investigations of these tests applied to individuals of different ages have consistently shown that the tests as they are now constructed—

Mr. Bernhard. I object. That is the purest hearsay.

The Court. Objection sustained.

Harry L. Hollingsworth, re-direct.

Q Give anything within your own knowledge, not what other persons might have done or might have told you. Just what you have found out yourself? A I know of my own knowledge that these tests are accepted under the law of New York for commitment of feebleminded people —

Objected to.

The Court. He is not shown to be a person able to speak of the law of New York, and the law of New York is shown by the statutes best. Objection sustained.

Mr. Simandl. As I understand it, an expert is qualified to testify in a court of record as an expert if he has studied. Now, books are pure hearsay. Any doctor that the state or defense may call has got his knowledge from books or other hearsay, or, as the doctor says, from opinions of other scientists, and the medical profession is based only on those opinions of the other doctors who have found certain things to be so. I say this man is qualified to say what he has read and where he got the information from.

The Court. You are trying to prove that he is an expert.

Mr. Simandl. I want to bring out the fact that this man has read all these things, that he has learned them from other scientists.

The Court. Have you any evidence to offer on the preliminary question of fact that the court can determine whether or not this is something beyond the ordinary understanding of everybody, with respect to its admissibility? Do you want to offer any evidence on that question, Mr. Bernhard?

Mr. Bernhard. No, I prefer to stand on the objections that I have already made.

The Court. I do not think he has answered the question of what he knows about the accuracy of psychology.

Q How many men, during all your experience as a psychologist, have you examined for mental defectiveness?

Objected to.

The Court. He has got to show that he knows. You are talking about mental defectiveness. He talked defi-

nitely about a standard of intelligence and he said distinctly that intelligence has nothing to do with education and environment, moral teaching, or anything of that sort.

Mr. Unger. Your Honor can see that this man is a high expert.

The Court. You are trying to prove it.

Mr. Unger. He has given to this court his qualifications. He came here from New York, from this great university. Your Honor, in other words, must accept the institution that he is coming from. It is one of the greatest probably in America, and he comes and testifies. Now he is giving his own opinion. This man is entitled to some credit by this court and his testimony ought to go to the jury for whatever it is worth, and I think it is up to the jury to disregard it if they so desire.

The Court. You haven't shown anything here that Columbia University recognizes psychology as an accurate means of measuring the standard of intelligence without consideration of any other factor. The mere fact that a man is a graduate of Columbia University does not give him the right to speak. The fact is that he has got to know a particular thing that is not generally known. I may be a graduate of Columbia University. That does not give me the right to speak unless I speak on a matter concerning which I have knowledge and a science which is reliable.

Mr. Unger. Dr. Rosewater was on the stand yesterday and he practically said that it was a recognized science.

The Court. No, he did not. He said that the medical profession recognizes it as a help and that he in particular regarded it as necessary. That is a very distinct thing from saying that psychology is a recognized science as a standard of measurement of intelligence to base a fair estimate of criminal responsibility upon. You haven't shown that Columbia University says that. In the law school they did not say that.

Mr. Simandl. I still go back to the 1919 statute, and I want another ruling, on this one theory, if we have to adduce enough evidence here for an absolute acquittal, why should we rely on the 1919 statute for life impris-

onment? Why can't we come forward and produce enough evidence to show such circumstances which will cause the jury to say there was something to mitigate this crime. If we have to bring forth enough evidence to prove this man absolutely insane, why should we ask for life imprisonment? Clearly the statute does not mean that. We do not have to comply with the hard, fast rules of evidence respecting acquittals. I think this evidence is admissible on another ground, on the theory, first, that if the State beyond a reasonable doubt must prove that this was a wilful, deliberate and premeditated murder, surely the professor can testify that this man has the mentality of a child ten or eleven years old. Your Honor will agree with me under the case of the State *v.* Giles, 10 Law, that a person or a child between the ages of ten and eleven cannot be held responsible for his acts.

Mr. Bernhard. It doesn't say that.

Mr. Simandl. Evidence is admissible to determine whether he does or doesn't, and the presumption is that unless there is evidence that he is absolutely responsible, that a child between eleven and twelve years of age, or a man between eleven and twelve years of age, in mental capacity, is not presumed until the contrary is shown, and I think we have a right to give it to the jury on that theory.

The Court. There is not anything before me to rule upon. I cannot see how you have shown that the standards of psychology are accurate and reliable.

Q To what extent does Columbia University teach psychology? A To a very great extent. There are nine or ten individuals giving their lives and attention to psychology work. Many hundreds of students are studying the subject, although personally I do not think that what the institution does is a sufficient guarantee of the accuracy of the science. I rest my confidence in the accuracy of the tests with my experience with it and by comparing the results with other scientists who have also given their lives to work of that character.

Q How many professors and teachers have you in the Department of Psychology at Columbia? A There are two full professors. I am only associate professor. There are four assistant professors and one instructor for that department.

Harry L. Hollingsworth, re-direct.

Q Can you tell, if you know, how many students are taking the course?

The Court. What difference does that make? The question is what the science does and how he knows what it does.

Q What does it do, professor, if you know.

The Court. That he has found out it does.

Mr. Unger. Yes, and you may state in this question what you have found out it does.

A I have found out among other things that it is able to measure mental—

Q You are stating your conclusions. A I have examined twenty-five hundred individuals of different degrees of age, normality and competence and compared my measurements of the tests with my knowledge of their age and competence in other respects and I find that the tests agree with the age and competence of those individuals as determined in other ways of my own knowledge.

Q Is that all?

Objected to.

Mr. Unger. He is stating everything about it. He related the number of teachers and professors there.

The Court. It does not make any difference how many teachers and professors there are. The question of the accuracy, reliability, of the standard of the science.

Mr. Unger. May I not ask your Honor again whether the fact that the United States Government in its army for the past two years makes that a standard of qualification—

The Court. There is no such evidence. The only evidence is that the Government did it for six or eight or nine months. We all know that in the army a thing is taken up and practiced and if it is found good it is kept and if it is not it is cast aside. Now, this witness says that he knows the age of the people he examined by methods and sources of information, observation and judgment other than these standards. Then he applied

these standards to them and he found that they were correct. That is the last statement that he made.

Q Do you know whether this subject that you have related yesterday to the Court and jury is still being used by the United States Government?

Mr. Bernhard. I object to that as immaterial.

The Court. Objection sustained. It doesn't appear how he knows.

Q If it is in use, for what purpose, and how was it used? A It is used whenever soldiers were being recruited, when it was necessary to estimate their intelligence. Since soldiers are no longer being recruited I cannot say from my own knowledge that the method is being used. It was being used so long as soldiers were being recruited and drafted as a means of determining their mental maturity, and it was increasingly used because it was found to be accurate, useful and serviceable.

Q How do you know it was found accurate? A From my own experience with it, from my knowledge and the fact that I myself was appointed to carry on that work under instructions of the Surgeon'-General's office.

Mr. Bernhard. I object to that and move to strike out what he said about under instructions.

Q From whom did you receive your appointment as psychologist?

Objected to.

The Court. Objection sustained. He has now finally said that based upon observation and judgment and in his belief that in these examinations he has taken certain normal people and applied these tests to them and he says that in every instance those tests have shown that those people were normal. That is something that you can argue, that the tests are reasonably correct, but it is an admission by him that there are other ways of obtaining the condition of a normal mind.

Q Can you tell from any other way except from the point of psychology? A I can tell the age of an individual and my experience consisted in testing individuals of different ages and determining whether or not those standards accurately reflected

the performance of those different ages, and I find that they did, I don't mean that everybody of the same age is alike by any means, but these tests show that they accurately portrayed the different individuals of different ages.

Mr. Bernhard. I object and ask that it be stricken out as a conclusion.

The Court. He says now what he found in those tests.

Q What other tests can you yourself use in order to ascertain the mentality of an individual besides psychology? A Used these tests only, and I tested the validity of these tests by comparing them with the accurate age, the physical age of the individuals examined, and I found that the average individual of six years can do those things and the average individual of eight years can do the things that are set for a standard of eight years, and I am therefore convinced that these standards are accurate, because they do agree with the actual physical age of the person.

Q Well, do you think from your own knowledge that you are competent to—

Objected to.

The Court. It does not make a particle of difference what he thinks.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court and the same is allowed and is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q Now, professor, assuming that about August, 1890, there was a boy born who was named Philip Schilling; he was normal until about the age of nine months.

The Court. Normal in what respect?

Mr. Unger. I take this from the testimony given by the mother. She said he was a nice baby.

The Court. Does that mean that he looked pretty or was a good baby or wasn't disagreeable or was normal, healthful? It doesn't state. Why not say that he was normal?

Harry L. Hollingsworth, re-direct.

Q That he was a nice baby at the age of nine months, when he fell from a washtub, striking his head upon a stone floor.

Mr. Bernhard. It does not appear that it was a stone floor.

Mr. Unger. To accommodate the prosecution, strike out the word "stone" and just use the word "floor."

Q That he was picked up by his mother looking like dead—

The Court. That gives the idea that he was almost dead.

Mr. Unger. I am endeavoring to quote her testimony. That is what she said.

The Court. That is what she said, exactly, but she didn't say when he came to or anything else about it.

Mr. Unger. No, she didn't say that.

Q That he had a wound on the left side of the head which was dressed by placing a bread poultice on it to stop the bleeding, that immediately thereafter his conduct changed; that he did not nurse properly for days; that he was restless and cried incessantly; that his sleep was poor, and that he became a very difficult baby to manage; that about the age of five years he was sent to school.

The Court. You say that the mother said this, that his conduct changed, and so forth?

Mr. Unger. That is as I remember. If Mr. Bernhard has any questions I will accept them.

Mr. Bernhard. I think she said he slept poorly.

Mr. Unger. It doesn't make any difference whether I said just exactly. If that is the fact that is substantially before the Court.

The Court. I do not see how you can say that the conduct of a baby changes, because it assumes that there was some kind of expressed kind of conduct of the baby up to nine months. There has got to be a foundation for a change.

Mr. Unger. The fall may have been the foundation in this change of conduct.

The Court. You can say that the baby became restless and cried incessantly and his sleep was poor and he be-

came a difficult baby to manage, but how can you say his conduct changed?

Mr. Unger. That caused the change in the baby's conduct.

The Court. Proceed.

Q That he did not learn well at school; that he was very restless, often in conflict with his playmates and teachers; that he played truant.

Mr. Bernhard. I have no recollection of teachers.

The Court. There is nothing about it.

Q Strike it out. That he was quarrelsome, and upon the least provocation—

Mr. Bernhard. There is no evidence of least provocation.

The Court. Where is there any evidence that he was quarrelsome?

Mr. Unger. She did say that he fought with all his playmates, that I remember.

The Court. Yes, she said that. There wasn't any evidence as to how the trouble came about, whether he was always the assailant and provoked it.

Mr. Unger. We are not concerned with how the trouble arose, but the fact remains that he was a quarrelsome boy.

Mr. Bernhard. There is no evidence that he was.

The Court. Go ahead from the point that he did not learn well.

Q I want to say that he played truant and that he was quarrelsome at the slightest provocation, he gave outbursts of temper.

Mr. Bernhard. I object to that.

The Court. Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Harry L. Hollingsworth, re-direct.

Q That about six years of age he fell from a pigeoncoop to the ground, striking his head.

Mr. Bernhard. I object to that. There is no evidence that he did.

The Court. There is no evidence of that.

Mr. Unger. Strike out the words "struck his head and fell to the ground."

The Court. There is no evidence that he fell from a pigeoncoop.

Mr. Unger. Your Honor asked her the question and she said, "I went out and picked him up from the ground."

The Court. But she doesn't know where he fell from.

Mr. Unger. She said pigeoncoop.

The Court. Why don't you say that he fell and she went out and picked him up from the ground, and he hollered, "my head, my head."

Q Embody that in the question. That while very young he would remain away from home nights and that he would be found sleeping in wagons and outhouses; he associated with bad company; that as a very young boy he would disappear from home for days at a time; that he stole money from his parents; that he stole from neighbors; that his parents placed him in the Newark City Home for boys, situated at Verona, New Jersey, where he was under good influences for about six months, and was released on parole, and very soon after leaving the institution reverted to his former bad habits; that on the evening of July 16, 1919, the defendant was sitting on a certain stoop on Norfolk street, in the city of Newark, at about 6:30 o'clock, and that he saw approaching him an individual whom he knew to be Detective Ryan, and that he ran away from the direction in which the said Detective Ryan was approaching, into a neighboring yard; that the deceased caught the defendant by the leg and pulled him from a fence, and grabbed him by the collar with one hand and by the wrist with the other; and that there was a struggle between the defendant and the deceased; and that the defendant made several efforts to break away from the deceased, and appeared to be wild; and that during the scuffle defendant was seen to take from his pocket a revolver—

Harry L. Hollingsworth, re-direct.

The Court. What does that mean, appeared to be wild?

Mr. Unger. One of the witnesses, I think, said that.

Mr. Bernhard. That he looked wild.

Q I will change that, that he looked wild—immediately thereafter and shot the deceased; that he ran away, and that about half an hour later he entered a store and purchased a cap, after making a selection from several caps which were shown to him; that when he purchased this cap he was calm and collected; that shortly after he went to a house of an associate within a few minutes' walk of the scene of the shooting; that about midnight he left the house and leisurely walked down the street; that he was armed with a loaded revolver and yielded to arrest without any resistance; that he was taken to Police Headquarters showing no evidence of excitement; that shortly thereafter he made a statement to a police surgeon, to whom the defendant stated, "I didn't mean to kill him; I wanted to get away."

Mr. Bernhard. I object, because it selects from the statement of Dr. Clark an essential element without including all of the statement of Dr. Clark, and counsel in a hypothetical question has no right to select something that appears to be in his favor and leave out the other material facts.

Q That shortly thereafter he made a statement to the police authorities; and assuming that during the examination by the police surgeon and the questioning of the police officials he remained calm and quiescent and readily answered the questions put to him concerning his conduct on the day of the shooting and the happenings during the shooting and immediately thereafter; and assuming that the defendant has never shown any remorse for the crime; that in describing the shooting he has made different statements as to the reason therefor; that about six or seven years ago he consulted an alienist to determine his mental condition.

The Court. What effect has that?

Mr. Unger. That is also testimony.

The Court. It may be testimony. How is it competent or relevant upon this point? A man might have a headache and go to see a doctor, and perhaps get well before he got there.

Harry L. Hollingsworth, re-cross.

Mr. Unger. The testimony is that he went there with his sister.

The Court. And he was examined. There is not a word of what the doctor found. It is simply that he consulted a specialist upon mental disease.

Mr. Unger. I will accept that.

Q Now, professor, assuming that all the acts recited in the hypothetical question to have been established by evidence to be true, in conjunction with the examination made by you of the defendant at the Essex County Jail on the 17th day of October of this year, and from your experience and your knowledge, in your opinion was the defendant, at the time of the shooting of the deceased, in such a mental condition as to know the nature and quality of the act he was doing or that the act was wrong?

Mr. Pernhard. I object, on the grounds which I stated to his Honor yesterday afternoon. I will repeat them. I object on the ground that the witness is not competent to testify to the question which has been put to him, and, furthermore, the hypothetical question does not contain all the salient features required by the material facts introduced in evidence.

The Court. The reason why the Court sustained the objection was that it relates to a different standard from the one which the law establishes. Strike out the word "or" and insert the word "and," and, I think, you will have the correct standard. Was he able to understand the nature and quality of the act and know that it was wrong?

Mr. Unger. I will accept that.

The Court. Objection overruled. Answer it yes or no.

Witness. No.

Re-cross examination by Mr. Bernhard.

Q How do you know he wasn't? A Because of the degree of his mental maturity, which is not such as to enable him to fully appreciate the quality of his act.

Q What was his mental maturity? A He had the mental maturity of a child between ten and eleven years.

Q How do you know that a child of ten or eleven years is not able to appreciate the difference between right and wrong and the nature and quality of an act? A My experience with individuals of that mental maturity.

Harry L. Hollingsworth, re-cross.

Q Do you mean to say that a child of today, between eleven and twelve years of age, does not appreciate the nature and quality of an act as being right or wrong; is that what you mean? A Yes, sir.

Q Then any normal child eleven or twelve years of age doesn't know that it is wrong to steal? A Doesn't know the quality of the act.

Q Will you answer my question or won't you? A Will you repeat the question?

(Question read.)

A He may know that it is an act which is called a wrong act and he may know even that he will be punished for doing it, but that is not understanding the nature and quality of the act.

Q What is the understanding of the nature of knowing that it is wrong if he understands that a thing that he has done he has to be punished for? A Even an animal means to avoid punishment by avoiding certain acts for which he had been punished, but the animal doesn't understand the act for which he is being punished.

Q What age does a human being have to reach before he understands the difference between right and wrong? A In the degree which I have described.

Q Answer my question. A I am unable to answer it, because there are degrees of such knowledge.

Q Where do you draw the line of distinction between ages where persons don't know the difference between right and wrong? A I can only answer that, I distinguish between the various degrees of such knowledge, if you mean by knowledge the complete knowledge of the nature of the wrongness, and the reason for its wrongness, then I can set an age which I should say would be approximately that age.

Q Go ahead and do it. How old does a person have to be to know the entire difference between right and wrong, a normal person? A I don't think anybody knows the entire difference between right and wrong.

Q (*By the Court.*) Not even at forty-five? A No, sir.

Q (*By Mr. Bernhard.*) Then it doesn't make the slightest difference what a man's education may be, his environment, his condition of life, his experience, such a person cannot know the

complete difference between right and wrong; is that right? A Such a person as the defendant, you mean?

Q Any person who has the attributes which I have just stated in my question? A I am very sorry, but I didn't get that clearly. What are the attributes?

Q (Question read.) A Those are not the factors on which his knowledge of right and wrong depends.

Q My question is clear, and I think I am entitled to an answer.

The Court. I think so. Answer.

Witness. It does make a difference.

Q I mean any person within your knowledge who knows the complete difference between right and wrong. A I am unable to reply to that question.

Q Why?

The Court. Because you do not know?

Witness. I should name some person who completely understands the difference between right and wrong—as I have pointed out, there are various degrees—

The Court. I do not want an explanation beyond the questions I ask. I asked you if you couldn't point it out or name a person, and do you say you don't know such a person?

Witness. That is my answer.

Q You are a graduate of what institution? A University of Nebraska.

Q When? A 1906.

Q You got an A. M. degree there? A A. B. in Nebraska.

Q Then you took a post-graduate course at Columbia? A I did.

Q And you are now associate professor at Columbia? A I am.

Q Can you tell us the difference between right and wrong? A There are very many differences between right and wrong, all of which could be enumerated.

Q Go ahead and do that. A A wrong act as distinguished from a right act is an act which results clearly in the misery of others concerned, which violates the established sentiments and

feelings of mature individuals who make up the larger bulk of the population of the world. The rightness or wrongness of a specific act would depend entirely upon the circumstances, on the time, on the place and on what those sentiments and emotions and feelings of the average population may be.

Q Right is founded upon fundamental principles of morality, is it not? A Which are very variable.

Q Is it not? A It is founded on custom and the sentiments and emotions of the time.

Q Do you understand my question? A I am not sure what you mean by fundamental.

Q Never heard the word "fundamental" before? It means basic. Isn't that right? A Yes.

Q Then you understand that all right? A I believe so.

Q Principles, you understand that? A Approximately, I think.

Q Then you understand the two words, "fundamental principles," is that correct? A That is correct.

Q And, of course, you understand the word "morality," don't you? A I understand the common use of that term.

Q Does anybody else understand any more than the common use of that term? A It is possible to understand various common uses of the term.

Q At any rate, you understand the term "fundamental principles," and the common usage of the term "morality," don't you? A I think so.

Q Right is founded upon fundamental principles of morality, is it not? A Yes, sir.

Q For the preservation of society? A Yes, sir.

Q And those principles are pretty well founded, either by custom or legislative acts, are they not; isn't that so? A I think not entirely.

Q Please tell us what else, what other standard is set? A Legislative act and custom are attempts to express what those fundamental principles and sentiments of a community are from time to time, depending on their own degree of enlightenment and appreciation.

Q Exactly what I said; they are either established customs or customs that have been put into language by legislative enactment; isn't that correct? A I think so.

Harry L. Hollingsworth, re-cross.

Q Therefore, anything that comes in contradiction or violation of either the established custom or violation of the legislative enactment is wrong, and that is the fundamental basis of our government; isn't that so? A That is the fundamental basis of our government.

Q And isn't it true that anything that comes in conflict with either the established custom or legislative enactment is wrong, and that is the standard, isn't it? A If you mean that only those thing are wrong I would say, because many other things can be wrong.

Q The things involved in the established custom and legislative enactment are wrong, then, aren't they? A They are.

Q And that is the distinction between right and wrong, isn't it? A That is part of it.

Q That is the substantial part of it. It is the legal distinction. Do you mean to say you can't tell us at what age, in your opinion, a person must be to recognize the distinction that I have set out to you, stated it to you? A In my opinion, not below twelve years of mental age.

Q Do you know how early in age a child goes to Sunday school—five or six, seven or eight? A I don't know that there is any authority, that it has ever been determined.

Q Do you know how early in age a child goes to public school? A Around five and six.

Q Do you know that in the public schools they read the Bible? A Some places I understand they do and other places they don't.

Q You know that the Bible contains the Ten Commandments? A I do.

Q Do you know the Ten Commandments? A Well, I have known them. I am not sure that I can repeat them.

Q Do you know what they relate to with reference to stealing, killing? A They prohibit those acts.

Q Therefore, that is a standard of right, is it not—isn't that so? A As recognized by society, that has a distinction—

Q Isn't that a standard of law as recognized by society? A No, sir.

Q Do you want to go on record as saying in this court that the Ten Commandments are not recognized as a standard of right by the society of these United States? A I don't believe they constitute the legal standards.

Q You are not going to quibble with me. I am entitled to an answer. The standard of right as accepted by the people of the United States—you know what I mean, don't you? A Well, if I understand what you mean, I should say yes, I think so.

Q And the object of those standards is to distinguish between right and wrong; isn't that the object? A Yes.

Q And in spite of that fact you mean to say that until a child reaches the age of eleven or twelve years it doesn't know the difference whether it is right or wrong to steal? A I haven't said that.

Q Well, what do you say about it? Does it or does it not? A I have said—

Q Does a child, in your opinion, before it reaches the age of eleven or twelve years, as you have stated, know the difference between right and wrong, as far as stealing is concerned? A To varying degrees, depending on his mental level.

Q Can there be any varying degree of taking a thing that doesn't belong to you? A No, sir; there are various degrees of understanding the quality of that act.

Q What are those varying degrees? A They are very numerous.

Q I know, you have said that. What are they? A First, a simple understanding that it is a thing that is carrying punishment if it is done.

Q And isn't it the sum and substance of the difference between right and wrong, where a person knows a thing is wrong because he will be punished for it, and isn't that the whole understanding of a thing being wrong? A Not in my conception.

Q You are speaking only of your own conception? A Not to my knowledge.

Q Now, which do you mean? A I don't distinguish between them, as I have given the answer.

Q Conception and knowledge mean about the same thing, do they? A Not precisely, if you press to pin them down, but when I made the reply—

Q I am not pressing it; you raised it first. You said it meant the same thing and then you said it didn't. What do you mean? A As I answered, I made no distinction between the terms.

Q Is there a distinction between the terms? A There is a distinction between the terms.

Harry L. Hollingsworth, re-cross.

Q What is your idea of the distinction? A My idea is that conception implies those ideas and values which we people develop because of our own innate ability. Knowledge consists of a number of things which we have been taught, learned in a purely verbal way or impressed upon us by punishment, and there may be a knowledge of many facts without a conception of the meaning of those facts.

Q Then any act which involves punishment is wrong, is it not? A No, sir.

Q Against established custom or legislative enactment, do you mean to say that? A I should say that; yes.

Q It is wrong, then, isn't it? A No, sir; I should say it is not.

Q Do you believe in government? A I do.

Q You know that government is founded upon a strict adherence to the principles of the constitution and the police regulations of the United States; isn't that so? A As far as I know, that is so.

Q And anything in violation or contradiction of those elements is wrong, isn't it? A It is criminal.

Q It is wrong, isn't it? A I am not prepared to say.

Q Then what would you call it? A Call it criminal and illegal; not necessarily wrong.

Q You mean wrong from a fanciful point of view, from your own individual point of view, don't you? Isn't that what you are giving us? A I have not; I mean that the customs and laws and police regulations are all subject to change and acts are constantly becoming wrong which were not previously illegal acts, and those things change, but wrong is a thing we are struggling as much as we can from time to time to define, to understand.

Q Do you believe in punishing criminals? (Witness pauses.) Do you hesitate to answer that question? A Yes, sir.

Q Then you don't believe in legal procedure in cases of criminals? A It depends on the criminal. I believe in punishing criminals, if you state it in a general sense.

Q Are you a believer in government? A I am.

Q As it is now established? A I am.

Q And still you don't believe in the punishment of criminals? A I said I did.

Harry L. Hollingsworth, re-cross.

Q Then you do believe in the punishment of criminals? A I do.

Q Then you believe that a man who kills should be punished, do you? A Depending on the circumstances and the nature of the man and his conduct at the time of the act. He may be punished or treated as a sick man. There are various methods of disposition. Care should also be taken to protect society from illegal acts, but due consideration has to be given to the criminal and his punishment.

Q What age, in your opinion, would a person have to reach to be punished for killing another person? A That would be only my opinion. I would say that the mental age, the physical age, is not a factor. The mental age of a child of twelve.

Q At what age should a child be punished, in your opinion, for telling a lie? A That would depend entirely on the purpose of his education and aim of his parents, and the aims of the educational system to which he belongs. What is desired is to encourage freedom and spontaneity. One might postpone such punishment. If one wanted to bring up an individual to fit in the social system as it now stands, the sooner the better.

Q The opinion that you gave to the last question of Mr. Unger, did you take into account that the defendant had made a confession of the crime that he had committed? A I did.

Q Did that enter into your opinion? A That was part of the hypothetical question, as I understood it.

Q But I am referring to the details. Did you take that into account? A In replying to his question?

Q Yes. A I did.

Q What did it indicate to your mind? A That indicated to my mind the typical, the characteristic response of a high-grade moron, without due appreciation of the nature and quality of his act, without a perfect realization or amplification of what he was doing.

Q Then if he had denied it he would have been perfectly sane, in your opinion? A Far from it.

Q Then in what class would you put him? A I would have put him just where he is.

Q Then his denial or admission had absolutely nothing to do with it? A It did; it was in no way inconsistent with my conclusion, in that sense.

Harry L. Hollingsworth, re-cross.

Q Then, it would not have made the slightest bit of difference if he had denied it? A My judgment would have been the same.

Q You knew, did you not, that when he was about to be arrested that he recognized the officer and knew that the officer had a warrant for him, and he ran away. What did that indicate?

Mr. Simandl. I object. That was not in the hypothetical question. The hypothetical question did not read exactly as the prosecutor is attempting to make it read.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Bernhard. My question is not based on the hypothetical question.

(Question read.)

A The question is, if I knew that?

Q Assuming that to be a fact, what does it indicate to your mind? A That here is a man, prompted by increasing, instinctive orgies of fear and who was trapped and was unrestrained by the due appreciation of that act which he might do in that process.

Q Did that indicate to your mind that he had done a wrongful act and wanted to escape arrest? A That he wanted to escape arrest.

Q That is what it indicated, and that he wanted to escape arrest because he had done a wrongful act? A Because he was wanted, I would say.

Q Wanted for what? A For some act that he had committed.

Q What kind of an act? A An act which he had been told was wrong.

By the Court.

Q In making your examination, you said you applied to him a number of tests of fifteen years of age. Did he answer any of those tests correctly? A Not one, your Honor.

Q Of fifteen, did he? A There are tests fourteen and fifteen years that together constitute one group, and in that group he passed one test.

Q You have been telling us there was a standard test for each group of ages, from three to eighteen; now you say you group everybody fourteen and fifteen together; is that so? A No, sir; but there are a series of eight tests for the level fourteen and fifteen; each of those carries a value of three months, which makes the two-point level. An individual answering half of that set—

Q I am asking you if there are any of the tests which you applied to him that you would apply to a normal fifteen-year-old child that he answered correctly. Answer that yes or no. A That I would expect a fifteen-year-old child to know?

Q Yes. A No; there were not.

Q Then try to answer it again. You applied to him some of the tests which you ordinarily apply to a fifteen-year-old child, didn't you? A Yes, sir.

Q And some of those he answered correctly, didn't he? Answer that yes or no. A It is impossible, your Honor.

Q Why? A Because the tests for fourteen and fifteen years old constitute one group, and I would give them to an individual whether he was fourteen or fifteen.

Q Then you asked him some questions that you ordinarily asked and applied the same tests as you do to a fourteen and fifteen-year-old boy? A Yes, sir.

Q Did he answer any of those correctly? A One.

Q I didn't ask you how many? A He did.

Q Why do you insist upon always answering except in the way that you are asked? A I assure you, your Honor, that I don't do it intentionally; I am not aware of doing it.

Q If he answered only one, why did you ask him about the fifteen-year-old proposition? A That is the rule, to go up as high in the scale to a point where he passes none whatever, so as to be sure to give him credit for anything that he can possibly do.

Charles A. Rosewater, direct.

CHARLES A. ROSEWATER, recalled in behalf of defendant.

Direct examination (continued) by Mr. Unger.

Q Doctor, do you know the defendant, Philip Schilling? A I do.

Q Did you have an occasion to examine him? A I did.

Q Where did you perform such examination? A At the Essex County Jail.

Q And when? A On Wednesday, Thursday, Friday and Saturday of last week.

Q What did your examination consist of? A On the first occasion I told him that I had come to examine him. "All right," I went with him to the room in the infirmary and I told him to take off his clothes and I was going to look him over. He says to me, "I don't know whether you have come here to help me or to throw me, but I will tell you everything you ask me." I examined him, making a physical examination. I examined his head for scars and examined his eyes, his mouth. I went over his lungs—his chest, rather. I looked over his body for scars. I told him to put his clothes on and he sat down, and asked him his full name, his age, what age he went to school, what he had done in school, how he had got along in school, whether he had played truant and how often. I asked him why he had left school; he said he couldn't learn. I asked him why he ran away from home as a small boy; he said he didn't know, he just wandered around. I asked him why he slept in wagons when he had a home to go to. He said he didn't know. I asked him why he stole from his parents. He said, "They wouldn't give me the money and I took it." "Why did you steal from the neighbors?" "Because I wanted to get money to have a good time." I asked him as to his sexual history and his habits, as to whether he ever used narcotic drugs and he told me that he did occasionally use cocaine and heroin, but not as a habit. I asked him why he didn't behave himself when he came back from the home for boys. He said he didn't know why, just don't know why he did it. I asked him, "Did you know that you were wanted in Newark the day that you left New York and came over here?" "I did." "Did you know that if they got you you were in for a long term?" He said, "I did." "Why did you come to Newark?" "I came over here to have a good time." "What did you do?" He said, "I walked direct

through the streets of the city." "Were you not well known to the police?" He said, "I think I was." "Didn't you know that they would pick you up if they saw you?" "I did." "Why did you come?" "I don't know. I came over to have a good time." I asked him to tell me just what happened when he say Ryan coming toward him. He said he ran away, but Ryan got him; there was a scuffle. "Why did you shoot?" He said, "To get away." "Why didn't you get away after the first shot?" He said, "I shot so fast I didn't know what I was doing." "How many shots did you fire?" "I don't know," he said; "they tell me it was four." I asked him further just what he had done, and he told me how he had run away, how he walked up the street and bought a cap; that he roamed around, went back to Wickliffe street, stayed there for a while; then he walked out, when he was arrested and taken to the station house; how he was examined by Dr. Clark.

Q Was this all the first day? A He said the first visit—I asked him then to tell me all of his experiences with the police, and he told me that he been in trouble several times; that he had been held up on the street by the police several times and searched; that he had been at Caldwell; that he had been at Trenton and Rahway and that he had been at the hospital for tuberculosis. I questioned him as to how many jobs he had ever held. He told me of one job that he held with Whitehead & Hoag; another job that he held in the Electric works, and worked steadily ever since he could remember. I then put him through some tests. I asked him questions. I asked him, now that he had been in jail for four months, about, and had time to think it over, whether it was right or wrong for him to shoot Ryan. He said it was right. "You have had time to think it over. What would you do today if you were in the same circumstances?" "I would do the very same thing over again." I examined him to try to learn his views on right and wrong. I asked him whether it was right to steal. He said it was right to steal, "if you could get it away from the other fellow." I asked him whether it was right to kill. "It depends under what conditions." "Would you say it was right to kill?" He said, "If you are raiding a place and you want to make a getaway it was all right." I asked him under what conditions it would be wrong to kill. He said it would be wrong to kill a man for pay, which is to hold him up on the street and sandbag him.

That would be wrong. I asked him why. He said because it would not give the other fellow a chance. I asked him to sit down and write on a piece of paper for me all the words that he could think of. He did that. He was getting along slowly. He said, "Shall I put down all the word I know, the good words and the bad words?" I said, "Put down every words that you know, that you can think of." He wrote a few words. I said, "That is enough today. Put that in your pocket and in your cell tonight put down all the words that come to your mind and I will be over and give them to me." I put him through a simple test to call out all the words that he could think of in three minutes. He started off with Mary John, James—names. I said, "I don't want names, I want words." He started out again; he called out about eight or ten words; then he broke off into sentences. I stopped him again; I said, "I want words." Then he called off the words to me, and I made notes of the number of words that he could call off in three minutes. I think I have covered all that I can think of at this first examination.

Q What did you do the second day? A On the second day I went to see him with Dr. Otto Lowy of this city. I had taken from him a specimen of his urine and I gave him a sputum cup and told him to give me the following day a specimen of his sputum, and I told him that Dr. Lowy would call the following morning and take a specimen of his blood. I asked him how he was feeling. He said he was feeling all right. "Anything worrying you?" "Nothing at all." I asked him whether he had any money. He said, "I have a few dollars." "Have you anything else in the world that is of value?" He said, "I have got another suit of clothes." I think that is all that we did on the second visit.

Q What did you do the third day? A The third visit was made in company of Professor Hollingsworth, and at one part of the visit was Dr. Ernest Reisman of this city. I was present on this occasion described by Professor Hollingsworth, and that took the greater part of the afternoon, and at one point we broke off and Dr. Reisman took an X-ray of his skull.

Q Did you see Dr. Reisman make this picture? A No, I simply told him to do it. I had nothing to do with the taking of the X-ray.

Q When Professor Hollingsworth applied the test that he related to the Court, did you aid him to do that test? A I was present.

Q (*By the Court.*) You stayed there all the time? A Yes, sir.

Q (*By Mr. Unger.*) Who else was there? A At the time of the psychological test?

Q Besides you and Schilling and Hollingsworth. A At one point Dr. Reisman entered the room and told us he was ready to take the X-ray. He did take an X-ray during the course of this psychological examination; he took about five minutes. That was Friday. And then the following day I saw him again with Dr. King; spent that time with him possibly three-quarters of an hour.

Q How much time did you spend all together with the defendant? A I should say all together about five hours.

Q Did you apply a medical test as to his mentality A Yes.

Q Relate what that was A That test consisted of asking him questions as to his knowledge of the place he was in, of the condition that he was in, and his life.

Q Is that the proper test that the medical men use to determine the mentality of an individual? A It is one of the methods of testing mentality.

Q What is the other? A Psychological tests.

Q Is there still another? A I think an examination which comprises a history of the case and questioning the patient and inquiring from him his life history and obtaining from those who know him all the facts which can be obtained bearing on his entire life, and supplementing that with psychological tests, would comprise a complete examination of the subject when supplemented by an examination of his blood, and, in special cases, X-rays.

Q And did you apply all the medical tests that you know of to this defendant? A I did.

Q How many individuals did you see and examine yourself since the time that you are in practice? A You mean all together?

Q All together.

Mr. Bernhard. I object to the form of the question.

Mr. Unger. I want to put a hypothetical question to this doctor. May I ask, so that we will not have any loss of time, that the stenographer read the question that I put to Dr. Hollingsworth and let the doctor answer.

Charles A. Rosewater, direct.

By the Court.

Q You were present in the court room, were you not, when the final question was asked this morning of Dr. Hollingsworth? A I was.

Q You heard it and you remember it, don't you? A I do.

The Court. You want to exclude from that what Mr. Hollingsworth says that he found as a result of his application of the psychological examination, whatever it was.

Mr. Unger. We will exclude that.

Mr. Simandl. I don't think we ought to exclude it in its entirety. From what the witness knows from being present when this psychological test was taken. Can I place this in: Instead of that one phrase, say, from the witness's own knowledge of the psychological examination which took place in his presence by Professor Hollingsworth, if he was present, as he testified, during the entire examination, he can testify from that examination, that is, the facts that he derived from that examination.

The Court. He can take into account only what Dr. Hollingsworth said here in court.

Mr. Simandl. That was part of his examination. He went there with Dr. Hollingsworth.

Q Now, Doctor, assuming that all the acts recited by the different witnesses for the State have been disputed by evidence to be true, in conjunction with the examination made by you of the defendant and from the facts gained by you from your observations and the examination made by Professor Hollingsworth at the County Jail on the 13th day of October of this year, and from your experience and your knowledge, was the defendant, at the time of the shooting of the deceased, in such a mental condition as to understand the nature and quality of the act he committed?

Mr. Bernhard. I object. He is not qualified to answer.

The Court. You asked him to assume that everything said by the State's witnesses is disputed by competent evidence. Suppose there is any conflict among the witnesses for the State, then how do we know what Dr.

Charles A. Rosewater, cross.

Rosewater thinks is what they said? You ask Dr. Rosewater to pass an opinion upon the result of so much of the psychological examination when he was present last Saturday afternoon. He may not know anything about psychology in its practical application. You have not shown that Dr. Rosewater is a psychologist. Eliminate what he observed Dr. Hollingsworth do.-

Mr. Unger. I will do that. I eliminate the part where I said, "From your observation of the examination made by Professor Hollingsworth."

The Court. I will allow cross examination of the witness on this question.

Cross examination by Mr. Bernhard.

Q Is the term "alienist" a pretty well accepted and defined and frequent one among the medical profession? A I think it is.

Q What do you understand it to be? A An alienist is one who devotes special attention to the study and treatment of mental diseases.

Q Are you an alienist? A I am an alienist.

Q Have you ever testified in court before? A Once; ten years ago.

Q So that only once in ten years have you testified as an alienist? A Yes; I am not a professional expert.

Q It relates entirely, does it not, to sanity or insanity of the subject examined? The term "alienist" relates entirely to the sanity or insanity of the subject examined? A No, sir.

Q It does not? A Oh, no.

Q What is insanity among the medical professions? A It takes into consideration all mental aberrations, any border line conditions which are not sanity.

Q Where did you testify, Doctor? A It was in this court, in a case which involved the mentality of a man who made a will who was addicted to the use of alcohol and drugs.

Q You have never testified in the case of a man charged with a criminal offense? A In court?

Q Yes. A No.

Q Then this is your first appearance? A In the case of this man, yes, sir.

Charles A. Rosewater, cross.

Q And in forming your opinion did you take into consideration all of the elements of the crime? A I did.

Q Together with what you saw of the patient? A Yes, sir.

Q Have you read works by alienists upon the subject? A Of what? Any special subject?

Q Of sanity or insanity? A Oh, yes.

Q Name some of them? A "Outlines of Psychiatry," by White; "The Unsound Mind and the Law," by George W. Jacoby; "Feeble-mindedness," by Goddard; "Clinical Studies," by Creppelin; "The Semi-Insane or Semi-Responsible," by Grasa; "Mental and Nervous Diseases," by White and Jelliff.

Q When you saw the defendant what was his physical appearance? A He had a flushed cheek. Otherwise I would say his physical appearance did not suggest anything.

Q Did the flushed cheek suggest anything? A It did.

Q What? A It looked as if it were the hectic flush associated with tuberculosis.

Q Did you find it a permanent flush or a temporary flush? A I didn't observe it.

Q Don't you think that was important? A It was, but it was just one of the elements in the case. It wasn't very vital to observe how long the flushed condition might last.

Q You don't mean to say that because a person's face is flushed that they are necessarily afflicted with tuberculosis? A No, sir; but when you have a history of tuberculosis—

Q Answer the question. (Question read.) A Oh, no.

Q So that was the only outward appearance that you noticed that was unusual? A No. He appeared dejected, quiet.

Q Anything unusual in that? A It was unusual in a man who was in his position.

Q Why do you think that a man charged with crime and having confessed the crime, would not appear dejected? A Why, I think he would be worried. He didn't look worried; he simply looked unconcerned.

Q Will you be good enough to define the difference between the person who is not dejected and the person who looks worried? A A man may be depressed and simply sit around, just quiet. A man will be worried and he will show it by lines on his face; his face will be drawn. There is a difference between mere worry and calm and acquiescene of the person depressed.

Q Temperament? A I think worry is largely a matter of temperament. If a man is worried he won't show it.

Q How do you know? A Some men might worry and not show it.

Q Of course; so there wasn't anything in that? A Nothing specific.

Q What else did you notice about his physical condition? A Do you mean after I noticed him?

Q Yes. A I noticed that he had a very high arch.

Q Where? A In his mouth.

Q Is that unusual? A It is one of the least important stigmata of degeneration.

Q Does everybody who has a high arch in his mouth have an indication of degeneracy? A No, not specifically. It might not by itself.

Q What else? A I noticed that his body did not have much hair on it.

Q Is that anything unusual? A Not very important.

Q Is it not important? Aren't there sane people who do not have much hair? A Of course.

Q Why did you notice it? A Because I was examining him.

Q In forming this opinion, do you base it upon the fact that he has little hair on his body? A You asked me.

Q Did it have anything to do with his mental disturbance? A Not exactly.

Q What physical indications were there of any mental disturbance, objective? A None.

Q So far as the objective symptoms are concerned there were none? A None that I saw.

Q And the subjective symptoms—it is a term well known among physicians, isn't it? A Yes. The subjective symptoms were the history that he gave me of his experiences and his reactions to those experiences.

Q There is no standard set by the medical profession that history is a subjective symptom? A No.

Q Why did you say so? A I misunderstood your question.

Q You said you knew what I meant. A I thought you meant only objective symptoms; there were no subjective symptoms.

Q So there were no objective symptoms and there were no subjective symptoms of mental degeneracy. You have just said so, haven't you? A There were no subjective symptoms, but on

inspection I told you that he showed a certain something which had a bearing on his condition.

Q I will ask you again: Were there any objective or subjective symptoms of his mental degeneracy? A Yes, sir.

Q What was it then? A The state of calm which he was in, under the circumstances which surrounded him. That was one indication of his defective mentality.

Q I asked you before and you said there were none. Do you want to change that? A If you please.

Q Then there were some objective symptoms? A Yes, sir.

Q And the objective symptoms were because the defendant looked dejected and calm? A Yes, sir.

Q You would expect a dejected person to be calm? A Ordinarily.

Q What else did you do? A I questioned him as to his life history.

Q Then, as I understand you, Doctor, you appealed to his powers of recollection? A Yes, sir.

Q From his earliest childhood? A Yes, sir.

Q And you got from him his history? A Yes, sir.

Q That indicated to you, did it not, that his powers of recollection were good? A It did.

Mr. Bernhard. Upon the cross examination of the doctor as an expert I have no further questions.

Re-direct examination by Mr. Unger.

Q Will you answer the question that you heard before? A He did not.

The Court. I think you intended to say and you did not say it. Did he understand the nature and quality of the act that it was wrong? Your answer stands that he did not understand the nature and quality of the act and that it was wrong?

Witness. Yes.

Further cross examination by Mr. Bernhard.

Q What do you mean when you say he didn't know the difference in your opinion between right and wrong? A Are you referring now to my answer to the question?

Charles A. Rosewater, further cross.

Q Yes. A That is not insanity, that he didn't know the difference between right and wrong.

Q The nature and quality of his act? A What do I mean by saying that he didn't know the nature and quality of his act?

Q As to whether or not it was wrong, the question as to whether he knows now that it was wrong or whether he knew then that it was wrong is based, in my opinion, upon the fact that when I examined him and repeatedly came back to the same question he insisted, and he still insists, that under the conditions he was not wrong in shooting Ryan and trying to get away.

Q That was his opinion of it? A That is his opinion of right and wrong.

Q Certainly. And have you adopted his opinion? A You have not asked me what my opinion of the act was. You asked me on what I based my statements.

Q You have said, on all the circumstances of your examination, after hearing the hypothetical question, that in your opinion he did not know the nature or quality of his act, as to whether it was right or wrong? A That definition does not read that way.

Q You don't answer it that way. A It says nature and quality.

Q Isn't that my question? A You said nature or quality.

Q I stand corrected. Nature and quality of his act, as to whether it was right or wrong. A To answer yes to the fact that he knew the nature and quality, he would have to know both. My testimony was no, he does not know all three, nature, quality, and that it was wrong, all three.

Q Then, as I understand you, you answered the question nature or quality, nature and quality, did you? A Yes, sir.

Q Why, in your opinion, did he not know the nature and quality of his act, as to whether it was right or wrong? A Because he is an evil-minded person.

Q You mean to say that evil-minded people do not understand and know the nature and quality of an act and whether it is right or wrong? A That would depend upon their degree of feeble-mindedness, but anybody who has sufficient knowledge to analyze the quality of wrong, I would not class him as feeble-minded.

Q Then what do you mean by that? Where do you draw the line? A It is a very fine line. I don't draw any. It is a gradation; there is a gradation between the two.

Charles A. Rosewater, further cross.

Q Where do you draw the line between this man and other men? A I don't think I understand the question.

Q What is there that makes you think he didn't know the difference between right and wrong? A Because he is feeble-minded.

Q You understood what I said. Don't repeat the question. A I classify him as a high-grade moron.

Q What do you mean by that? A A moron is a feeble person who is able to support himself under favorable circumstances, but who, by reason of mental defects, either congenital or acquired early in life, is unable to compete with his fellow-man upon equal terms or to manage himself or his affairs with ordinary prudence.

Q Then any man who is not able to compete on equal terms with any other man, in your opinion, is a high-grade moron? A Not necessarily. He might be blind.

Q Assuming that he is not blind? A I wouldn't make a definition of any one.

Q Haven't you just said so? A I have given you the best definition of a moron. If you take them all in you can say he is a moron if he falls into part of that definition.

Q Why is this man a high-grade moron?

The Court. Why don't you answer the question?

A He is a moron by reason of arrested mental development.

Q In what way is his mental development arrested? A His mental development is arrested in the fact that he has not gone on to maturity.

Q In what way has he not gone on to maturity? A By stopping.

Q Where? A Below the level of eleven years.

Q In what? A In his mental development.

Q Mental development is a general term which is made up of a large number of elements? A It certainly is.

Q That is what I am trying to find out; in what element is his mental development delayed? A Practically all the mental processes which comprise intelligence there has been an arrest.

Q Specify them, please. A He lacks the power of abstracting sense from nonsense to a very large extent. He lacks the ability to call to mind the words that he knows. He is deficient in observing things which are done before him and in repeating

those acts. He is deficient in carrying from one place on a paper to another the numerals which are keyed on the same piece of paper. He lacks the ability to fill in missing words in simple sentences. He is slow in performing a very simple test of placing certain things into the aperatures to which they fit. He is lacking in moral sense. His power of controlling himself is very much restricted. His judgment is very poor. I think that in the main covers the—may I add one more?

Q Certainly; we want you to. A He has not got the ability of adjusting himself to the rules of conduct laid down by society and by law.

Q Any more? A I think that covers practically the points that I have now in mind.

Q You have the same point in mind as you had when you formed your opinion, haven't you? A I might have at that time other points in my mind, which at the present moment I do not recall.

Q You expected to come to court and testify when you formed your opinion? A I did.

Q And you expected to retain the points which you had in mind so that you could repeat them here in court? A To the best of my ability.

Q You considered that an important feature? A To the best of my ability.

Q To the best of your ability you have given us all the reasons upon which you then formed your opinion of his deficient mentality? A There is one additional reason I would like to add. The look of criminality is the strongest point in my mind constituting his feeble-mindedness.

Q Now we have them all? A I don't recall any other just now.

Q The first reason, because he had not the power to abstract sense from nonsense? A That is one.

Q That is the first you mentioned? A Yes, sir.

Q In what way did you determine that he didn't have the power to abstract sense from nonsense? A By reading to him some paragraphs which were nonsensical.

Q How do you know they were? A They were.

Q How do you know they were? A I think I know sense from nonsense.

Charles A. Rosewater, further cross.

Q You are setting yourself up as a standard? A As between sense and nonsense, yes.

Q So in reaching your opinion upon this particular point you set yourself up as a standard, and because he didn't happen to reach your standard you thought he was deficient? A No, sir; those sentences were taken from the accepted method of testing by the United States Army.

Q Now, then, tell us about them? A Do you want it?

Q Yes. A Well, I said to him, "I am going to tell you some things that are wrong, foolish, you show me what is wrong about them." And he listened. I said, "I have three brothers, John Henry and myself." He said, "There is nothing wrong about that; that is all right."

Q Isn't that all right? A That is one of the tests which indicated that he didn't.

Q Do you call that nonsense? A Don't you think it is, Mr. Bernhard?

The Court. You are not examining Mr. Bernhard. Mr. Bernhard is examining you.

Q What is nonsensical about that? A I think it is nonsensical.

Q You think it is nonsensical. You don't think he might have misunderstood the application? A He might have.

Q He might have misunderstood the question? A He certainly might.

Q Why didn't you give him the benefit of the doubt on that subject then and not say it was nonsensical? A Because I was testing him according to my best information and my best knowledge.

Q Then, having knowledge that he might have been mistaken, why didn't you give him the benefit of it on reaching that conclusion? A I didn't form it on that one.

Q You said all the tests? A Yes, sir.

Q And that was the basis of one of them? A It was one of them.

Q He didn't have the ability to call to mind things that had happened, I think you said? A No; words that he knew.

Q Is that another reason? A That is one more point.

Q That to your mind was an indication of his defective mentality? A Yes, sir.

Charles A. Rosewater, further cross.

Q Doctor, you have been in court all the week? A Yes, sir.

Q You were here when a witness for the State, Mr. Meyer, testified, were you not? A I think I have been here during all the testimony. I don't recall Mr. Meyer.

Q You were here, were you not, and sat alongside of counsel for the defense when Mr. Meyer was on the witness-stand and was asked to state to the Court the name of the corner of the street which he had been located in business for four years and he couldn't do it, were you not? A I recall that.

Q Your opinion, then, as to Meyer, because he was unable to recall words that he knew, is that he has a defective mentality? A Not at all.

Q How do you draw the distinction? A He was embarrassed through being in court.

Q How do you know that the defendant was not embarrassed? A At that question he didn't show any signs of embarrassment.

Q How do you know that he wasn't embarrassed? A I don't know whether he was embarrassed or not.

Q The next reason that he was deficient was in failing to observe rapid operations; is that right? A That is right.

Q What were the operations? A They were the operations of letting him observe the operator make certain taps upon cubes, four cubes, four small cubes.

Q What was that operation? A The operator would make one, two, three, four taps; he would be asked to repeat that, and he would repeat, one, two, three, four, and then the operator would leave out in the next test one of the cubes, executing a more complicated movement, and he would make another movement and then another.

Q And the more complicated they became the more unable the defendant became to repeat them; is that right? A Yes, sir.

Q What is wrong in that? A What is wrong in it?

Q Yes. A A normal child would have done better work than he did at that test.

Q What do you mean by that? A I mean that these tests have been made upon thousands of children throughout this country; they have been made by the United States Army—

Q Are you speaking from your personal knowledge or from something that you have read? A Personal knowledge. I have been in the army.

Charles A. Rosewater, further cross.

Q You have spoken of thousands of children. Did you make the tests? A No, sir.

Q Did you see them made? A No.

Q Then you don't know about that except from what you have read? A Yes, sir.

Mr. Bernhard. I move that that be stricken out, as to what he has read. He said tests of thousands of children which he knows nothing about.

The Court. It may stand that the tests have been made and that he has read about them.

Q Go ahead. A Let me ask the last word that I spoke.

Q "In the army." A At Ellis Island, in examining the immigrants, and practically every institution for feeble-minded people in this country, to a mere incident in our schools.

Q In what way did he fail? A He didn't come up to the scale that he would have come up to if he were a normal boy.

Q Give us an example. A A child—

Q Give us an example where he failed? A I haven't got the specific determination in my mind, just what he reached, but I know he fell down on that test.

Q That is what you say. What I want to find out is how he fell down? A By not doing them properly.

Q That is what you say. Give us a specific instance? A The standard which has been set as the result of all these tests which I have described have arranged a series of years during which certain children will do these things—

Q I know all about that. A He failed in not coming up to the standard.

Q Give us a specific instance of the failure, was my question. A I couldn't do that without the things in my hand which would describe accurately every movement that he made.

Q That you don't remember? A I remember the detail of it, but not the specific performance.

Q He was deficient in carrying numerals, wasn't he? Wasn't that your fourth reason? A I don't think I said that.

The Court. You said deficient in carrying numerals from one paper to another.

Witness. That test was made in this way. There was a—

Charles A. Rosewater, further cross.

The Court. You have not been asked any question; you were asked whether that was one of the tests.

Witness. That was one of the tests.

Q Now, then, you put him to that test? A No; Professor Hollingsworth.

Q Oh, then your opinion is based upon something that somebody else did? A In my presence.

Q Well, is that true of all of these other things? A No.

Q What I want from you are specific instances of tests that you applied to him. That was my question before. Let me have them. A I put a test to him, asking him to call out all the words he could think of in three minutes, and I asked him to write down for me all the words that he could think of. I put to him tests as to his ability to pick out the certain things which were not right in the sentences. Those are the only tests that I made before I called in Professor Hollingsworth, and he put in the rest.

Q What were the tests that you made after you called in Dr. Hollingsworth? A I examined him again mentally in conjunction with Dr. King.

Q What did you do? A I questioned him once more as to his history, of the happenings of the days of the shooting, his attitude toward the shooting, how he felt about it, how he felt about this trial. That practically covers my examination.

Q So, then, your opinion is based upon five salient features; first, the objective symptoms, the subjective symptoms and three tests that you put him to? A No, sir.

Q Well, that is what you said? A I beg pardon. You asked me about his history and his life of criminality.

Q Isn't that part of his history? A You didn't mention that just now.

Q I will do that. Six specific things, objective, subjective, three tests and his history? A Yes.

Q You have told about the objective and the subjective? A Yes, sir.

Q And you found absolutely nothing so far as the objective and subjective symptoms were concerned except as you have testified? A That is all.

Q The first test you put to him was, you asked him to call out all the words he could think of in three minutes? A Yes, sir.

Charles A. Rosewater, further cross.

Q And he started to do it, didn't he? A Yes, sir.

Q And after he had proceeded awhile he began to make use of sentences? A Yes, sir.

Q And you objected to that, didn't you? A Yes, sir.

Q Why? A Because in making this test we want to get words to see whether he has the ability of calling words that he knows.

Q Is there any better system under the heavens than by recalling words in sentences that you have learned—is there or isn't there? A There is.

Q By taking a primer and sitting down and repeating them against the will? A No.

Q How? A It is more difficult to recall words than it is sentences.

Q Then you put the most difficult tests to him? A No, sir.

Q Why didn't you let him go on with the sentence test? A I was examining him according to standard.

Q What objection is there to the sentence test? A None.

Q Why did you give him the advantage of it? A I prefer the other test.

Q Why didn't you give him the advantage of it by sentences rather than by single words? A That is not a recognized test.

Q Did you understand my question? A I did.

Q Will you be good enough to answer it? A I have answered it.

Q Is that the best answer you can make? A That is the best answer.

Q That is not for you to say whether it is or whether it is not. A To the best of my ability.

Q I am asking you now, why didn't you give him the advantage of the sentences? A I couldn't see any advantage in doing it.

Q Do you mean that now? A Which do you mean?

Q Do you mean to say that a man who can mention words in sentences is not at as great a disadvantage as one who can mention them singly? A I never thought about it.

Q Don't you think it is about time? A It doesn't concern me.

Q You wanted words singly? A Yes, sir.

Q And you base your opinion entirely upon the fact that this man's mentality is affected because he cannot mention words

Charles A. Rosewater, further cross.

singly as equally well as he can if used in a sentence? A I don't base my conclusions as to his mentality upon that fact.

Q You base your conclusions entirely upon that fact? A That is one test.

Q What right have you got to do that? A That is what I have been taught to do.

Q Your next test was that you required him to write down words that he knew; is that right? A Yes, sir.

Q Well, he did, didn't he? A He did.

Q What is there objectionable in that? A Nothing.

Q Well, then, as far as that test is concerned, he met the standard, did he? A No, sir.

Q Why not? A Because he wrote very few words.

Q He may have had a restricted vocabulary, may he not? A That is one of the tests, to find out his vocabulary.

Q In which he may have had a restricted vocabulary? A He may have had.

Q And you charged that up against his mental deficiency, did you? A That is one of the tests.

Q Are you going to answer my question? A I am trying to very hard.

Q I asked you if you charged that up against his mental deficiency? A I do.

Q Then, because one person who may have had the advantage of a long education in etymology as against another person who may have had no education in etymology, the first person would know the difference between right and wrong, in your opinion, more keenly than the second person; is that correct? A Not necessarily.

Q Then what is the difference? A The question of determining that by a standard scale of years. After ten years of age a child ought to be able to recall a certain number of words within a certain number of minutes. At that age a child could write down a certain number of words regardless of the time that you put the child to the test. The object of asking him to write down the words he knew was not merely to observe the words that he knew; it was done by me to find out whether he was faking.

Q How do you know he wasn't? A That is what I was trying to find out.

Charles A. Rosewater, further cross.

Q How do you know he was? A By his manner of response to me, by his co-operation in answering my questions, by the lack of any evidence to the contrary. He didn't know when I came to him whether I was for or against him, and he sat down and told me—he answered my questions without the slightest hesitation.

Q I want to know how you knew that he wrote down all the words that he knew? A I don't know that he did.

Q All right, then. Then you don't know? A All I know, that he didn't go off and write stuff to mislead me, because there was nothing like that written.

Q Then, because he didn't write enough words to meet your standard you say that he didn't know the difference between right and wrong; is that right? A I don't know that I testified that he doesn't know the difference between right and wrong.

Q To know the nature and quality of his act? A Nature and quality?

Q Yes. A I can't answer both nature and quality unless you want to take my entire answer.

Q Well, you are entitled to your entire answer; go ahead. A My entire answer is, from all the studies of this boy, that he didn't know the nature and quality of the act and that it was wrong.

Q Will you please answer my question as to this specific test that you made; he did or didn't he? A That specific test was not conclusive of anything in itself.

Q And the final reason was because he couldn't point out the defects in certain sentences that you submitted to him; was that the reason? A That was one of the reasons.

Q In what way did he fail? A I have given you one instance. There were other instances.

Q What were they? A I said to him, "I will tell you something which is wrong, something wrong about this sentence. Now listen and tell me what is wrong about it: 'A boy was running down a hill on a bicycle very fast and smashed into a telegraph pole, was killed; was taken to the hospital. When he got there they said he was severely injured, he wouldn't be out for some time.' What is the fault in that?" "That is the boy's fault for riding so fast."

Q Wasn't that a very good answer? A I don't think so. He didn't get the thought expressed.

Charles A. Rosewater, further cross.

Q How do you know that he heard the word "killed"? A I repeated it to him very clearly and he listened to it, and if he didn't hear it that is another reason for his defective mentality.

Q Then a person who doesn't understand or understand clearly is deficient mentally? A Not necessarily so.

Q Didn't you say so? A No; it has to be taken in connection with other facts.

Q What were the indications along this particular line? A You have had several of them, haven't you?

Q I want some more, the third reason? A I read some lines to him.

Q Out of what? A A piece of paper I had.

Q What was it—Sanskrit? A I don't know Sanskrit.

Q What was it? A Plain English.

Q What was it? A I read to him?

Q Yes. A I read to him this, I said, "I am going to read something to you. I want you to repeat what I have read to you." I said to him, "On September 5, 1918, there was a fire in the center of the city; a large apartment house was burned, $30,000 damage was done, and in rescuing a girl the fireman was burned. Repeat that?" And he repeated that by saying approximately that there was a fire and the house was burned and the fireman was killed in rescuing a girl. That is just one more test.

Q What is there seriously wrong about it? A Nothing so serious.

Q And it is upon such tests as that that you form your opinion as to his mental deficiency? A That is not the important point.

Q Tell us the important point. A The important point I made my diagnosis on?

Q Yes. A The life of criminality is the most important on which I made my diagnosis.

Q Now we will come to that. A That is the idea.

Q So that this extraneous matter that you have told us about had really no important bearing upon the opinion that you formed at all? A It had so much bearing that it showed me the need of a most profound psychological examination to determine his age.

Q I thought you said it didn't have any bearing on your opinion? A Oh, they did.

Charles A. Rosewater, further cross.

Q But I thought you said it didn't have any bearing upon your opinion? A They had an important bearing upon my conduct.

Q Did you hear me use the word "opinion"? A Yes, sir.

Q Why did you substitute the word "conduct"? A To make myself plainer.

Q I said the word "opinion" and that is the answer that I want. Then these facts that you have told us about have an important bearing upon the opinion which you have rendered here before? A Yes, sir.

Q I thought you said they didn't have any real important bearing, that the real important thing was his history and his life of criminality. Which is correct? A Taking them all together they have an important bearing, but not taken singly.

Q Yes, which statement is correct, that they did or didn't have an important bearing? A I don't remember that I stated taken all together they didn't have a great bearing. I said taken individually they didn't have a great importance.

Q All right, taken all together; and would you say that they had any effect upon your opinion, in forming the opinion that you are giving us today? A Yes, sir.

Q In what way? A Indicating to me that he was feeble-minded.

Q Indicating to you that he lacked intelligence, that is what you meant? A That is one of the elements.

Q That is what you mean? A Yes, that is one of the elements of feeble-mindedness.

Q Do you mean that? A I do.

Q Do you mean to say that because a person has not the advantages of education and environment, that that person is probably necessarily feeble-minded? A No.

Q Tell us what you mean? A I mean intelligence is a matter that is relative. A man may be a very intelligent man and had very little learning. A man may be a certain level of intelligence as compared with another man, but a man doesn't require very much intelligence to respond to certain tests.

Q How did the fact that he could not recollent more words than you thought he ought to have written indicate to you that you thought he was feeble-minded? A Because of my knowledge of the subject; I know that a boy of twelve years ought to

write a certain number of words in a certain time. If he doesn't do it it indicates feeble-mindedness.

Q Then every single boy that doesn't measure up to the standard that you have just set is feeble-minded? A It indicates it; it is not conclusive.

Q Is it conclusive in this case? A Any one?

Q The fact that he could not measure up, is that conclusive in this case? A No, sir.

Q Then none of the facts, reserving only the question of the history and the life of criminality, is conclusive, is it? A No one test that I made, standing alone, is conclusive.

Q And all of the tests, reserving the history and the life of criminality, taken together, are not conclusive, are they? A They are.

Q Then you didn't have to consider his history or his life of criminality, did you? A I don't think I get that point. I try to be attentive.

Q I ask you if, taking all the tests that you have mentioned excepting the history and the life of criminality, taking all the other tests together, are they determinative factors upon which you base your opinion? A No, sir.

Q They are not? A No, sir.

Q So you would not have been able to give your opinion if you didn't know the additional facts of his history and his life of criminality? A Not from the tests that I made.

Q That is so, is it? A Yes, sir.

Q What was there in his history to lead you to that conclusion? A His history indicating a life of criminality from early boyhood.

Q What were the details? A A truant—

Q Let us say a boy who plays hookey from school? A Habitually?

Q A boy who is a truant from school is mentally deficient? A Not necessarily.

Q Haven't you said so? A No, sir.

Q Then because he was a truant from school had nothing to do with his mental capacity? A That was one indication.

Q Did it or not? A It was an indication.

Q Did it or not? A I should say it did.

Q That was a plain question, wasn't it? Because he was a truant from school he was mentally deficient? A No, sir.

Charles A. Rosewater, further cross.

Q Haven't you said so? A No, sir.

Q Well, was he or wasn't he? A Mentally deficient?

Q Yes. A He was.

Q Well, that is just exactly what I asked you. A Oh, no, you didn't ask me that.

Q Was he or was he not mentally deficient in your judgment because he was a truant from school? A I think he was mentally deficient because he had that bad fault and had arrested development.

Q And every boy who is a truant from school is feeble-minded? A Oh, no.

Q How do you make the distinction between this defendant and a normal child? A Any normal child who plays hookey knows he will be punished and will respond to discipline and won't go on with it.

Q And if he continues— A And if he continues and he goes on and does it and keeps going on is a very strong indication that there is something wrong.

Q Do you think he is wrong if he wants to go to work instead of going to school? A Not necessarily.

Q How do you know that the defendant didn't want to go to work? A I know he didn't.

Q How do you know? A He told me.

Q He did go to work? A Very little.

Q Did he go to work? A He didn't stay at it.

Q You answer the question. He did go to work? A He did go to work.

Q What else was there that you observed about his history that indicated this opinion that you have expressed? A Stealing.

Q When he was a young boy; that is right? A And right along since that time.

Q How do you know? A He told me so.

Q Did he mention more than one instance?

Mr. Simandl. We object. The prosecutor is not going to bring out the boy's criminal record.

The Court. He says that he based his opinion on these criminal acts, and the jury is entitled to know what he is talking about.

Charles A. Rosewater, further cross.

Mr. Simandl. If there are any facts that ought to be disclosed upon which a conviction was not had I say they are not admissible.

The Court. Do you mean to say that you can open the door for your witnesses to testify and that the prosecutor cannot find out upon what he bases his opinion?

Mr. Simandl. I mean this, if the doctor tells the criminal record that is within his knowledge, he is not compelled to disclose it against the interest of the defendant unless the defendant consents to it.

The Court. The objection is overruled.

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

WM. P. MARTIN,
Judge.

Q What specific instance are you referring to? A No specific instance.

Q If you refer to no specific instance what right have you to form your opinion? A Because he told me that he stole upon many occasions.

Q Is it your opinion that because he stole on many occasions he is mentally defective? A Strongly suspicious of feeble-mindedness. I would say that a person who steals incorrigibly is a very strong indication of feeble-mindedness.

Q Do you mean to say that everybody in institutions is feeble-minded? A Almost invariably.

Q How do you form that opinion? A By the best institutions in the world.

Q Mention one of them. A The Massachusetts Institution for Feeble-minded; an investigation was conducted by Dr. Farnell, who proved that 70 per cent. of inmates of institutions for delinquency were feeble-minded.

Q In his opinion? A According to recognized tests.

Q In his opinion, is that not so? A Based on his tests.

Q That is the opinion that he expressed? A Yes.

Q How do you reach your conclusion? A By what I have stated and read as to the subject of criminality, and I have the opinion based upon my studies, that habitual criminality is due to feeble-mindedness in such a large percentage of cases that it is

exceptional to find an habitual criminal who could be classified as a normal mental individual.

Q There are exceptions? A Very rarely.

Q There are exceptions? A There are exceptions. I have seen some exceptions.

Q Well, you see and hear about them every day, don't you? A I am very suspicious.

Q Well, you do? A Yes; I do.

Q How do you know that the defendant is not an exception? A I examined him.

Q In your opinion is he an exception? A He is no exception.

Q How do you draw the line? A As a result of the examination I have made of his absolute lack of moral sense and his mental age.

Q His lack of moral sense—entirely? A Almost entirely.

Q Why do you make any reservation? A I don't know as I could say as to any individual.

Q As to the defendant? A Why, I wouldn't say that he hasn't some sense of morality.

Q Be a little more specific. A I tried to investigate that, to learn the truth. I asked him whether it was right—he told me that the police had treated him very severely. I said, "Was it right for them to do that?" He said, "It certainly wasn't." Then I said, "You do know something about right." So he has a certain sense of right.

Q Is that as far as your examination went to determine that? A No. I think that the question that he answered that it would be right to kill a man in a get-away, but it would be wrong to kill him for pay, indicates also that he has a slight appreciation of morals.

Q Why do you qualify it by the word "slight"? A Because if he had full appreciation he would say it would be wrong to kill in both instances.

Q Why do you say that? A Because it is wrong to kill.

Q How do you know he wasn't acting in self-defense? A Well, in doing a burglary—

Q How do you know he was not acting in self-defense, as a man has a right to do? A I didn't ask about that.

Q You ask what was in his mind? A I certainly don't. He answered my question.

Charles A. Rosewater, further cross.

Q Did you find any other instances? A Yes—you mean when I examined him?

Q Yes, as to his moral sense? A I don't recall anything at that time.

Q Let me recall one to your mind. Do you think that it is an indication of normal moral sense to admit a crime that you have committed? A Do you what?

Q Do you think it is an indication of normal moral sense to admit a crime that you have committed? A No, not necessarily; no. I wouldn't think that would be any indication as to moral sense.

Q Then you think if a man denied a crime which he had committed that it would be an indication of normal moral sense? A Couldn't make any conclusions from that one fact at all.

Q I will state it is not sufficient for my understanding. What is your understanding? A I would have to have all the facts in the case before me to determine whether or not that individual realized the nature of his act.

Q I said in a case where he had committed the crime he had committed, isn't that an indication of normal moral sense? A No, it is not.

Q What is it an indication of, abnormal moral sense? A It might be an indication of total lack of appreciation of the consequences of his acts.

Q Then a man who admits a crime that he has committed lacks moral sense? A Not necessarily.

Q How do you make the distinction? A I haven't attempted to make any distinction.

Q Make it. A I can't.

Q Why not? A Because I haven't sufficient facts to base my opinion upon.

Q Do you mean to say that a man who admits a crime that he has committed doesn't indicate some moral sense—do you mean to say that? A Not necessarily.

Q What do you call it? A It might be a total lack of appreciation of what he did. He might know that he did it, and at the same time he might be of the opinion that he was perfectly justified in doing it, and it might have been absolutely wrong.

Q Then he does show some moral sense in admitting it, doesn't he? A Not necessarily.

At this point the Court took a recess for one hour.

Charles A. Rosewater, further cross.

Q What do you mean by not necessarily? Can't you answer that question yes or no? Does he or doesn't he show some moral sense? A He might or might not.

Q In this specific instance does he or doesn't he? A I could not draw any conclusions upon the facts as you have presented them.

Q Then you don't know? A I cannot answer that question.

Q Then you don't know whether it does or does not show any moral sense, in your opinion? A In my opinion I could not form any opinion on the statements as you have made them to me.

Q Assuming that this defendant, after committing this crime, ran away and threw away the shells and the cartridges with which he had fired the shots, would that indicate anything to your mind? A Simply that he was obeying a natural instinct to run after what he had done, and he—

Q He realized something that he had done? A He realized that he had done something that he shouldn't do.

Q He realized that he had done something that he should not have done? A That he had done.

Q Why, you have just—didn't you just say that he had done something that he should not have done? A Yes.

Mr. Simandl. At this time I desire to offer to your Honor—

Mr. Bernhard. I object to the reading of any paper. I object to him stating the contents of any paper which is not legal evidence.

The Court. You offer that paper in evidence?

Mr. Simandl. Yes.

Mr. Bernhard. Objected to.

The Court. (After examining paper.) How is this possibly competent or relevant?

Mr. Simandl. As I understand, the prosecutor does not first require that I have to prove that it is part of the original record of the Court of Pardons. Is that correct?

Mr. Bernhard. Correct. Objection that it is not a record of the Court of Pardons is not made.

Mr. Simandl. What better proof can be shown to the jury that this man is now in a condition that he does not know the difference between right and wrong or the re-

Charles A. Rosewater, further cross.

sponsibility or the nature or quality of his act than if we bring a paper here which was produced before the Court of Pardons for a judicial discussion, and upon which the record shows he was actually pardoned.

The Court. You asked that he be released by the Court of Pardons from the New Jersey State Prison because he has suffered enough, had been there long enough. If you thought he was insane and irresponsible and not acting with good judgment, the people who signed this would not have let him go.

Mr. Simandl. I think the statement shows that this man is of low mentality.

The Court. This is signed by Frank McDermit, Thomas H. Powers, and other people.

Mr. Simandl. It can go to the jury for what it is worth to show feeble-mindedness. I think the question of what it is worth is entirely with the jury. As to its admisibility, I think it is perfectly competent.

Mr. Bernhard. My first objection is that the admission of that paper would put the State in a position where it could not exercise its legal right to cross examine the persons who have made the statements claimed therein. My second objection is that it has absolutely no relevancy to the issue raised here in this particular trial, and my third objection is that it is not competent under the rules of evidence to admit a paper of that kind in evidence.

The Court. It is not proof of the allegations contained therein. That paper is not proof of the statements made therein. I sustain the objection.

Marked Exhibit D. 1 for identification.

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

WM. P. MARTIN,
Judge.

DEFENDANT RESTS.

J. WELLINGTON CRANE, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Bernhard.

Q What is your business? A I am resident physician of the New Jersey State Prison.

Q And from what institution did you get your certificate as a physician? A University of the South.

Q Where is that located? A In Tennessee.

Q When, Doctor? A In 1900.

Q And when did you begin to practice? A In 1900.

Q Where? A In the City of Newark.

Q And whereabouts? A 62 Thirteenth avenue.

Q How long did you practice in the City of Newark? A Until June, 1909.

Q Then you did what? A Went to the New Jersey State Prison.

Q In what capacity? A Resident physician.

Q In charge of what? A In charge of the inmates of the New Jersey State Prison.

Q And you have been there since 1909? A In the same position.

Q And what do your duties consist of? A Examining all prisoners upon their admission to the prison and taking care of their ailments while in prison.

Q And as part of your duties do you recall whether or not you ever examined one Philip Schilling? A Yes, sir.

Q Can you tell us when that was and where? A At my office in the New Jersey State Prison.

Q And whereabouts is that? A In the hospital of the prison, inside of the prison walls, part of the institution.

Q And have you any recollection as to when that was? A Well, to the best of my recollection it was about— I examined him upon admission, upon two admissions; I think he was in the institution when I came there; I believe he was admitted twice after that and I believe I examined him on both of his admissions. In fact, I personally examine all the men.

Q And, Doctor, do you recall whether or not after you made the examination of admission you ever saw him after that? A On numerous occasions.

J. Wellington Crane, direct.

Q From the examination that you made, Doctor, and the occasions upon which you saw him, are you able to form an opinion as to whether or not he was rational or irrational any time during the time he was in State's Prison? Answer yes or no. A I think I am.

Mr. Simandl. The witness should state exactly what his examination was before he is qualified to make an answer.

Mr. Bernhard. I think that is a subject of cross examination.

The Court. Not when it is the issue in the case. I think he ought to state what he found.

Q What sort of an examination did you make? A The examination consists of an examination of the eye, ear and nose and throat and the chest and the blood, urine, and taking into consideration his weight, height and questioning him as to whether he was ever sick.

Q I understand you do not pretend to be an expert or an alienist in insanity? A No, sir.

Q Now, then, from the examination that you made and from the observation that you made after the examinations on the two admissions, I understand you to say that you are able to form an opinion as to whether he was rational or irrational while he was at the institution?

Mr. Simandl. I object. That is not the question at issue. The question at issue is whether or not he knows the difference between the nature and quality of his act.

Mr. Bernhard. The presumption of law is that a man does know the nature and quality of his act, and the burden is upon the defendant charged with a crime to prove his insanity. This witness does not appear as an expert and he may, the same as any lay witness, give his opinion as to whether or not the man was rational or irrational, and then it becomes a legal question as to whether or not a man who is testified to as being rational does or does not know the difference between right and wrong and knows the nature of his act.

The Court. Your argument is that if he was rational at some period prior to July 15th, that it is competent in order to base an opinion that he has been in the condi-

tion of a child eleven years old and incompetent to understand the difference between right and wrong and know the nature and quality of his act. It breaks the continuity of the condition which you set up owing to the peculiar circumstances of this case.

Mr. Simandl. I think this, as I understand the law as laid down in this State, a man may have been insane years ago, and that would have no bearing upon his present sanity or insanity, and if that is so, then a man may have been rational at a certain stated period of time and yet today or at the time of the commission of the act he might not have known what the quality of the act was, therefore, I say, if the contrary is true, I think the State must also be bound by the same rule of evidence; I think it is an absolute doctrine.

By the Court.

Q Where did you say you graduated? A University of the South.

Q Where? A Tennessee.

Q What place, whereabouts in Tennessee? A Semanee.

Q And that was in 1900, if I remember correctly? A Yes, sir.

Q What hospital experience have you had? A I was associated with Dr. Baynon at St. James' Hospital on the medical staff for over a year.

Q Where? A Here in the City of Newark.

Q You studied nervous and mental diseases, didn't you, in your course at the University of the South? A Yes.

Q Was this examination to which you refer made for the purpose of determining whether the defendant was sane or insane? A No, sir.

Q Have you ever made examinations for the purpose of determining that fact with reference to prisoners? A Yes, sir.

The Court. You may cross examine.

Cross examination by Mr. Simandl.

Q How many years did you study at the University of the South? A Nine months at the University of the South, yes, sir.

J. Wellington Crane, cross.

Q What other universities did you attend? A I entered Jefferson Medical College in 1895 and stayed there for three years.

Q Did you specialize in any particular line while at Jefferson College of Medicine? A I studied medicine.

Q No particular branch? A No, sir.

Q Did you specialize while at the University of the South? A No, sir.

Q Have you ever read, Doctor, any of the standard works of science on mental and nervous diseases? A No, sir.

Q How many men have you had occasion to examine during the time that you have been practicing medicine to determine the sanity or insanity of the man? A Well, every examination conducted at the New Jersey State Prison is conducted partly to determine whether a man shall be referred to a psychiatrist for a thorough examination. My examination in that line is not complete, so I wouldn't call it a real examination.

Q Then you really have not made any real examination exclusively to determine the sanity or insanity of a man? A Yes, sir, I have.

Q Have you ever made a test of feeble-mindedness? A Yes, sir.

Q How many? A Possibly about fifty.

Q Have you ever studied the subject of feeble-mindedness? A No, sir.

Mr. Bernhard. I press my question and add another reason: This testimony may be preliminary testimony upon which the State experts may be able to base their opinion, and upon that ground the State is entitled to the testimony of this witness.

Mr. Simandl. First, I don't think, with due respect to the doctor, that he is qualified at this time to testify either as an expert or as to whether or not anything which would help us, that is, whether or not this man, at this particular time, was sane on July 16th. Anything that he may testify to might in some way delude the minds of the jury.

The Court. You must sustain the burden of showing that the defendant was not responsible for his act, and if, in endeavoring to sustain that burden, you have called

J. Wellington Crane, further direct.

some witnesses from whose evidence you are going to contend before the jury he did not know the nature and quality of his act and that it was wrong on July 16th, when the act was performed, and that that was the case ever since he was nine months old, when he had a fall, which was aggravated by another one four years later; that he has had some kind of a defect which gives him the intelligence of a person of ten or eleven years of age, why cannot the prosecutor show, in rebuttal, that regardless of whatever your test may show about his being ten or eleven years old, in point of fact he did a lot of other things which a ten or eleven-year-old person does not ordinarily do.

Mr. Simandl. May I object to that question on two grounds? First, that I do not think the doctor is qualified to testify that this man is not suffering from feeble-mindedness or any other form of insanity, because I understand him to say that he made only a partial examination and that he referred a part of the examination to another department, and consequently no matter what his condition might have been he might have been sane for an interval of time and insane at a certain time. If he wasn't insane on July 16, 1919, then that is the only point which we are concerned with now.

The Court. Objection overruled. You must fix more definitely the date of these examinations.

By the Court.

Q When was the first one? A To the best of my knowledge, I would say about 1911.

Q When was the second one? A To the best of my knowledge, it would be some time in 1915.

The Court. You may cross examine him as to the nature of the examinations, if you want to, or hold it until later.

Mr. Simandl. I will hold my cross examination until later.

By Mr. Bernhard.

Q What is your opinion, Doctor, as to whether he was rational or irrational?

J. Wellington Crane, further cross.

Mr. Simandl. I object to that.

The Court. Objection overruled.

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

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

WM. P. MARTIN,
Judge.

A Rational.

Further cross examination by Mr. Simandl.

Q Why do you say that? A Why, because he acted in the same manner as the majority of the prisoners at the New Jersey State Prison were acting at that time.

Q Are prisoners rational men as a general rule? A Yes, sir.

Q Do you think so? A Yes, sir.

Q Is every prisoner a normal man? A I don't think so.

Q So that if he acted the way the other prisoners down there acted would you say that that is a proper qualification to say that he is rational? A He acted the way most of them acted; I would say so; yes, sir.

Q Have you ever read Goddard on Feeble-mindedness, Doctor? A No, sir.

Q Just tell us what he did that made you think he was rational? A He worked regularly; he slept regularly; consumed three meals a day regularly; he went back and forth to his work and came out to see me and complained when he was feeling ill, and he went through the daily routine life of the prisoner in a perfectly normal manner.

Q You say he worked, Doctor. Is that the only basis for your opinion? A No, sir.

Q What other facts do you base your opinion on? A That he consumed his three meals a day.

Q We have heard that. A Well, the other facts as I gave you in the answer.

Q Are they all of the facts that constitute the basis of your opinion? A That he acted rational?

Q Yes. A Yes, sir.

Q You say he worked? A Yes, sir.

Q Did he work willingly? A At times.

J. Wellington Crane, further cross.

Q He didn't work willingly all the time, did he? A No, sir.

Q You had to make him work, didn't you? A No, sir.

Q Had guards there for that purpose, didn't you? A I didn't, no sir.

Q The prison maintains them, don't they? A Yes.

Q And those guards sit there with a gun on their knees? A No, sir.

Q Do you mean to say the guards don't sit in the work-rooms in the New Jersey State Prison without a rifle on their knees? A Most assuredly I do.

Q How long ago is that? A Never, in my experience in the prison, have the keepers sat in their positions with a gun on their knees.

Q Where do they hold the gun? A Well, they have revolvers in their pockets.

Q And they have no rifles? A Not the keepers in the shops; no, sir.

Q You say he walked to work? A Yes, sir.

Q Everybody else has to walk to any place, don't they? A No, sir.

Q Unless they own an automobile? A No, sir.

Q Couldn't an insane man walk? A Yes, sir.

Q What is peculiar about the fact that he walked? A Well, some of them run.

Q They are so willing to go to work? A No, sir; away from it.

Q Did he run away from work? A No, sir.

Q He went willingly? A I don't know; he walked there.

Q There was always a guard with him when he walked to work? A No, sir.

Q Do you mean to tell me that he was left to roam around the building? A No; he went with the rest of them.

Q And the guards took all of them; is that right? A I think they generally did; yes, sir.

Q So that if he wanted to resist going to work he was liable to get in trouble with the guards? A I guess he would.

Q You say he ate three meals a day; what is peculiar about that? A Nothing.

Q An insane man might eat three meals a day? A Yes, sir.

Q Why do you place any special significance on that fact? A If he hadn't it would have been an irrational act. That is one of

the things that made me think he was rational, because he ate three meals.

Q Then you think if I only eat two meals I wouldn't be right? A Well, I don't know.

Q Then that has not any basic fact by which you could determine a man's rationalness or irrationalness? A Not the actions of one day.

Q He was often in trouble down there, was he? A I think he was.

Q Had trouble with the guards, did he? A I don't know that he ever had any trouble with the guards; no, sir.

Q What was he in trouble about? A Quarrelling with other prisoners.

Q He was quarrelling with other prisoners? A Well, fights with other prisoners.

Q How often did you see him during his stay in State's Prison? A Well, I would say a hundred and fifty times, offhandedly.

Q Do you see all the prisoners down there a hundred and fifty times? A Some of them more.

Q Would you treat him every time you saw him? A If I thought he needed anything, yes, sir.

Q What did he generally complain to you about? A The most frequent complaint was that he had consumption and was unable to work.

Q Do you think that that fact had any effect upon his mentality? A No, sir.

Q Why not? A Because he didn't act otherwise as though his mentality was affected.

Q What do the prisoners at your institution do that a twelve-year-old boy could not do? A At present or during the time—

Q At that time. A Well, they couldn't do plumbing, steam fitting; they couldn't make brooms; they couldn't make mats; I don't think they could make brushes, nor make shoes, which were portions of the contracts at that time in the prison.

Q Anything else? A Well, I don't think they could run a heating plant, nor do I think they could do the cooking nor the baking, nor could they carry the food up and downstairs, nor could they properly clean out the wings of the institution.

Q Is that all? A That is all I can think of just now.

J. Wellington Crane, further cross.

Q Anybody could take meals up and downstairs who was twelve years old? A Not the way they have to carry them up and downstairs there.

Q What is peculiar about the way they carry them up and downstairs? A They have such a short time allotted that they have to be carried up in bulk; it takes some strength to do that.

Q That requires strength, not mentality, don't it? A Yes, sir.

Q Will you relate something that the prisoners at the New Jersey State Prison do which requires mentality and not strength that a twelve-year-old boy could not do?

The Court. He has already answered that.

Q Do all of your prisoners do that? A All of that work is done by prisoners, but all of the prisoners don't do that, but all that character of work is done by prisoners.

Q Did he do plumbing? A No, sir.

Q Do he do steam fitting? A No, sir.

Q Did he bake? A No, sir.

Q Did he carry food up and downstairs? A No, sir.

Q He swept out the wings of the institution? A No, sir.

Q What did he do? A He made mats, made brushes, went on the boring machine in the brush shop; made mats.

Q What did he have to do with the work when he worked on a boring machine in the brush shop? A I believe he had to bore so many holes within a certain length of time in so many pieces of wood.

Q Could a twelve-year-old boy do that?

The Court. He does not hold himself out as a psychologist. You are asking him to answer a question in reference to psychology.

Mr. Simandl. He says that he is a physician and has given his opinion based on all these facts, and he says that this boy at that time was rational. I am trying to find that out.

Mr. Bernhard. I object on the further ground that it is not cross examination.

Mr. Simandl. I still press my question.

The Court. He does not know what a twelve-year-old boy does or does not do. The twelve-year-old boy that the

psychologist talks about is the ordinary, normal boy. You are asking him to name anything that a twelve-year-old couldn't do. He don't know whether you are talking about psychology or what that means.

Q Did you or did you not make a specific examination of this defendant at any time to determine whether or not he was feeble-minded? A No, sir.

J. HENRY CLARK, sworn for the State in rebuttal.

Direct examination by Mr. Bernhard.

Q Dr. Clark, how long have you been a practising physician? A Thirty-six years—thirty-seven years.

Q Where? A City of Newark.

Q Along what line? A For thirty-three years I have worked in the line of an alienist. During my official capacity I have worked among the insane.

Q What do you mean in your official capacity? A Chief surgeon of the Police Department of the City of Newark.

Q How many years? A Thirty-three years.

Q What do you mean when you say you have worked among the insane? A I have come in contact with, been called upon to treat, examine, place in proper institutions, render opinions, on an average of 300 insane a year, including feeble-minded, epilepsy and that category of persons.

Q Are you connected with any hospitals or other institutions? A I have been connected with the City, St. Barnabas; I am surgeon-emeritus in St. Michael's; I was three years in a New York hospital.

Q Is there any distinction in the examination that you have made in cases in the years of persons that you have examined—age? A I have examined all ages.

Q By that you mean what? A Children to adult life; senility, old age, from eighty-one up.

Q And have been called on in court or otherwise to express an opinion upon the examinations that you have made? A Yes, sir.

Q Where in court—whereabouts? A In this court—in this court house; been in Trenton, Elizabeth, Jersey City, New York.

J. Henry Clark, direct.

Q How many times have you testified as an alienist? A Well, I couldn't state, it has been so numerous, very numerous; I have been connected more or less with every prominent case.

Q Did you make an examination of the defendant as to his mental capacity? A I did.

Q When, first? A October 1st, half-past ten in the morning, at the Essex County Jail, in the infirmary department.

Q Was that the first time you had seen him? A No.

Q You had seen him where before? A July 17th, at Police Headquarters, in the Bertillon room.

Q What kind of an examination did you make at the jail? A I made a general examination to determine his mental capacity.

Q Be a little more specific. A I made such inquiries, I made such an examination as would determine his degree of mentality with particular reference to memory and orientation and his knowledge of himself and his family history and all his life work.

Q Did you or did you not make any physical examination? A I made also a physical examination.

Q With or in connection with the opinion that you formed? A Yes, sir.

Q And from the examination that you made did you form an opinion as to his mental condition, as to whether he knew the difference between right and wrong and as to the nature and quality of his act? A Yes, sir.

Q What was that opinion, Doctor?

Mr. Simandl. Objected to.

The Court. Sustained. Let him state what he found first.

Q What did you find upon your examination? A I found a well-nourished physically normal man, normal hearing, normal sight, normal limbs, normal condition of the head as regards its formation. I found the man presenting a good memory and fully orientated as regards time, place, surroundings, people, dates and events.

Q How did you find out these latter elements? First, as to memory? A By questioning.

Q By what questions? A "What is your name?" "How old are you?" "Where do you live?" "Where are you now?"

Q Doctor, as you give us the questions won't you be good enough to give us the answers? A "Philip Schilling, twenty-

nine years of age. I did live at 158 East Twenty-second street and also had a Newark home with my brother here in Newark. I am now in the Essex County Jail. I was born in Elizabeth, came to Newark when I was a child; lived here in Newark all my life with my father and mother. I have a sister. My father is not living. I went to school at five years of age; I left school at thirteen. I felt that I had had enough. I worked in Edison's lamp factory for nine months, about, and in Whitehead & Hoag's for about two or three months. After that I didn't work. I was knocked around and kept bad company and got into a different life. I began to get in trouble about sixteen years of age, which has kept up."

By Mr. Simandl.

Q What questions did you put to him, Doctor? A The questions that would permit the answers that I am giving you.

Mr. Bernhard. In view of the objection, state the questions and the answers.

Witness. I don't understand; you wish me to go back and go over?

The Court. You are not entitled to the questions. If he states enough of the examination upon which to base an opinion that will be sufficient.

Q Proceed. A "This kept up. I was arrested several times. I was not treated fairly at all times. My pals squealed on me. I was arrested once for assault and battery, highway robbery, and I didn't know anything about it. I got my living from the money I picked up from the crimes that I committed. I found it the easiest way to get money. I read the papers, but I only read the headings; I am not interested in the League of Nations; I know Mr. Wilson is President of the United States. The only thing I am interested in is baseball and fighting. I believe the Cincinnati's will win."

Q When did he tell you that? A At this examination.

Q What was the date again? A October 1st. "They are the best teams. I haven't kept tally on the Police Court. I picked Dempsey to beat Willard. I killed Paddy Ryan because he wanted to arrest me. I knew what he wanted. I didn't want to be arrested. I would rather die than spend any more time in jail. I want to get away. I don't sleep very well. It is on ac-

count of the confinement here. I don't hear any noises. I don't see any funny things, that is all right, I only object to the confinement. I know what you are here for. I know what both of you fellows are here for. You are here to see if I am crazy. I don't care what you think, it makes no difference to me. I know what I will get; I will get the chair. It don't worry me any. I have talked enough. I don't intend to answer any more questions. You can go out and say anything you please; I don't care what you say. I can write my name, yes." I allowed him to write his name; he wrote it well on a piece of paper. "I felt justified in killing Paddy Ryan because he wanted to arrest me, and I know he had every reason to arrest me, and I didn't want to be arrested." That is practically all that I can remember.

Q Have you exhausted your memory of what took place at that time? A I might add that physically I found—

Q I ask you now have you exhausted your memory of the conversation that took place at that time? A It is difficult for me to remember in the absence of notes.

Q That is the reason I am asking the question. Have you exhausted your memory? A I think I have.

Q You spoke of notes. Did you take any notes? A At this time, while he was talking, I wrote down his answers.

Q Have you them in your possession? A Yes, sir.

Q Without the aid of your notes have you exhausted your memory as to everything that was said there at that time? A Yes, sir.

Q And with your notes you will be able to give us the entire conversation? A Yes. I may have remembered the major portion of my notes.

Q Look at your notes and determine whether or not you have given us all of the conversation?

Mr. Simandl. I object to the doctor using his notes. I think he is qualified. He has shown that he remembers most of what transpired there. I don't think the notes are necessary.

By the Court.

Q These are your notes made at the time of this interview? A Yes, sir.

Q In your own handwriting? A Yes, sir.

The Court. Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Witness. He made the remark, "I came to Newark when I was a baby." He may have mentioned he came to Newark at five years of age. He mentioned nothing of an accident. "I was in the fourth grade then; I wasn't given a fair chance when I was arrested by the police several times. Some crimes I committed and some I didn't commit. I was punished for a crime two and a half or more years ago I didn't know anything about, in 1917, assault and battery and highway robbery; several times my pals squealed on me. I believe I have been in crime too many years to stop."

The Court. Do you want him to fold up the paper and put it in his pocket?

Mr. Simandl. Yes.

The Court. Do that, Doctor.

Q Look at the whole paper and see if there is anything you forgot to tell us about. A "Cobb is the leader in the American League." I remembered it quite fully.

Q How did the asking of these questions and the soliciting of these replies help you to form a conclusion? A By the accuracy, the promptness and clearness with which he made them.

Q Upon what, then, in general did you form your conclusions, upon what facts in general and examination did you form your conclusions? A His good memory, his orientation.

Q What does that word mean? A Orientation?

Q It is a medical term? A Yes; it means the concise, proper idea as regards persons, time, and locality and events and where they live, "Who am I?" and I recall a question I asked him to which he replied, which I didn't write down.

Q What was it? A I said, "Do you know me?" He said, "Yes." "Did you ever see me before?" "Yes." "Whereabouts?" "Down at police station." "When?" "Why, you examined me that morning."

J. Henry Clark, cross.

Q On what do you base your opinion? A He proved to me that his memory was good; he proved to me that he knew where he was, knew his age, knew all the circumstances of his life, recognized me. Knew events and knew localities and knew persons and knew time. I asked him what year it was; he told me 1919; I asked him the month and the day, and he was correct in his answers; we put all of that under the head of orientation, which we lay considerable stress on.

Q What else, then, besides the head that you have just described did you base that opinion on? A That was practically the basis of my opinion.

Q Do you include your physical examination? A Yes, sir.

Q What opinion did you form as to whether or not, in your opinion, he knew the nature and quality of the act, as to whether it was right or wrong?

Mr. Simandl. I think I have the right to cross examine the doctor on his qualifications.

The Court. Yes.

Cross examination by Mr. Simandl.

Q Doctor, you are a nose and throat specialist? A I am not.

Q Have you been such in St. Michael's Hospital for thirty-five years? A I have not.

Q On what occasions were you called to examine a man for sanity or insanity? A On what occasions?

Q Yes, in connection with your position of chief surgeon of the Police Department? A I don't quite understand you. It is my duty to examine all men brought in for murder; it is my duty to examine all men brought in whose mental or physical condition is a matter of question or doubt for me to determine, any crime, no matter what it may be.

Q Any crime of any moment you are called in because there may be a question? A In any case where there is any question in the minds of the officers of the department.

Q Have you kept in touch with the modern literature on the subject of the human mind? A Yes.

Q For feeble-mindedness also? A Yes, sir.

Q Have you ever read Goddard's book on "Feeble-mindedness"? A Yes, I have it.

Q Have you read a book by Grasa on "Semi-Insane and Semi-Responsible"? A No, I haven't that.

J. Henry Clark, re-direct—further cross.

Re-direct examination by Mr. Bernhard.

Q Answer my other question? A I consider him normal in mentality, fully aware of the quality and the nature of his act, shooting Lieutenant Ryan.

Q And what have you to say as to whether he knew it was right or wrong? A I believe he knew fully whether it was right or wrong.

Further cross examination by Mr. Simandl.

Q Doctor, what is a moron? A Oh, it is some individual who is morally derelict, who is a moral mental deficient. It is a term not commonly used. There are other definitions a good deal better, but moron means criminal depravity, of criminal mentality; a man whose mind is of such a nature that he enjoys crime, does not hestitate to commit crime.

Q Where did you get that definition from? A Dieffenbach has it; White will give it to you under another heading, in the course of his explanation that the term "moron" is sometimes applied to that class of cases. You will find it in Dieffenbach, which is a very excellent translation of Crepplin, on page 318.

Q Is Goddard a standard work on feeble-mindedness? A It is a work that you might call standard. It is one of several works that we all ought to have in our library. We don't depend on Goddard's or any one work, but benefit from all of them.

Q Then do you know what Goddard's definition of a moron is? A I don't think I have looked it up, no.

Q Do you agree with the definition given by Goddard if I were to tell it to you?

Objected to.

Mr. Simandl. He has agreed that it is a standard work.

The Court. He says he does not know about the definition of moron. You can ask him whether he agrees with a certain definition and leave the word "Goddard" out, and then the prosecutor cannot object successfully.

Q Do you agree with this definition of a moron: "One who is capable of earning his living under favorable circumstances, but is incapable from mental defects existing from birth or an early age from competing on equal terms with his normal fellows or of managing himself or his affairs with ordinary prudence"?

A I don't think that is very complete or full; no. I wouldn't say that I agree with that altogether.

Q If I told you that this definition was defined by the Royal College of Physicians and Surgeons, would that have any weight, in your opinion?

Mr. Bernhard. I object, unless the doctor knows the college and the definition to which reference is now made.

The Court. How is that competent?

Mr. Simandl. First I asked the doctor whether or not Goddard's was a standard work. He said it was. I then read him a definition, which he did not agree was correct—

The Court. He said, "I don't think it expresses it fully."

Mr. Simandl. Then I told the doctor the originator of the definition in order that he might say whether or not the definition came from one who is a standard authority for making such a statement.

Mr. Bernhard. What difference does it make where it came from?

The Court. Objection sustained.

Q Then you don't agree with the definition; is that right? A Yes.

Q You came up here to make an examination to find out whether or not this man was sane; is that right? A You refer to my going to the jail on October 1st?

Q Yes. A Yes.

Q Did you have him stripped for an examination? A No.

Q You didn't? A Did not.

Q Did you make a thorough physical examination of his body? A Thorough enough to satisfy me personally.

Q Was it thorough? A To my mind, yes; to my satisfaction, yes.

Q Had his clothes off? A Yes.

Q Sufficient to make a thorough examination? A Yes; it is not necessary to remove a man's clothes to determine whether a man is sane or insane.

Q You said you made a thorough examination? A I did. There is no necessity of removing a man's clothes, and it is not mentioned as a necessity.

J. Henry Clark, re-direct—further cross.

Q You asked what his name was. Would a child know that? A Some children, yes, very quickly, five or six years old, they would know it.

Q Would a child know how old it was? A Yes.

Q Would a child know where he lived? A Yes, at the proper age.

Q Would a child know where he was at that time? A Yes.

Q He would know his name? A Yes.

Q It would know you if it saw you before? A A bright child, a child of normal mentality would.

Q Would a child know that its father was dead? A Yes.

Q The child would know the house it was in, wouldn't it? A If the child is of an age that would justify her knowing, that you could expect her to know.

Q What age? A About four years of age.

Q Every child would know something about the ball game? A That depends on whether it is a boy or girl.

Q A boy. A You are speaking about a child and don't mention whether it is a girl or boy.

Q Would a boy of twelve know anything about a ball game? A Most assuredly.

Q A boy of twelve would know something about a prize fight? A As a rule they do.

Q A boy of twelve would know who the President of the United States was, wouldn't he? A A bright boy would.

Q Under the present circumstances, wouldn't any boy of twelve know that Mr. Wilson was our President? A We have some stupid boys who wouldn't know.

Q If a boy was arrested, a boy under twelve years of age, wouldn't he know that fact?

Mr. Bernhard. Under twelve is a very general term. It is only fair that he should have a definite age.

Q Would a boy of eleven know that he was arrested, know that he had been arrested? A Yes.

Q Wouldn't he know that he had been to a boys' home? A If he had been, yes.

Q If he had stolen wouldn't he have known it? A Yes.

Q If he had shot a man wouldn't he have known it? A Yes, sir.

J. Henry Clark, further direct.

Q What did you ask this boy by which you could determine what his mental age was?

Objected to.

Q Doctor, would a boy of eleven remember his lessons in school? A It depends on the boy. Some boys do and some don't.

Q What makes you say that he was accurate, how do you know that, Doctor? A Because they were verified by the previous examination, made by the same party, and they were verified by statements, to my knowledge, that he had made to others.

Q What was it that impressed you as to his truthfulness? A I wasn't looking after the truthfulness. I was looking after his ability to state facts as regards his life and being able to state facts, having the intelligence to make the proper replies that were called for by my questions, and his replies were intelligent.

Q Did those replies correspond with those made at the first examination? A Yes, sir.

Q What did you think of his truthfulness? A I am inclined to believe that he was right, correct; had every reason to believe that it was true. I knew of the occurrences of the crime; I know they were true; I knew of his statement that he was wanted by Paddy Ryan for that Eighth avenue job, and I knew he was correct in that respect, and I knew that Paddy Ryan had a warrant for him, and I knew that his statement in regard to "That there was every reason why Paddy Ryan should arrest me" was because he had a warrant for him. I knew that was true.

Q Then he personally told you the truth? A He told the truth in many instances, and the fact that it was the truth I knew from other sources than from him alone.

Q You believe, then, that he was telling you the truth; is that right? A Yes, that is right.

Q Then, if that is true, when he told you as you testified here the other day, "I shot Paddy Ryan because I wanted to get away, I didn't intend to kill him," that he was telling the truth? A Yes.

Further direct examination by Mr. Bernhard.

Q I understood you to say that you personally knew that Lieutenant Ryan had seen a warrant for the defendant's arrest. Is that what you intended by your answer? A Had seen it?

Walter S. Washington, direct.

Q Yes. A Had a warrant.
Q When did you learn that?

Objected to.

The Court. You brought it out. Why didn't you move to strike it out?

(Question read.)

Objected to.

By the Court.

Q In answering that question, Doctor, can you tell us something within your own personal knowledge and observation, or must you mention some information that was conveyed to you? A No, sir; my own personal observation, if I may be permitted to state.

Q And in answering you can give us your observation? A That word observation assumes my own knowledge of the occurrence that made a warrant necessary. Of course, I don't pretend to—

Q I want this question answered just exactly as it is asked and answered yes or no. In answering that question can you base your answer upon your own personal observation or are you going to possibly say something that somebody told you? A May I explain the circumstances?

Q You can't explain anything. Just answer that one question.

Mr. Bernhard. I withdraw my question.

WALTER S. WASHINGTON, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Bernhard.

Q Doctor, your office is where? A 9 Fulton street, Newark.

Q How long have you been a practicing physician? A Nearly forty-four years.

Q You received your diploma where? A Trinity, Toronto.

Q During that period of time how much have you practiced in Newark? A Between thirty-three and thirty-four years.

Q And your practice has consisted of what? A General practice, as a rule, a large part of the time.

Walter S. Washington, direct.

Q Have you specialized on any subject? A No. I was the assistant surgeon to the nose and throat clinic of St. Michael's Hospital for a number of years, but aside from that I have held myself out not as a specialist, although for many years my work has been court work generally.

Q Have you held any official position in the County of Essex? A Yes, I was county physician for eight years, and during that time, I might say, Dr. Clark was my deputy, and during his absence I acted as police surgeon. I was acting police surgeon during his absence during that eight years.

Q Doctor, is the term alienist a well-accepted term in the medical profession? A It is.

Q What is it? A A study of the diseases of the mind.

Q Are you an alienist? A I suppose I really am. I have made quite a considerable study of diseases of the mind and I have rather an extensive practice through the examination of insane people, and also people who are not insane.

Q What do you mean by the last answer? How considerable has your experience been? A Well, it has extended over twenty-five years. During the period from 1894 to 1902 I examined with Dr. Clark all of the indigent cases that were sent to the various asylums from Newark; that consisted of several hundred a year. Since that time I couldn't say how many I have examined, but every year I examine quite a number, and I go to Morris Plains several times a year and examine all the patients from Essex County that I find there; and I have examined, in addition to that period, for either the State or defense, every case in Essex County in which insanity has been interposed as a plea for twenty-five years without any exception. I have also appeared in Hudson County probably a dozen times.

Q Did you make an examination of the defendant? A I made an examination.

Q When? A I made the first one on the morning of July 21st last and the second one on the morning of October 1st, last.

Q Where? A In the County Jail.

Q Anyone with you either time? A The first examination was made by myself alone. There were others about, not physicians. The second examination was made in connection with Dr. Clark.

Walter S. Washington, direct.

Q What did you do on your first examination? A The examination was made for the purpose of determining whether this man knew the difference between right and wrong and whether he knew the nature and quality of the act of which he had been accused, and it was made with a special purpose.

Q Doctor, was there anything said by you in making the examination, or any replies elicited from the defendant? A There were.

Q Was there a memorandum made of them? A I made written memoranda of that and the same in the second examination.

Q Are you able to testify from your recollection without referring to the memorandum? A No.

Q Will you give us as much as you can recall without the aid of your memorandum? A I am not to use the memorandum? It makes a very disconnected story.

Q It is the rule of law. A This is the first time I have ever known that. Do you want me to give you this in narrative form? I can't give you all the answers and replies.

The Court. Go ahead, doctor, and do the best you can.

Witness. I asked him his name, and he said it was Philip Schilling. I asked him his age; he said he was thirty. I asked him where he was born. He said he was born in Elizabeth. I asked him if his father was alive. He said no, his father was dead at the age of fifty-nine. I asked him if his mother was alive, and he said yes, she was alive at the age of sixty. I asked him if he had any brothers and sisters. He said yes, he had a brother and sister, all alive. And then I asked him at what age he began going to school. He said between five and six. What age did he quit school? At the age of seventeen. The grade he was in when he quit school. He said Five-D. I asked him what he did after he quit school. He said he went to work in the General Electric Company, where he worked for nine months; later he worked four months as a chauffeur on a truck for Bamberger. Outside of that he gave no history of having done any work of any kind. He said he had remained home until he was eighteen or nineteen years of age; after that he had lived part of the time in Newark and part of the time in New York, but not

at home with his mother. He said that he was first arrested or committed to an institution by his father, I understood it; he was sent to Verona, the Reform School—

Mr. Simandl. May I make an objection so it may appear on the record? I object to the doctor not giving the questions.

The Court. Objection overruled.

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

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

WM. P. MARTIN,
Judge.

Witness. He said he was there nine months; he said that in 1911 he was arrested and sent to State's Prison for three years; that he served about fifteen months of that time, when he was pardoned or paroled—at least he got out. He was later arrested, I think it was about 1915; I won't be absolutely sure of these dates. He was arrested this time I think in Passaic and was sent down again for a term of three years, of which term he served three and a half months. He was also arrested and sent to Caldwell, where he served—

Mr. Simandl. Are you testifying to what the defendant told you in answer to questions?

Witness. Yes.

Mr. Simandl. I think I ought to have a right to hear these questions. This is an indirect method of trying to bring in the criminal record of this defendant.

The Court. Did you not open the door? Didn't your experts say that he told them that he had been to the Reformatory, State's Prison, and so forth. Have you not opened the door for just exactly this proposition?

Mr. Simandl. Objection withdrawn.

Witness. He said that he had been sent to Caldwell, that he was arrested and sent there and punished. He said he was also arrested July 16, 1919, which was five days before I saw him. He said that he was arrested without authority, picked up on the street many times

and searched. He said that Detective Ryan arrested him on the corner of Norfolk street; that he didn't care—that he knew he had a right to arrest him because he was a fugitive from justice, but he didn't care to be arrested; that he chased him; that Detective Ryan brought him back to the corner of Norfolk street; that he struggled to get away and that during the struggle Detective Ryan had hit him in the face; that he pulled out his gun and shot four times; that the defendant ran away and went up the street and finally, some hours later, was arrested in Broome street, I think, six or seven hours later, and then locked up, and then brought up to the jail. He said he sometimes thought he had not been given a fair chance by the police; that when he had been arrested he had been convicted on his police record, not on the actual facts in connection with each case. I asked him which one. He said that some times he had been convicted when some of his pals squealed on him. I asked him in which case or cases in which he had been convicted when he was innocent, and he said the time he was sent to Caldwell. I asked him if he had committed crimes of a like character for which he had not served time and been punished and he refused to answer. His general attitude was one of defiance at that particular time. He said, "I know what the punishment is, it is the electric chair, but I am not afraid, they can take me out and kill me any time they want." That was his general attitude towards this particular crime. He said, when asked if he thought he was justified in shooting anyone or killing anyone, "Well, in a way, I think one is justified." He said, "Paddy Ryan did me a hundred wrongs; he was always picking me up on the street, arresting me and searching me and making an awful time." I think that concludes practically the whole of the first interview.

Q Now, doctor, you have told us about the history. Did you make any physical examination? A None whatever. I made an inspection of his head to see if his head was symmetrical in form. He has a very prominent nose; he has two remarkably well-shaped ears, and he has a chin which is normal and without any signs of weakness whatever. Aside from that I made no physical examination of him whatever.

Q Was one necessary in your opinion? A Not in the slightest.

Q I understand that you saw him again? A Yes, I saw him again on October 1st, at the county jail with Doctor Clark.

Q What did you do then? A I asked him if he knew me; he said he did; he said I had been there before, and he said that he knew Dr. Clark; Dr. Clark had examined him at Police Headquarters. He also volunteered at that time the further information in regard to his work, that he had worked at Whitehead & Hoag's for a few months. That information was not volunteered to me at the first examination, to me; that was on the second examination. I asked him about Detective Ryan and the shooting, and he said that he was justified in shooting him, and some few things of that character. At any rate, he maintained at that time that he was justified in shooting him on account of the treatment he had received from him.

Q What was the object of asking these questions? A In the first place, it is to determine one's memory; in the second place, it is to search out, if possible, and eliminate any of the ordinary things which are associated with insanity in any form. There was absence, entire and complete, on both examinations, of any delusions, of any hallucinations, had no illusions. The statements were all responsible; they were rational; the reactions to all of the questions were of the same nature and the questions were directed towards that end entirely. We wanted to get a line on his general attitude and intelligence. I asked him if he took any interest or knew anything about the League of Nations, and he said no, he wasn't interested in that. I said, "Aren't you interested in the coal strike"? "No, the coal strike I am not interested in that. I read the headings of them and I don't care anything about it." I said, "You are not interested in it?" He said "I am interested in fighting and baseball." "Who is leading the National League?" He said "Cincinnati."

Q Who was leading in the National League at that time? A Cincinnati. I said, "Who is leading the American League"? He said, "The White Sox."

Q Who was leading the American League? A White Sox. I said, " Which do you think will win the championship?" He said, "I think Cincinnati will. I have been following the race all season; I think they are the nearest; I think they will win." I said, "Who is the leading batter in the National League?"

He said, "Ed Rousch." I said who was the leading batter in the American League, all of which information was correct. I said, "Who do you think will win the fight between Ratman and O'Dowd," and he said he thought Ratman would win. I said, "Who do you think will win the fight between Dempsey and Willard?" and he said, "I think Dempsey will." I said, "Who is the lightweight champion?" He said, "Benny Leonard," "Who is the featherweight champion?" "Johnny Kilbane." "Who is the bantamweight?" "Herman." All of these statements were correct and responsive. His attitude at this time was of the same character as at the first. I said, "Do you know the punishment?" "Yes," he said, "the punishment is the chair, but I don't worry about that; that don't worry me." And this was about the conclusion of the interview, because he said, "I think I have talked enough; I don't care to talk any more."

Q From the examination that you made are you able to form an opinion, doctor, as the result of the examination that you made, and were you able to form an opinion as to whether he knew the nature and quality of his act and as to whether it was right or wrong? A I am.

Q What is that? A That he did.

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

Q I forget to ask you the reasons that you base the conclusion upon that you have just given us? A What conclusion was that?

Q That the defendant knew the difference between right and wrong and the nature and quality of his act? A During the course of the two examinations I made he showed a good memory; he showed that he was in touch with everything connected with the ordinary affairs of life that I asked him about; he didn't give the slightest evidence of any delusions of any character, of any hallucinations or illusions. His answers were always responsive, at least, whether they were always truthful or not; but during the course of them there was nothing elicited that in any way showed there was the slightest departure from what one might speak of as the ordinary man whatever, mentally.

Walter S. Washington, cross.

Cross examination by Mr. Simandl.

Q You are an expert in many things, are you not, in relation to your science? A I don't believe I am. I wish I were, but I don't think I am.

Q You have testified as an expert in many cases, have you not? A Oh, yes, a great many.

Q And you have held yourself out as an expert on many of the various matters within your science, have you not? A I never hold myself out as an expert of any kind whatsoever. I have answered justifying my position whenever I can, but I have never held myself out as an expert.

Q You said you testified as an expert many times, did you not? A Yes.

Q Isn't that holding yourself out as an expert? A No, that is justifying the position I am taking, not that I have held myself out.

Q Do you do court work generally? A Yes, quite a good deal.

Q Do you hold any professional connection as an expert in the Public Service Corporation in Newark? A I do work for them a great deal.

Q You can answer that question, doctor, yes or no? A Well, it depends on what you mean by connection. I am employed by the Public Service. Aside from that I have no connection with them.

Q You testify in court for them, don't you? A Oh, yes.

Q Regardless of what the nature of the case is, don't you? A Well, no, I wouldn't say that. There are many cases in which suits are brought against the Public Service involving specialties that I have nothing to do with whatever, but in the ordinary cases where it is a question of injury, and frequently where the nervous system is involved, I testify for them regularly.

Q In fact, in any case where medical testimony is necessary you testify, don't you? You can answer that yes or no. No explanation is necessary.

The Court. He does not have to answer yes or no. He may state the truth.

Mr. Simandl. I submit that where the questions can be answered yes or no he should be compelled to answer them yes or no.

The Court. I will not confine him to yes or no until a point is reached where the proper exercise of the discretion of the Court seems to be necessary, if it is reached.

Q You testify in cases for the Public Service involving bone injuries, fracture cases, cases of that nature, don't you? A I do.

Q How many times did you see the defendant? A Twice.

Q For what purpose did you go there to see him? A I went both times to make an examination of him to determine whether he knew the difference between right and wrong, whether he knew the nature and quality of the act that he had committed, and whether it was wrong. That was the sole purpose of my going there in both cases, both times.

Q Then you didn't make any examination specifically to determine whether he was feebleminded, did you? A Only, as that question developed during the course of the examination.

Mr. Simandl. I object to the answer as not responsive. He could have answered that yes or no. I ask the question, which is plain, whether he went there to discover feeblemindedness, make an examination specifically to discover feeblemindedness. The answer should be yes or no.

The Court. I decline to rule that he must answer yes or no. Have you anything further to add to that, doctor?

Witness. No, that answers it sufficiently.

Mr. Simandl. Do I understand your Honor to rule that the doctor must answer that question yes or no?

The Court. No. I said he must answer it according to his understanding of the truth. My point is that in the evidence brought out it is not precisely and exactly clear just what feebleminded is, whether it is a thing susceptible of an accurate statement or whether it has difficulties of comprehension. I think the witness ought to be permitted to have a certain reasonable leeway in which to answer.

Walter S. Washington, cross.

Q Did I understand you to say that you based your examination on the questions that you submitted to him alone, you base your opinion upon an examination? A I base my opinion upon the two examinations that I made.

Q Did you take into consideration his history, doctor? A I did.

Q You didn't mention that before? A I did. I mentioned it quite extensively.

Q Could a boy eleven years old tell you his name? A Most boys could. There may be exceptions, but the ordinary boy could.

Q Could he tell you his age? A Yes.

Q Could he tell you his mother's name? A Yes.

Q And whether or not his father was living? A Yes.

Q The members of his family? A Yes.

Q Whether he worked or not? A Yes.

Q His age? A Yes.

Q Wouldn't a boy know all about baseball games? A I don't think the ordinary boy twelve or eleven years of age would have as complete and accurate knowledge of the baseball games in this country as this man had. There may be some boys that know it pretty thoroughly, but I don't think the ordinary boy does, not as completely and thoroughly and truthfully. His statements were all exact.

Q His statements were true, were they not? A With reference to those matters, the ball games.

Q How about the other matters? A I don't know that all of the statements were true; some of them were undoubtedly, and some of them undoubtedly were not.

Q Did he, doctor, in your opinion, try to evade the truth? A I wouldn't say that he tried to evade the truth, but I will say this, that I don't believe in some of the statements he is stating precisely what his belief and opinion is.

Q And yet you base your opinion upon the examination of what he said, did you? A Yes, sir.

Q If he didn't tell you the truth how could you arrive at a conclusion? A The larger part of the statements, that is, as to his age, and family history, and habits, and conduct, the history of his criminal appearances in court, and the various terms that he had served were nearly sufficient; it didn't make any difference whether they were absolutely true or not, but I ac-

cepted them as true, but there was nothing in other suggestions to indicate to me that they were untrue. With reference to the crime itself there is a slightly different aspect. This man is thirty years old; he knows what crime is because he has been a criminal for years and he knows what punishment is, and he knows that if he is convicted what that punishment is that he will have to serve. Now, when he says to me that he thinks he is justified—first, he said he thought in a sort of way he was justified; other times he says he is justified, then I have a right to withhold my opinion as to the truthfulness of that statement. He is a man thirty years of age; he knows all about crime; he knows what the punishment is; he knows just what will happen, and when he knows that and he tells me that it is right to kill somebody, then I don't believe.

Q Doesn't a dog know that he will be punished if he does wrong? A Well, now, you would have to specify the dog—

Q You can answer that yes or no. A You have got to be more specific than that.

Q I said that a dog knew that he would be punished if he had done wrong? A I don't believe I can answer that question.

Q Have you ever owned a dog? A No, never owned one. I am satisfied with a cat.

Q How about the cat? A The cat is not an individual that responds to anything of that kind.

Q Can you train a cat to be clean?

Mr. Bernhard. I object to this as irrelevant. He has not testified as to his knowledge of any animal instinct, but simply testifies as to the knowledge and instincts of a human being.

Mr. Simandl. It is proper on cross examination to determine the scope of the doctor's knowledge.

The Court. You haven't shown that there is any relation between the human intelligence and that of an animal, have you?

Mr. Simandl. It is common knowledge.

The Court. You claim that it is.

Mr. Simandl. I claim that it is common knowledge that a human being has a larger degree of intelligence than an animal.

The Court. You just said that it was common knowledge that an animal has intelligence.

Mr. Simandl. It has been proven.

The Court. I thought you said that it was common knowledge that an animal had instinct.

Mr. Simandl. Whatever your Honor would call it. I think an animal can be trained and therefore if it can be trained it must have some intelligence.

The Court. I will not require the doctor to answer it, but I will let him answer it if he can.

(Question read.)

A I can only say from personal experience, that I have a cat that has been trained for many, many years, but it is not clean yet.

Q Well, you know that if an animal does a wrong act by his actions he shows that he expects to be punished? A You mean a cat or a dog.

Q Yes. A Our cat does not, and I am not familiar with dogs.

Q Then, doctor, because the defendant knew there was punishment for crime, do you think then that he knew the quality of his act? A Because there was punishment? That is the reason, certainly.

Q Why? A Why?

Q The question is plain, I believe. A Just ask the question again in some shape that I can understand it.

(Question and answer read.)

Mr. Simandl. I think it is perfectly proper of me to ask why the doctor said that it is part of his reason.

The Court. Ask him.

Q I ask you that, doctor? A That particular opinion is part of the whole. That is all it shows, that he knows what crime is, that he knows that there is punishment and he knows what the punishment is; that is part of the whole.

Q But what then, doctor, was there about this examination that led you to believe that this boy knew the quality of his act? You said that is only part? A I have gone over it two or three times. The whole examination, which indicated his

memory, his knowledge of his surroundings, his responsiveness to questions that were asked him, his intelligence in different things that I spoke to him about, together with his entire actions, not the slightest indications of delusions or hallucinations or illusions or any mental disturbance whatever.

Q Wouldn't a six-year-old child know the knowledge of his surroundings? A Oh, yes, earlier than that.

Q And he could give you an intelligent description of a baseball game, could he? A I don't think so; oh, no.

Q At eleven could he give you an intelligent description of a baseball game? A Some boys could.

Q Of a prize fight? A I know there are no children of that age attending prize fights in this country—I don't suppose there are.

Q Could a boy eleven years of age give a description of a prize fight? A If he saw it.

Q I ask you if there are any boys eleven years of age that could give a description of a prize fight? A Yes, if they seen it.

Q Did he tell you he was a fugitive from justice? A He did.

Q Did he use those exact words? A I wouldn't say that. I think he used the exact words, that he was a fugitive, that Paddy Ryan had a warrant for him and knew that he had a right to arrest him if he saw him.

Q Then you believe, in spite of the fact that the defendant killed Detective Ryan, if he hadn't killed him, he would be fit to mingle with his fellow men? A Just as fit as he was before.

Q That is not the question, doctor. I repeat my question and I think it can be answered yes or no.

(Question read.)

A Just what precisely do you mean by being fit—morally or otherwise? Now just precisely state what you mean and I will answer you without any hesitation.

Q I thought you said that this man was sane, doctor? A Oh, undoubtedly sane, no doubt about that.

Q Then a sane man is fit to mingle with his fellow men, is he not? A Ordinarily.

Q You can answer my question? A That is what I mean, and I mean precisely that he can associate with his fellow men so long as he behaves himself and doesn't get into trouble again.

Walter S. Washington, further direct.

Mr. Simandl. I move to strike that out. I move to strike out after the words, "That is what I mean."

(Answer read.)

The Court. What is the trouble with that?

Mr. Simandl. The questions which are so simple for an expert to answer yes or no should not be qualified so that the doctor places himself in the position of not answering the question at all. That is practically what the doctor is doing, he is evading the question. He can answer yes or no and he refuses to or volunteers additional information.

The Court. You want stricken out the words "Until he gets in trouble again?"

Mr. Simandl. Yes.

The Court. Your motion is to strike out, "As long as he behaves himself and does not get in trouble again."

Mr. Simandl. Yes.

The Court. Strike it out.

Further direct examination by Mr. Bernhard.

Q Is there any further explanation or answer that you wish to make to the last question? A The last question is not strictly a question for an alienist. It is a sociological project; it is not for an alienist to say. It is for anyone to say, if a man is sane he can go about. If there are other circumstances preventing him going around, that is a different matter. In so far as his sanity is concerned he can go about. I say yes to that.

STATE RESTS.

DEFENDANT RESTS.

Adjourned until tomorrow, Saturday, October 25, 1919, at nine o'clock.

SIXTH DAY.

Saturday, October 25, 1919.

Continued pursuant to adjournment.

Present, counsel as before stated.

Mr. Simandl sums up in behalf of defendant.

Mr. Bernhard sums up in behalf of the State.

Court's Charge.

The Court charged the jury as follows:

MARTIN, *J.*

Gentlemen of the Jury: The function of the Court is to instruct the jury in reference to the principles of law governing the case. The principles of law as charged should be accepted as a correct statement of the law. The jury, however, are the sole judges of the facts, weight of the testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all the facts. The Court, in referring to the testimony, is not to be understood as deciding any of the facts, but merely as attempting to elucidate the evidence for the convenience or assistance of the jury, or to illustrate or explain principles of law. If the Court errs in its statement of any evidence, or assumes the existence of any evidence, whether disputed or not, that is not actually before the jury, the jury are to rely upon their recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis, the jury are not to disregard other evidence which they may deem of equal or greater importance. It is the duty of the jury to consider and weigh all the evidence and pertinent proof bearing upon the questions before the jury, not only those which are mentioned by the Court, but all that have been presented here before you.

If it has been suggested or merely stated by counsel during the course of the trial that some facts have or may have occurred, or matters have been offered as evidence and excluded, or matters have been presented and subsequently stricken out, the jury

should disregard all such suggestions, statements, offers and excluded matter. The verdict can lawfully and properly be based upon the evidence remaining in the case only.

The law presumes that the defendant is innocent and this presumption can be overcome only by evidence showing beyond a reasonable doubt the guilt of the defendant. The defendant is entitled to the benefit of the reasonable doubt not only as to the commission of the crime and the nature of the offense, but as to the degree of the offense. The State must likewise show all the essential elements of the crime beyond a reasonable doubt, and of the grade or degree of the offense which is charged. The burden of proving the guilt of the defendant beyond a reasonable doubt is upon the State, and does not shift from the State throughout the whole case.

> "Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is on the prosecution. If upon such proof there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt, because if the law should go further than this and require absolute certainty it would exclude circumstantial evidence altogether."

This defendant is presented upon an indictment found by the Grand Jury at the April term, 1919, which contains a single count, charging that the defendant, Philip Schilling, at the City of Newark, did, on the 16th day of July, 1919, wilfully, feloniously and of his own malice aforethought, kill and murder one Patrick J. Ryan.

The finding of an indictment is a mere step in the regular course of legal procedure which must be taken before any person

can be put upon trial for certain offenses, and is of no evidential value against the defendant. The charge is in the statutory form, and under the indictment the defendant may be found guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter; otherwise, of course, he must be acquitted.

Murder is the unlawful killing of a human being with malice aforethought by a person of sound mind and discretion. The Crimes Act, Sec. 107, in so far as it relates to the matter, is as follows:

> "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 all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree."

The jury is to determine the guilt or innocence of the defendant, and if it finds that the deceased met his death at the hands of the defendant with a deadly weapon, used by him for that purpose, the presumption of law is that the murder was murder in the second degree. To raise the grade of such offense to murder in the first degree the jury must be satisfied beyond a reasonable doubt that the distinguishing features of that grade of crime exist, that there was present in the defendant intent to take life, and that such intent was wilfully, deliberately and premeditatedly executed. Normally premeditation comes first, that is, an entertainment by the mind of a design to kill; then follows deliberation, the weighing of considerations pro and con, after which the killing, being determined upon, becomes wilful, deliberate and premeditated in the sense intended by the statute. The forming of such a design and its deliberate execution necessarily take some appreciable time. Not a long time, not necessarily an hour, or a minute, but still an appreciable time. The mental acts to which these words refer are capable of being performed with the rapidity with which the human mind is capable of acting.

The judges, magistrates, sheriffs, coroners, constables, policemen, and other ministers of justice, while in the execution of

their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice; for, without it, the public tranquility cannot possibly be maintained or private property secured; nor, in the ordinary course of things, will offenders of any kind be amenable to justice.

In considering this case, it seems to the Court that one of the main controversies which will have to be decided by you concerns the rights and duties of the parties respectively. If you find that Ryan was acting in accordance with his duty, it was the duty of the deceased to take the body of the accused into custody and to hold him in custody to answer the indictment, and it was the duty of the accused to submit to such arrest and custody. If, in making an arrest, an officer meets with resistance he is not obliged to retreat or desist. The person having authority to arrest or imprison may repel force with force, and if death ensues in the struggle he will be justified. This is founded in reason and in public utility. For few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone. If the officer meet with resistance and kill the offender in the struggle he will be justified, and if he be killed it will be murder. It must not, however, be assumed that an officer in the execution of process would be protected in acts of violence upon the prisoner committed of his own wrong and not warranted in the performance of his duty.

A peace officer—and a policeman of the City of Newark is such—has a right to arrest without warrant one whom he suspects to be guilty of robbery, although it afterwards appears that no crime was committed, provided he had reasonable cause to suspect that the person arrested has committed a felony. There is this distinction between a private individual and a police officer or constable: in order to justify the former in causing the imprisonment of a person he must not only make out a reasonable ground of suspicion, but he must prove that a felony was actually committed; whereas, a police officer or a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.

One of the principal controversies in this case is whether the accused is criminally responsible for the act. The defense is in

part insanity. If a defense of this character be sufficiently established the law accords the accused the benefit of it by an acquittal; but with regard to the methods by which such a defense may be made successfully, the law, from considerations of public policy, exacts, in the proof of such a defense, compliance with the standard adopted by the law for determining where criminal responsibility ends and criminal irresponsibility begins.

In the first place, the burden of proof rests upon the accused. The law presumes that every man is sane until the contrary be proved. Hence, when an accused sets up a defense of insanity the burden of proof is upon him, and he must overcome the legal presumption of sanity by a preponderance of proof and by evidence satisfactory to the jury. In the next place, the law adopts a standard of its own as a test of criminal responsibility—a standard not always in harmony with the views of scientists. Many of the forms and degrees of mental disease which, in the judgment of learned men would be regarded as insanity, are rejected by the law in the administration of criminal justice. The law regards insanity as a disease of the mind.

The law also repudiates in criminal prosecutions such defenses when based upon a defective or perverted moral sense—generally known as moral insanity. The person who steals the property of another, knowing the nature of the act he is doing, whose moral sense is so perverted that he cannot restrain his propensity to steal, is sometimes called a kleptomaniac, but in the law he is a thief and is punishable as such.

If the persons from whom the subjects of criminal law are derived should be permitted to prosecute their avocations because they are such as their moral propensities have led them to adopt, the object of organized society—the preservation of life and property—would be defeated. Stripped of its high-sounding name, moral insanity is wickedness, depravity. Laws are enacted and courts established for the suppression of crime begotten of such causes, and, therefore, moral insanity—crime excused on the ground of a defective or perverted moral sense—has no place in the criminal law.

Furthermore, the law not only considers insanity, when offered as a defense to a criminal charge, as a disease of the mental faculties, but it also prescribes the degree of the mental disorder which shall be exacted as the condition on which the defense of insanity shall be allowed; for it is not every kind or every degree

of insanity that will render a man irresponsible for acts otherwise criminal.

To establish a defense on the ground of insanity it must be proved that at the time of committing the act the accused was laboring under such a defect of reason, or mental disability, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. If an accused has sufficient mind to know the difference between right and wrong with respect to the act he is doing, he cannot discharge himself from responsibility by showing that he did the act under the influence of an irresistible impulse. Capacity and reason sufficient to enable the accused to distinguish between right and wrong has been adopted as the test of insanity in criminal cases, not only by the English courts, but by the courts of our own State.

An accused may have the most absurd and irrational notions on some subjects; he may be unsound in mind in some respects, and be a fit subject for confinement and treatment in an asylum for lunatics; but if, on an accusation like this, he has the mental capacity to distinguish right from wrong and to understand the nature and quality of the act done by him, he is amenable to the criminal law.

The law does not require a man to be in the full possession of his faculties, or in the possession of all his faculties, to subject him to criminal responsibility. It adopts as the test of responsibility the capacity to distinguish between right and wrong, and to comprehend the nature and quality of the act the accused is doing; and there the law stops. The safety of society and the security of life are dependent upon the maintenance of the standard adopted by the law and its enforcement.

The Court will not endeavor to review all the evidence before you, but will content itself with an outline of some of the matters which the State contends are shown by the evidence and some of the matters to which the defense has alluded and contends are also shown by the evidence.

The State contends that it is shown by the evidence that Philip Schilling, under the name of Harry Young, rented a room at 43 Eighth avenue from Miss Elizabeth Hefferon, and while there took from her person, about March 17, 1919, $5, by means of force, and aiming a revolver at her face; that Miss Hefferon made a complaint and subsequently identified the defendant's

picture as representing the person who committed the alleged robbery; that thereafter the defendant was indicted under the name of Harry Young for robbery; that a copy of the indictment was given Lieutenant Sweeney and he showed it, with the warrant and a picture of the defendant to Lieutenant Patrick Ryan in the latter part of June, 1919; that the defendant was not arrested until the 16th day of July, 1919; that about two months before that time he obtained a revolver from a man in New York; that shortly before twelve o'clock on the morning of the day mentioned he, knowing that he was wanted in Newark to answer a criminal charge, came here with a revolver apparently in his possession and certainly about his person and fully loaded before Lieutenant Ryan attempted to arrest him; that Lieutenant Ryan got on a westerly bound South Orange avenue trolley car about two blocks east of Norfolk street; that he saw Captain Cordano and spoke to him; that they alighted at Norfolk street, Lieutenant Ryan in the lead, and Schilling jumped up from where he was seated, recognizing Lieutenant Ryan, whom he knew for fourteen years, and knowing that he, Schilling, was wanted in Newark for an alleged robbery; the defendant ran north on Norfolk street about sixty-eight feet to an alley in back of a saloon, onto a pile of rubbish right alongside of the fence and jumped up on this rubbish and the fence and finally onto the shed, and that finally Lieutenant Ryan grasped him by the leg and brought him back to the ground; Lieutenant Ryan searched his hip pockets in his trousers; Captain Cordano arrived, and while he was there the prisoner made no attempt to escape or to use the revolver at that time; the defendant's hat dropped on the ground; Captain Cordano left to run after another man; Lieutenant Ryan proceeded with his prisoner, his left hand grasping the prisoner's collar at the back of the neck, the right hand grasping the forearm or wrist of the right arm of the defendant; they walked with Lieutenant Ryan to the right and slightly to the rear of the prisoner, whose left arm at this time was free; they went from the alley to the sidewalk on the west side of Norfolk street, down a short distance on the sidewalk, and then diagonally across to the northeast corner of Norfolk street and South Orange avenue; the defendant told Lieutenant Ryan to let him go, otherwise he would regret it, "I am not going in;" Lieutenant Ryan refused and held him, and defendant reached with his free hand into his right-hand inside coat pocket, took

out his revolver and fired four shots at Lieutenant Ryan, striking him in vital parts of the body with at least three of the bullets; Lieutenant Ryan let go after the first two shots, moved to a showcase across the sidewalk, partially fell, was taken to the City Hospital and died a short time thereafter that night; the defendant ran up South Orange avenue, turned down Jones street and into an alleyway, at the same time exhibiting his revolver, apparently as a menace to some of those who would follow; an hour later he purchased a cap, or perhaps it was half an hour, threw away the empty shells and reloaded the revolver, and finally arrived at 124 Wickliffe street, late in the night—I think it was about quarter-past one o'clock in the morning; Lieutenant Eugene Heller, hiding opposite to the house, saw the defendant come out, followed and accosted him about two block away, and the defendant said: "I want to get a trolley; I work in the market; you don't want me;" Lieutenant Heller searched his trousers and his coat while the defendant's arms were extended horizontally, and then took him a block away, where Sergeant Gannon saw the defendant place his right hand in his right coat pocket; Gannon grasped his right hand and the pocket with both of his hands and took away the revolver from the defendant; defendant said on the way in the car to Police Headqaurters to Lieutenant Heller, "I didn't want to be arrested by Ryan, because I knew if I was taken in I had a long bit waiting for me; I had consumption; I had to shoot him to try to get away;" that at Police Headquarters Dr. Clark examined him and found that he was not intoxicated, that he was not injured, except for a scratch or two, that he was not insane, and that thereupon the defendant made a statement in part as follows:

> "On Wednesday, July 16th, 1919, I left New York between 11.30 & quarter of twelve."

Then he states his arrival in Newark, where he went with Jaglin, and then proceeds:

> "I had no drinks in the saloon. I came out on Norfolk St. side and sat on stoop about six thirty. Just me and Jaglin sat there. I was sitting there about 10 or 15 minutes when Paddy Ryan came over to me. I knew him to be a Lieut of Police. I knew him about 14 years or more. He had a police officer with him. I do not know his name. This man is now here and I learn his name

is Capt Joseph Cordano. They were running across towards me from So Orange Ave. I saw them coming and I got up and ran into a yard and tried to jump a fence. I mean yard in back of saloon. I know the bar tender. This saloon is on right hand side as you come up So. Orange Ave. I went into yard of saloon called the 'Transfer.'

"As I was climbing over the fence Paddy Ryan pulled me down and got a-hold of me. He took me outside the yard and was crossing the St. Capt. Cordano was in the yard with me and Paddy Ryan told this officer to go and get the other fellow and this officer then left. Ryan then searched my hip pockets but he didn't find anything. He searched me coming out of the yard. He was walking me across the St. He had a hold of my right hand with his right hand and his left hand in back of my neck. He brought me across the St. to the saloon, near the corner of So. Orange Ave, across Norfolk St. to the candy store. I then told him to leave me go as I am not going in. We were about 3 foot from the side-walk. Ryan hit me a couple of punches in the mouth. I did not resist but I might have jerked but I didn't use my hands or feet to try to get away. My left hand was free. We were tussling around and I pulled a revolver out of my pocket on my right inside pocket of my coat. Ryan saw the gun after I pulled it out and then we started to tussle. As I pulled it out it went off accidentally. I didn't take aim but I had my finger on the tricker. He had a hold of me with his left hand around my body. He had ahold of my right hand too. I shot three shots. Ryan let me go after the third shot and he said 'I am hit.'

"Ryan after I shot him backed up and I ran. I didn't wait to see him fall. I ran across So Orange Ave into Jones St and into an alley, jumped a fence and into Hayes St. Through Hayes St over to 14th Ave and walked up 14th Ave to Bruce St. From Bruce to Springfield Ave.

"I lost my hat before I shot Ryan. I lost my hat in the yard where Ryan first caught me. I walked all the way up Springfield Ave to a hat store on the right hand

side of Fairmont Ave. I paid $1.50 for the cap. They didn't ask no questions.

"I then walked up to 20th St. and Springfield Ave. and over the lots.

"I got the gun from a man in N. Y. about two months ago. I had about 10 or 11 rounds of bullets. I took this gun out of my pocket and threw the empty shells on the St. along side of a church on 13th Ave. This was after I re-loaded the gun on 20th St. about 2 or three blocks from Springfield Ave. I didn't pay any attention to the streets I went through until I got to 13th Ave where I threw the shells away. I then wandered around and had nothing to eat. I walked over to Warren St. and was walking around until I came to Jaglin's house, #124 Wickliffe St. I couldn't find Jaglin in the house. I saw the fellow who runs the house and he didn't know whether he was in or not so I went up to Jaglin's room. I came down stairs and out of the house. As I got near Springfield Ave a man called me back. He said 'Come here I want to see you.' I asked him what he wanted to see me for and he told me to come over to him until he looked me over. He then took me by the arm and as we got to Wickliff St. Walter Burns came up with a machine and there was a lot of officers in the machine. I didn't resist as there was too many there. I had the gun in my right hand side of my coat, outside pocket. I had my hand down by my side. I don't know who took the gun away from me. Some of the officers felt my backpockets. I couldn't say who the man was who took the gun away from me when I was arrested. This is all I know.

"I resisted the arrest when Ryan wanted to arrest me because I knew that I was wanted for a robbery I had committed on 8th Ave. last March when I put a revolver up to a woman's head and robbed her of $5.00. I knew the police were looking for me as I got word from some friend that police were looking for me."

The next day he made another statement in the prosecutor's office, in which he said in part:

"I wouldn't stand for being arrested. I told him to leave me go otherwise he would regret it. So I pulled a revolver out of my inside pocket and started shooting."

Then he goes on to describe where he went and at the end he says:

> "I knew Paddy Ryan to be an officer and I knew that he wanted me for a robbery charge."

Then he describes it as being for $5 and a woman on Eighth avenue, adding:

> "The woman I robbed was my landlady and she knew me as Harry Young."

Dr. Warren testified that at the autopsy there was a wound one-half an inch above the navel and one and a half inches to the left. It had punctured the skin and muscles and then had passed through the small intestine—there were four puncture wounds in the intestines. It passed through the lower end of the bowel and it was found in the back of the bladder. There was another wound on the left side of the abdomen. There was a mark about three inches below the lower end of the breast bone and one inch and a half to the left. This was a circular wound about a quarter of an inch in diameter. It led through the skin, the muscles and to beneath the intestines. It led from the front part of the body to the back, left to right, six inches from the opening in the skin, and punctured the stomach. The other was three inches below the upper end of the breast bone, three and a half inches, and one inch and a half to the right of the middle line. I presume he meant of the body. A circular wound which measured one-quarter of an inch in diameter and extended from that spot in the right side of the chest through the lung and to a point in the shoulder blade. It went right through the chest and led to an opening between the fourth and fifth ribs and to another between the seventh and eighth ribs.

The State contends that it has shown by the evidence beyond a reasonable doubt that the defendant, while under a lawful arrest, waited until Captain Cordano was not in a position to assist Lieutenant Ryan, demanded to be set free, and then to effect his escape used a revolver and fired three shots, any one of which would be fatal, into vital parts of Lieutenant Ryan's body; and he conceived the design to kill and willfully, deliberately and premeditatedly executed it in a manner which constitutes murder in the first degree, as hereinbefore defined, and, therefore, the State contends that your verdict should be murder in the first degree.

The defendant does not deny that the arrest was lawful and does not deny that the defendant fired the shots. The defendant contends that the State has failed to sustain the burden of proof to show, beyond a reasonable doubt, that the defendant willfully, deliberately and premeditatedly killed Lieutenant Ryan, and, amonst other matters to which he has called your attention, the defendant contends that he has the intelligence of a boy ten or eleven years of age and, therefore, did not have the ability to perform the mental acts, or any of them, willfully, deliberately and premeditatedly to kill and slay Lieutenant Patrick Ryan. The defendant also contends that he merely intended to frighten Lieutenant Ryan, not to kill him, and, at all events, the defendant contends that he is excused from legal responsibility for his act upon the ground that he did not know the nature and quality of the act, or that it was wrong. The defendant contends that by the evidence it is established that he is twenty-nine years of age, born in August, 1890, apparently a normal baby; that at nine months he fell, striking his head, which affected his conduct; that he was restless, crying incessantly, and became a difficult baby to manage; that at five or six years of age he again fell, striking his head; that he went to school until thirteen years of age; that he stayed away at nights from home and slept in wagons and outhouses and stayed from home sometimes days at a time; that he was incorrigible; that he stole money from his parents and others; that at the City Home he was under good influences and shortly after his release reverted to his former practices; that he worked nine months in one place after leaving school, two months in another, and never did any other work; that after the performance of the act of killing Lieutenant Ryan confessed it freely to Dr. Clark, police authorities and the county detectives; that he was calm when he entered a store half an hour afterwards and made a selection from several caps of one; that he was calm when he went to look for his associate within a few minutes' walk from the scene of the shooting; that he was calm at headquarters; that he showed no evidence of excitement when questioned by the police surgeon, nor when making his allege confession; that he has continued from that day until the present time in a state of calm and quiescence, and that the defendant has never shown any remorse for his act, in fact, stating an opinion that the act was right if done for the purpose of escaping, and the defendant contends further that

these and other facts, coupled with the results of a psychological examination, show that he is of the mental age of a boy ten or eleven years, and the psychologist and the alienist stated for the reasons given by each of them that he did not know the nature and quality of his act, or that it was wrong, and that, at all events, he did not have sufficient intelligence to perform the several mental acts constituting murder in the first degree.

It is contended here that the defendant was feeble-minded—has a defective intelligence. It is my duty to inform you, and your duty to remember, that the law does not recognize every degree of feeble-mindedness as a defense to a criminal charge. The statute enumerates that to constitute murder in the first degree there must exist a specific intent to kill, and that it must be willfully and deliberately and premeditatedly conceived and executed. These ingredients of murder in the first degree, it is said on behalf of the defendant, were not present because of feeble-mindedness. This is not a defense put in by the defendant because, as I have stated to you, feeble-mindedness in no respect is a defense of crime. It is an essential ingredient, as I have stated to you, of the crime of murder in the first degree that there should be an intent to take life. Any feeble-mindedness may be considered with reference to the existence of that intent and its willful, deliberate and premeditated character; and I charge you that if, at the time of doing the act, the evidence shows you that this defendant was so feeble-minded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its willful, deliberate and premeditated character, then, although it is no defense nor justification, his offense would be murder in the second degree. But I also charge you that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are merely morally depraved. You should discriminate between conditions of the mind merely blunted by familiarity with wickedness and yet capable of forming a specific intent to take life and carry it out as stated, and such a prostration or condition of the faculties as renders a man incapable of forming the intent and carrying it out.

The State contends that the defendant had sufficient intelligence to know and understand the nature and quality of the act

and that is was wrong; that the normal boy of eleven years has sufficient intelligence to commit murder in the first degree; that, at all events, this defendant is above the mental age of eleven years, and that the evidence of Dr. Crane, Dr. Clark and Dr. Washington shows that he is responsible and knows the nature and quality of his act and that it was wrong.

The State contends that the defendant was in Newark armed with a loaded revolver, apparently so skillfully concealed about the person as to avoid detection, not only by Detective Ryan, but by Lieutenant Heller; that he commenced to run the moment he saw Lieutenant Ryan; that when captured he did not try to escape when Captain Cordano was at hand; that he seized the opportunity offered to him to use his left hand and shot Lieutenant Ryan when he was not looking, or could not see, or could not seize the revolver, thus evincing judgment, skill, stealth and ability to grasp an opportunity, the power of selection; that he permitted some of those who might run after him to see the revolver and believe they were in danger, so as to insure his own escape; that he did not immediately try to escape from Newark by the ordinary methods of travel where capture might await him, but followed a winding roundabout course for a time after the deed; that he went to the home of a friend and about one o'clock in the morning came out, and when arrested told Lieutenant Heller a plausible excuse for being on the street so late at night; that he made intelligent answers to Dr. Clark and Dr. Washington, and two statements evincing in themselves memory and capacity to narrate most of the circumstances attending this deed, and that while made on two different days they do, in most particulars, agree, and, therefore, that he has the intelligence and mental capacity much higher than the normal boy of eleven years.

The State contends that while the defendant says he did not intend to kill, nevertheless he came to Newark knowing he was likely to be arrested for an alleged robbery; that he was fully armed and determined not to be taken into custody, and told Lieutenant Ryan if he did not release him he would regret it and then fired three bullets into Lieutenant Ryan's body, one into his intestines and bladder, another into his stomach, and a third into his lung, and that no other result than death might reasonably be anticipated from such wounds.

The State also contends that the psychological tests are inaccurate and inadequate, because they exclude the history of the subject, his education, surroundings, environment, mental teaching, moral teaching, his training, his discipline, and many other factors that ought reasonably to enter into an accurate estimate of intelligence, and that the very great interest which this defendant has in any verdict which you may render was a strong motive to induce the defendant to give answers or refuse to give answers to the examinations conducted by Hollingsworth in such a way as to produce a result of an estimate of a low grade of intelligence.

Gentlemen, it is for you to search through this evidence and ascertain where the truth is. If you find beyond a reasonable doubt, upon the evidence and under the law, that this defendant is guilty of murder in the first degree, your verdict should be guilty of murder in the first degree, except as I shall charge you hereafter with reference to another feature of that verdict. If you do not find him guilty of murder in the first degree, then if you find him, beyond a reasonable doubt, upon the evidence and the facts and under the law, guilty of murder in the second degree, your verdict should be guilty of murder in the second degree. If you do not find the defendant guilty of murder, your verdict must be not guilty.

In connection with guilt of murder in the first degree, the Court should charge you that there was a statute passed in 1919, chapter 134, page 303, which reads in part as follows:

> 108. "Every person convicted of murder in the first degree * * * 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. * * *"

Before this act was on the statute book the duty of the jury was merely to determine from the evidence whether or not the defendant was guilty, and, if so, whether he was guilty of murder in the first degree, second degree or manslaughter, or whatever the evidence warranted, and the statute provided that if a verdict of murder in the first degree was rendered by the jury the Court had no option whatever but to impose the penalty of death in the electric chair. The statute now provides that the jury may render a verdict of murder in the first degree, if

they find a person guilty of murder in the first degree, and in that case the defendant shall suffer the death penalty, but that if they shall recommend imprisonment at hard labor for life, then the Court must impose that sentence. The very important duty is therefore placed upon the jury of deciding whether to render a verdict of murder in the first degree, carrying the death penalty, or render a verdict of murder in the first degree, with a recommendation of imprisonment for life.

As the statute authorizes the jury in this class of cases and gives it the power practically to impose sentence, the jury, it seems to the Court, might properly have some information about the system of the criminal law in this state, what the imposition of a sentence means and how a sentence may be defeated. Over and above this Court of Oyer and Terminer and General Jail Delivery of Essex County, and what it may do as a result of any verdict that you may render, if you render a verdict, there is a Court of Pardons, which is a constitutional court, not restricted or limited in its conduct by this statute or any other. That court exercises what is known as the pardoning power of sovereignty. It may act as a court of pure mercy or grace. It may, for reasons which are satisfactory to that court, modify or change or reduce or abolish or set aside whatever result you may arrive at, whether you fix the penalty of death or whether you fix the penalty of life imprisonment. If a defendant in a case of this character is sent to State Prison for life, that court may change the result of your verdict.

The defendant has presented to the Court thirty-three separate and distinct requests to charge, most of which the Court believes that it has fully covered by its charge.

Request to charge No. 9 has been withdrawn by counsel.

"10. Defendant requests your Honor to charge that the jury are not to be influenced, in the consideration of this case, by any comment or expression of opinion in the newspaper reports of this case, and they must disregard any statement or comment contained in any such report, if same has in any way been brought to their attention." I so charge you.

"22. Defendant requests your Honor to charge the jury that the insanity of the defendant need not be proven beyond a reasonable doubt." I so charge you.

"33. Defendant requests your Honor to charge the jury that the denial of the several motions made by defendant's counsel

throughout the trial, and the rulings of the Court upon objections, and refusals by the Court to charge as requested, are not to be taken as any expression of opinion on the part of the Court upon the facts of this case, but are only rulings upon the law, about which the jury has nothing to do." I so charge you.

It has been already charged that when an accused sets up a defense of insanity the burden of proof is upon him. He must overcome the presumption of sanity by a preponderance of proof and by evidence satisfactory to the jury, not to such degree as beyond a reasonable doubt.

This is a very serious case, because if you find beyond a reasonable doubt that the facts are as contended by the State it involved, as I stated before, a person who was acting on behalf of the government. On the other hand, if that is not shown beyond a reasonable doubt, it is a very serious charge brought against a person who is not responsible.

Gentlemen, it seems to the Court that it has dealt with this matter sufficiently to give you information as to the law of the case, and it has, therefore, fulfilled its duty. Yours is now about to begin.

(The jury retires.)

Mr. Simandl. I desire take a general exception to your entire charge.

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

WM. P. MARTIN,
Judge.

Mr. Simandl. I desire to take specific exceptions to your Honor's charge.

The first exception to the charge is where your Honor charged that the defense had admitted that the arrest was lawful. I desire to except to that part of the charge.

The Court. Is there any question about it?

Mr. Simandl. There is.

The Court. Where was there any denial of it?

Mr. Simandl. The evidence and the only proof that the State has submitted to prove that this arrest was lawful, or the existence of any warrant, or anything of that sort, was the testimony of those two witnesses, and that, I think, was a question of

fact for the jury to determine. We did not have to bring proof forward.

Mr. Bernhard. Dr. Clark specifically says that the defendant admitted to him that Ryan had a right to arrest him.

The Court. I think he confessed it in two confessions.

Mr. Simandl. He confessed that he knew Ryan and that he knew Ryan was after him, but he didn't confess that Ryan had the right to arrest him. The State's duty is to show that Ryan had the right.

The Court. Has it not done it?

Mr. Simandl. I don't think so; no.

The Court. Where is there any word of denial in the whole of the defendant's case of it?

Mr. Simandl. I think it is a fair question for the jury. Will your Honor allow me an exception?

The Court. You cannot make a question before the jury unless affirmed on one side and denied on the other. I understood from the opening of your associate that he said that he admitted the killing and that he was going to justify or excuse it or mitigate it. Now, your position is that you deny the lawfulness of the arrest. In the first place, it was proper for Ryan to arrest anybody that had been indicted.

Mr. Simandl. Properly so.

The Court. Secondly, he had a right to arrest anyone whom he had reasonable cause to suspect committed a crime, regardless of whether or not it had been committed, is not that right?

Mr. Simandl. Exactly.

The Court. And, thirdly, he had a right to arrest Schilling anyway, because he had a concealed weapon on his person, and that is a crime.

Mr. Simandl. The State relied on one thing to show that Ryan had the right or knew of the existence of a warrant, and that was the testimony of Officers Sweeney and Owens.

The Court. It does not make any difference whether there was a warrant.

Mr. Simandl. Does he know of the existence of it?

The Court. All he has to do under the case of State *v.* Brown, 62 L., quoting from the opinion of Chief Justice Depue, 666, at p. 695:

> "A peace officer has a right to arrest without warrant one whom he suspects to be guilty of felony, although it afterwards appears that no felony was committed; provided he had reasonable cause to suspect that the person arrested committed a felony."

Mr. Simandl. That is exactly my point, the latter part of the Brown case.

The Court. Did not he have reasonable cause to suspect that Schilling had committed a felony?

Mr. Simandl. I don't think so, depending on the evidence alone of Lieutenant Sweeney and Lieutenant Owens, that was the only ground that the State advanced to show that he knew of the existence of any crime which Schilling may have committed or that he suspected.

Mr. Bernhard. Schilling said, "I knew Patrick Ryan to be an officer and that he wanted me on a robbery charge."

The Court. He said it twice.

Mr. Simandl. But did Ryan know it?

The Court. Lieutenant Ryan saw a picture of this man and a short time afterwards he got into a trolley car and he spoke to Captain Cordano and they got out together and he ran after the man. Now, was that pure accident? Did not that inherently evince in and by iself, an exhibition of knowledge on the part of Ryan that he knew Schilling?

Mr. Simandl. I think those questions are entirely for the jury.

The Court. Send for the jury.

Mr. Simandl. The inference of your Honor in your remark to the jury ruling out the fact that the defendant had not taken several available means of escape.

The Court. I did not make a ruling of any such character.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. I also except to the charge of the Court respecting feeble-mindedness as not being, as I remember your

Honor to say—I am not sure on that because I have not got it entirely down, but I think your Honor said feeble-mindedness is not insanity. I am not sure about that, but it was something respecting feeble-mindedness as a defense to this action.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. Your Honor further said that we contended that the defendant had only intended to frighten Lieutenant Ryan. Our contention is that if he had an intent to do bodily harm that would not be enough intent to sustain a conviction of murder in the first degree.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. We also object to the part of your Honor's charge wherein your Honor comments on the evidence regarding the commission of this offense after Cordano's assistance had left. We contend that Cordano had left some time prior to the time that this crime was committed and that during the intervening time the defendant had not shown that he had any desire to kill the deceased.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. We object to your Honor's charge respecting psychology as a method of determining the proper mental status of a defendant.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Further Charge to Jury.

Mr. Simandl. We object to that part of your Honor's charge which contains a comment respecting the Court of Pardons.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

The Court. That was decided in the case of State *v.* Rombolo (89 L. 565).

Mr. Simandl. I desire an exception on the ground that your Honor repeated the charge with reference to insanity, which your Honor had already made.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. One more point, that your Honor did not charge respecting manslaughter.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

(The jury returns into court.)

(Jury called.)

MARTIN, *J.*

Counsel for the defense has brought to the notice of the Court a statement which he contends is not a correct statement of the position of the defense, and in order that there may be no misconception of what the Court has stated, the Court has asked you to return so that it can make a further charge to you.

The Court has stated in its charge that there was no dispute about the lawfulness of the arrest. Counsel for the defense states that there is a dispute about that and there is nothing to show—emphasizing particularly that Ryan knew that when in the act of taking hold of Schilling that he was arresting him in connection with the Hefferon case. Therefore, the Court withdraws from your consideration the statement of the Court

that the defendant admits the arrest was lawful and leaves that as a matter of fact for you to determine under the principles of law, as stated.

In another aspect of this case, where a material fact is within the knowledge of the defendant and he could take the witness stand and deny that material fact which is sworn to by someone else against him and he fails to do so, his failure presents a situation where you have a right to draw inferences against him. The defendant is a competent, but not a compellable, witness in his own behalf, and his failure to testify in his own behalf raises no presumption of his guilt. But, however, where a defendant has specific knowledge of the facts charged to make out his guilt and can specifically deny it, then he may be criticized for not making such denial.

You may now retire.

(The jury retires.)

Mr. Simandl. I take a general exception to your Honor's additional charge.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. I would also take a specific exception to that part of the charge where your Honor says the Hefferon crime.

Exception allowed and the same is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Mr. Simandl. I would also take a special exception to that part of the charge where your Honor says the Hefferon crime and does not include the words "any other crime."

The Court. Do you want me to send for the jury and tell them that Ryan had a right to arrest this man for carrying concealed weapons?

Mr. Simandl. Well, I withdraw my objection on that ground to protect my client's rights.

DEFENDANT'S REQUESTS TO CHARGE.

(1) The defendant requests your Honor to charge the jury, that if the jury do not find beyond reasonable doubt, the fact to be, that the deceased intended to arrest the defendant, and do find that the alleged act was committed in hot blood under great provocation, and without malice, then the jury shall return a verdict of manslaughter.

(Refused.)

(2) The defendant requests your Honor to charge the jury, that if the jury shall find beyond a reasonable doubt that the evidence discloses the fact to be that the deceased knew at the time of the commission of the alleged crime, of the existence of an indictment against the defendant or that a felony had been committed by the defendant, and that the deceased was shot in the performance of his duties by the defendant, and that the jury find that the defendant was under a passion of hot blood and reasonable provocation and shot without premeditation, that in that case the verdict shall be second degree murder.

(Refused.)

(3) The defendant requests your Honor to charge the jury, that if the jury, after weighing all of the evidence, does not find beyond a reasonable doubt that the deceased was acting in good faith in the performance of his duties, and did not know at the time of the commission of the alleged crime of the existence of an indictment against the defendant, or that defendant had committed a felony, and that deceased was shot by the defendant under a passion of hot blood and reasonable provocation without premeditation, then, in that case, the verdict shall be second degree murder.

(Refused.)

(4) Defendant requests your Honor to charge the jury, that the act charged in the indictment is presumed to be second degree murder until the State beyond a reasonable doubt proves an intent to take the life of the deceased, an intent carried out willfully, with deliberation and with premeditation.

(Refused.)

(5) Defendant requests your Honor to charge the jury, that if the State does not prove beyond a reasonable doubt that the

defendant willfully, with deliberation and with premeditation took the life of the deceased, then the defendant must be acquitted.

(Refused.)

(6) Defendant requests your Honor to charge the jury, that if the evidence on the part of the State proves beyond a reasonable doubt that the deceased intended to do bodily harm, then the defendant is guilty of murder in the second degree.

(Refused.)

(7) Defendant requests your Honor to charge the jury, that if after considering all of the evidence you find the defendant guilty of murder in the first degree, under your oaths as jurors, you may by your verdict, and as part thereof, recommend imprisonment at hard labor for life.

(Refused.)

(8) The defendant requests your Honor to charge the jury, that premeditation means a willful and deliberate intent to take life, and that an intent to do bodily harm is not intent sufficient to support a conviction of first degree murder.

(Refused.)

(9) Defendant requests your Honor to charge the jury, that in determining the guilt or innocence of the defendant of the offense charged in the indictment the jury are to consider only the evidence of the case, and are to disregard any statement made during the course of the trial by counsel or the Court, and are not to be influenced or governed by any expression of opinion or action of either the Court or counsel for defendant or the State.

(Withdrawn by counsel.)

(10) Defendant requests your Honor to charge that the jury are not to be influenced in the consideration of this case by any comment or expression of opinion in the newspaper reports of this case, and they must disregard any statement or comment contained in any such report, if same has in any way been brought to their attention.

(Charged.)

(11) Defendant requests your Honor to charge the jury, that in considering this case, after its submission to them, the jury must proceed upon the presumption that the accused, the de-

fendant herein, is innocent of the crime charged in the indictment and that it is necessary for the State to overcome this presumption by evidence to convince them, beyond a reasonable doubt, that the defendant is guilty of the crime charged against him in the indictment.

(Refused.)

(12) Defendant requests your Honor to charge the jury, that in consideration of this case the jury are bound to act and proceed upon the presumption that the accused is an innocent man, and this presumption must continue throughout the trial.

(Refused.)

(13) Defendant requests your Honor to charge the jury, that the defendant, being charged with the crime of murder in the first degree, the State is bound to prove every and all the essential facts necessary to constitute this crime beyond a reasonable doubt before the jury can convict the defendant of the crime charged in the indictment.

(Refused.)

(14) Defendant requests your Honor to charge the jury, that upon the whole case, if the State has failed to prove all the facts beyond a reasonable doubt, the defendant is entitled to be acquitted.

(Refused.)

(15) Defendant requests your Honor to charge the jury, that the burden in this case rests with the State, from the beginning to the end of the trial, to establish beyond a reasonable doubt every fact essential to the conviction of the defendant, and if the State has failed to prove such charge beyond a reasonable doubt the defendant is entitled to an acquittal.

(Refused.)

(16) Defendant requests your Honor to charge the jury, that the unintentional killing of a human being by another without motive, intent, premeditation, is neither murder nor manslaughter.

(Refused.)

(17) Defendant requests your Honor to charge the jury, that the questions of deliberation and premeditation, intent and mo-

tive, are purely questions of fact, to be determined by the jury from the evidence alone.

(Refused.)

(18) Defendant requests your Honor to charge that if the jury cannot say, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the act, and cannot say whether, at that time, he was sane or insane, the defendant must be acquitted.

(Refused.)

(19) Defendant requests your Honor to charge the jury, that if, at the time the defendant committed the act charged against him, upon struggling with deceased, he was thrown into a state of mind from which he was deprived of his understanding, so as to be unaware of the nature and quality of the act he committed, or so as to be unable to distinguish between right and wrong in reference to that particular act at the time of its commission, this defendant must be acquitted.

(Refused.)

(20) Defendant requests your Honor to charge the jury, that if defendant was deprived of his reason at the time the act charged against him was committed, and which resulted from a settled and well-established mental alienation, or from the pressure and overpowering weight of circumstances occurring before and at the time of the commission of said act, the said defendant is legally irresponsible for it, and must be acquitted.

(Refused.)

(21) Defendant requests your Honor to charge the jury, that if, at the time of the commission of the act, the defendant was under the influence of a diseased mind, and was really unconscious that he was committing a crime, this defendant must be acquitted.

(Refused.)

(22) Defendant requests your Honor to charge the jury, that the insanity of the defendant need not be proven beyond a reasonable doubt.

(Charged.)

(23) Defendant requests your Honor to charge that the jury, in considering this case, are bound to act upon the presumption

that the accused, the defendant, is innocent, and should endeavor, if possible, to reconcile all the circumstances of the case with that of innocence.

(Refused.)

(24) Defendant requests your Honor to charge the jury, that the burden of proof rests with the State in this case, from the beginning to the end of the trial, and the State are bound to prove that the defendant committed the crime charged in the indictment beyond a reasonable doubt, otherwise the defendant is entitled to be acquitted.

(Refused.)

(25) Defendant requests your Honor to charge that the jury must be satisfied beyond a reasonable doubt, from the evidence of the case, of the sanity of the defendant at the time of the commission of the act charged in the indictment, and if the State fail to establish the sanity of the defendant at the time of the commission of the act charged in the indictment, this defendant cannot be convicted of any crime and is entitled to an acquittal.

(Refused.)

(26) Defendant requests your Honor to charge the jury, that if the insanity, imbecility, or mental aberration which absolves from crime operated at the moment that the act was committed, that is sufficient in law to absolve from guilt, and this defendant cannot be convicted of the offense charged in the indictment, or any other offense.

(Refused.)

(27) Defendant requests your Honor to charge the jury, that the State must satisfy the jury beyond all reasonable doubt that, at the moment the act alleged in the indictment was committed by the defendant, he had reason, perception, and understanding sufficient to enable him to discern right from wrong, and that if he had not, it is the duty of the jury to acquit this defendant.

(Refused.)

(28) Defendant requests your Honor to charge the jury, that if there is a reasonable doubt in the minds of the jury as to whether the act charged in the indictment was committed by the defendant while he was unable to discern between right and wrong, or if the evidence is equally balanced as to this, so that the jury cannot safely and conscientiously determine whether the

killing of the deceased was intentional, or was committed by the defendant while he was unable to discern between right and wrong with respect to the act, then this defendant is entitled to the benefit of that doubt and entitled to an acquittal.

(Refused.)

(29) Defendant requests your Honor to charge the jury, that if it finds that the defendant is of a mental age of under twelve years he is presumed to be incapable of the commission of crime unless he is proven by the State, beyond a reasonable doubt, to be capable of the commission of a crime.

(Refused.)

(30) Defendant requests your Honor to charge that if the jury finds that the defendant is of a mental age of under twelve years, the evidence that he understood the nature or quality of the act charged against him and knew its wrongfulness must be strong and clear beyond a reasonable doubt.

(Refused.)

(31) Defendant requests your Honor to charge that the burden is upon the State to show that the defendant has intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent.

(Refused.)

(32) Defendant requests your Honor to charge the jury that they have no right to presume a motive from the mere commission of the crime, and have no right to speculate, guess, or surmise, or supply any motive for the commission of the act charged in the indictment.

(Refused.)

(33) Defendant requests your Honor to charge the jury, that the denial of the several motions made by defendant's counsel throughout the trial, and the rulings of the Court upon objections, and refusals by the Court to charge as requested, are not to be taken as any expression of opinion on the part of the Court upon the facts of this case, but are only rulings upon the law, about which the jury has nothing to do.

(Charged.)

Certificate of Judge.

STATE

vs.

PHILIP SCHILLING.

I, William P. Martin, presiding judge of the Essex County Court of General Quarter Sessions and Essex County Court of Oyer and Terminer, and the judge who presided over the aforesaid cause, certify that the above-printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

Dated March 25, 1920.

WM. P. MARTIN,

Presiding Judge of the Essex County Court of Oyer and Terminer and General Quarter Sessions.

Certificate of Court Stenographers.

STATE

vs.

PHILIP SCHILLING.

COUNTY OF ESSEX.

We, Harold T. Cook and Walter W. Ressland, official stenographers of the Essex County Court of Oyer and Terminer, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by us at the trial of the case of the State of New Jersey *v.* Philip Schilling, on indictment No. 14, Murder, which trial was held before the Honorable William P. Martin, Presiding Judge of the Essex County Court of Oyer and Terminer in and for the County of Essex, and a jury, on Monday, October 20th, Tuesday, October 21st, Wednesday, October 22d, Thursday, October 23d, Friday, October 24th, and Saturday, October 25th, 1919, at Newark, New Jersey.

HAROLD T. COOK,
WALTER W. RESSLAND.

ASSIGNMENTS OF ERROR.

Filed.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,*	*In Error.*
vs.	*Assignments of Error.*
PHILIP SCHILLING, *Plaintiff-in-Error.*	

NEW JERSEY, *ss.*

Afterwards, that is to say, on Tuesday, the 27th day of April, A. D. nineteen hundred and twenty, before our Court of Errors and Appeals in the last resort in all causes of law, comes the said Philip Schilling, by Harold Simandl and Harry Unger, his attorneys, and Benjamin M. Weinberg, of counsel with plaintiff-in-error, and says:

That in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also of giving verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That the said Court before whom, &c., at and upon the trial of the said issue so joined, between the State of New Jersey and the said Philip Schilling aforesaid, erroneously refused the motion of the counsel for plaintiff-in-error to sequester the witnesses during the trial.

2. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously permitted the witness, Dr. John Vail Bisset, on behalf of the State, to be asked and to answer the following questions:

> *The Court.* Did Ryan say anything to you at that time with reference to whether or not he thought that he was about to die?
>
> Objection and exception noted.

Witness. He did.
The Court. Answer that yes or no.
Witness. Yes, sir.

Re-direct examination by Mr. Bernhard.

Q What did he say?
Mr. Simandl. I object.
The Court. Upon what grounds?
Mr. Simandl. The same grounds.
The Court. Overruled.
Q He said, "am done for?"
Objection and exception noted.

This testimony was incompetent and inaccurate, it being shown by proof that the deceased, Ryan, could not have had sufficient control of his faculties to make an intelligent statement or answer.

3. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously struck out the answer of the witness, Sarah Schilling, on behalf of the defendant, to the following question:

Q If you know, did he go to school? A He went to school and he came back that the teacher said, "call mother, call mother."

Which evidence was competent as part of the history of the defendant, to be used as the basis of an opinion, by the experts on behalf of the plaintiff-in-error.

4. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously sustained an objection to the following question asked of Dr. Livingston Hinckley, an alienist, called on behalf of the defendant:

Q What did you tell the defendant?
Objected to and sustained.

5. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously sustained an objection to the following question asked of Dr. Livingston Hinckley, an alienist, called on behalf of the defendant:

Q What did you tell the person who was with him?
Objected to and sustained.

Assignments of Error.

6. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to permit Dr. Livingston Hinckley, an expert, called on behalf of the defendant, to testify that he had rendered his opinion bearing upon the defendant's mental capacity seven years prior to the time of trial and sustained an objection to the following question:

Q Seven years ago at this particular time you told us you rendered an opinion. Did you not? A I did.

Q Doctor, did that opinon have any bearing upon this man's mental state? A I think so.

Q Now, Doctor, what was that opinion rendered seven years ago?

Objected to and sustained.

This testimony was entirely relevant and competent and the Court should have permitted the witness to answer said question.

7. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously compelled the witness, Harry L. Hollingsworth, expert on behalf of the defendant, to testify to the following question, which was objected to by the counsel for defendant:

Q What would you expect a man who had perpetrated a crime to do—stand by and be caught?

Mr. Simandl. I object. It calls for something that the professor can't answer.

(Argument between counsel and Court.)

The Court. Your objection is not well founded.

Exception noted.

This testimony was incompetent and prejudicial to the interests of the defendant, plaintiff-in-error.

8. That the said Court before whom, &c, at and upon the trial of the said issue so joined, erroneously would not permit the expert, Harry L. Hollingsworth, on behalf of the defendant, to answer the following question:

Q Now, from your examination of the defendant, can you state whether or not he knew the quality of wrong?

Mr. Bernhard. Objected to.

The Court. Objection sustained. Ask him a hypothetical question including the facts in this case as you understand them.

(Argument between Court and counsel.)

Exception noted.

This testimony was entirely competent and proper and the Court should have allowed the witness to answer it.

9. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to accept the paper D. 1 for identification into evidence which was offered by the defendant, to which refusal counsel duly excepted.

This paper was a part of the original record of the Court of Pardons, and was entirely competent to aid the jury in determining the bona-fideness and real value of the defense.

10. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously permitted the witness J. Wellington Crane, in behalf of the State, Sur Rebuttal to be asked and to answer the following question:

Q Now, then, from the examination that you made and from the observation that you made after the examinations on the two admissions, I understand you to say that you are able to form an opinion as to whether he was rational or irrational while he was at the institution?

(Argument between Court of counsel and further testimony.)

The Court. Objection overruled. You must fix more definitely the date of these examinations.

By the Court.

Q When was the first one? A To the best of my knowledge, I would say about 1911.

Q When was the second one? A To the best of my knowledge, it would be sometime in 1915.

The Court. You may cross examine him as to the nature of the examinations, if you want to, or hold it until later.

Mr. Simandl. I will hold my cross examination until later.

By Mr. Bernhard.

Q What is your opinion, doctor, as to whether he was rational or irrational?

Mr. Simandl. I object to that.

The Court. Objection overruled.

This testimony was entirely irrelevant, incompetent, immaterial and prejudicial to the plaintiff in error.

11. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously permitted Dr. Walter S. Washington, on behalf of the State, Sur Rebuttal to testify to an examination had of the defendant, wherein questions were asked of defendant and answered by him, without the doctor stating what questions were asked.

This was prejudicial to the defendant as it would not give to the jury the questions which were asked but merely stated answers which may have been conclusions drawn by the doctor from a number of questions asked.

This ruling on the part of the Trial Court was erroneous.

12. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

> "If, in making an arrest, an officer meets with resistance he is not obliged to retreat or desist. The person having authority to arrest or imprison may repel force with force, and if death ensues in the struggle he will be justified. This is founded in reason and in public utility. For few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone. If the officer meet with resistance and kill the offender in the struggle he will be justified, and if he be killed it will be murder."

13. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

> "To establish a defense on the ground of insanity it must be proved that at the time of committing the act the accused was laboring under such a defect of reason, or mental disability, as not to know the nature and quality of

the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. If an accused has sufficient mind to know the difference between right and wrong with respect to the act he is doing, he cannot discharge himself from responsibility by showing that he did the act under the influence of an irresistible impulse."

14. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"they went from the alley to the sidewalk on the west side of Norfolk street, down a short distance on the sidewalk, and then diagonally across to the northeast corner of Norfolk street and South Orange avenue; the defendant told Lieutenant Ryan to let him go, otherwise he would regret it. 'I am not going in;' Lieutenant Ryan refused and held him, and defendant reached with his free hand into his right-hand inside coat pocket, took out his revolver and fired four shots at Lieutenant Ryan, striking him in vital parts of the body with at least three of the bullets;"

15. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"the defendant ran up South Orange avenue, turned down Jones street and into an alleyway, at the same time exhibiting his revolver, apparently as a menace to some of those who would follow;"

16. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"the State contends that it has shown by the evidence beyond a reasonable doubt that the defendant while under a lawful arrest waited until Captain Cordano was not in a position to assist Lieutenant Ryan, demanded to be set free, and then to effect his escape used a revolver and fired three shots, any one of which would be fatal, into vital parts of Lieutenant Ryan's body; that he conceived the design to kill and wilfully, deliberately and premeditatedly executed it in a manner which constitutes murder in the

first degree, as hereinbefore defined, and, therefore, the State contends that your verdict should be murder in the first degree."

17. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"It is contended here that the defendant was feeble-minded—has a defective intelligence. It is my duty to inform you, and your duty to remember, that the law does not recognize every degree of feeble-mindedness as a defense to a criminal charge. The statute enumerates that to constitute murder in the first degree there must exist a specific intent to kill, and that it must be wilfully and deliberately and premeditatedly conceived and executed. These ingredients of murder in the first degree, it is said on behalf of the defendant, were not present because of feeble-mindedness. This is not a defense put in by the defendant, because, as I have stated to you, feeble-mindedness in no respect is a defense of crime. It is an essential ingredient, as I have stated to you, of the crime of murder in the first degree that there should be an intent to take life. Any feeble-mindedness may be considered with reference to the existence of that intent and its wilful, deliberate and premeditated character; and I charge you that if, at the time of doing the act, the evidence shows you that this defendant was so feeble-minded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its wilful, deliberate and premeditated character, then, although it is no defense nor justification, his offense would be murder in the second degree. But I also charge you that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are merely morally depraved. You should discriminate between conditions of the mind merely blunted by familiarity with wickedness and yet capable of forming a specific intent to take life and carry it out as stated, and such a prostration or condition of the faculties as renders a man incapable of forming the intent and carrying it out."

18. That the said Court before whom, &c., at and upon the trial of the issue so joined, erroneously charged the jury as follows:

> "The State contends that the defendant had sufficient intelligence to know and understand the nature and quality of the act and that it was wrong; that the normal boy of eleven years has sufficient intelligence to commit murder in the first degree; that, at all events, this defendant is above the mental age of eleven years, and that the evidence of Dr. Crane, Dr. Clark and Dr. Washington shows that he is responsible and knows the nature and quality of his act and that it was wrong."

19. That the said Court before whom, &c., at and upon the trial of the issue so joined, erroneously charged the jury as follows:

> "The State contends that the defendant was in Newark armed with a loaded revolver, apparently so skillfully concealed about the person as to avoid detection, not only by Detective Ryan, but by Lieutenant Heller; that he commenced to run the moment he saw Lieutenant Ryan; that when captured he did not try to escape when Captain Cordano was at hand; that he seized the opportunity offered to him to use his left hand and shot Lieutenant Ryan when he was not looking, or could not see, or could not seize the revolver, thus evincing judgment, skill, stealth and ability to grasp an opportunity, the power of selection; that he permitted some of those who might run after him to see the revolver and believe they were in danger, so as to insure his own escape; that he did not immediately try to escape from Newark by the ordinary methods of travel where capture might await him, but followed a winding, roundabout course for a time after the deed; that he went to the home of a friend and about one o'clock in the morning came out, and when arrested told Lieutenant Heller a plausible excuse for being on the street so late at night; that he made intelligent answers to Dr. Clark and Dr. Washington, and two statements evincing in themselves memory and capacity to narrate most of the circumstances attending this deed, and that while made on two different days they do, in most particulars, agree, and, therefore, that he has the intelligence and mental

capacity much higher than the normal boy of eleven years."

20. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"The State also contends that the psychological tests are inaccurate and inadequate, because they exclude the history of the subject, his education, surroundings, environment, mental teaching, moral teaching, his training, his discipline, and many other factors that ought reasonably to enter into an accurate estimate of intelligence, and that the very great interest which this defendant has in any verdict which you may render was a strong motive to induce the defendant to give answers or refuse to give answers to the examinations conducted by Hollingsworth in such a way as to produce a result of an estimate of a low grade of intelligence."

21. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"In connection with guilt of murder in the first degree the Court should charge you that there was a statute passed in 1919, Chapter 134, page 303, which reads in part as follows:

108. 'Every person convicted of murder in the first degree ** 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.'

"Before this act was on the statute book the duty of the jury was merely to determine from the evidence whether or not the defendant was guilty, and, if so, whether he was guilty of murder in the first degree, second degree or manslaughter, or whatever the evidence warranted, and the statute provided that if a verdict of murder in the first degree was rendered by the jury the Court had no option whatever but to impose the penalty of death in the electric chair. The statute now provides that the jury may render a verdict of murder in the first degree, if they find a person guilty of murder in the first degree, and in that case

the defendant shall suffer the death penalty, but that if they shall recommend imprisonment at hard labor for life, then the Court must impose that sentence. The very important duty is therefore placed upon the jury of deciding whether to render a verdict of murder in the first degree, carrying the death penalty, or render a verdict of murder in the first degree, with a recommendation of imprisonment for life.

As the statute authorizes the jury in this class of cases and gives it the power practically to impose sentence, the jury, it seems to the Court, might properly have some information about the system of the criminal law in this State, what the imposition of a sentence means and how a sentence may be defeated. Over and above this Court of Oyer and Terminer and General Jail Delivery of Essex County, and what it may do as a result of any verdict that you may render, if you render a verdict, there is a Court of Pardons, which is a constitutional court, not restricted or limited in its conduct by this statute or any other. That court exercises what is known as the pardoning power of sovereignty. It may act as a court of pure mercy or grace. It may, for reasons which are satisfactory to that court, modify or change or reduce or abolish or set aside whatever result you may arrive at, whether you fix the penalty of death or whether you fix the penalty of life imprisonment. If a defendant in a case of this character is sent to State Prison for life, that court may change the result of your verdict."

22. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"This is a very serious case, because if you find beyond a reasonable doubt that the facts are as contended by the State, it involved, as I stated before, a person who was acting on behalf of the government. On the other hand, if that is not shown beyond a reasonable doubt, it is a very serious charge brought against a person who is not responsible."

23. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

> "In another aspect of this case, where a material fact is within the knowledge of the defendant and he could take the witness stand and deny that material fact which is sworn to by some one else against him and he fails to do so, his failure presents a situation where you have a right to draw inferences against him. The defendant is a competent, but not a compellable, witness in his own behalf, and his failure to testify in his own behalf raises no presumption of his guilt. But, however, where a defendant has specific knowledge of the facts charged to make out his guilt and can specifically deny it, then he may be criticized for not making such denial."

24. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the jury do not find beyond reasonable doubt, the fact to be, that the deceased intended to arrest the defendant, and do find that the alleged act was committed in hot blood under great provocation, and without malice, then the jury shall return a verdict of manslaughter.

25. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the jury shall find beyond a reasonable doubt that the evidence discloses the fact to be that the deceased knew at the time of the commission of the alleged crime, of the existence of an indictment against the defendant or that a felony had been committed by the defendant, and that the deceased was shot in the performance of his duties by the defendant, and that the jury find that the defendant was under a passion of hot blood and reasonable provocation and shot without premeditation, that in that case, the verdict shall be second degree murder.

26. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the jury, after weighing all of the evidence, does not find beyond a reasonable doubt that the deceased was acting in good faith in the performance of his duties, and did not know at the time of the commission of the alleged crime of the existence of an indictment against the defendant, or that defendant had committed a felony and that the deceased was shot by the defendant under a passion of hot blood and reasonable provocation without premeditation, then, in that case, the verdict shall be second degree murder.

27. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the act charged in the indictment is presumed to be second degree murder until the State beyond a reasonable doubt proves an intent to take the life of the deceased, an intent carried out wilfully, with deliberation and with premeditation.

28. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if the State does not prove beyond a reasonable doubt that the defendant wilfully, with deliberation and with premeditation took the life of the deceased, then the defendant must be acquitted.

29. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the evidence on the part of the State proves beyond

a reasonable doubt that the deceased intended to do bodily harm, then the defendant is guilty of murder in the second degree.

30. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that if after considering all of the evidence you find the defendant guilty of murder in the first degree, under your oaths as jurors, you may by your verdict, and as part thereof, recommend imprisonment at hard labor for life.

31. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

That premeditation means a willful and deliberate intent to take like, and that an intent to do bodily harm is not intent sufficient to support a conviction of first degree murder.

32. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that, in considering this case, after its submission to them, the jury must proceed upon the presumption that the accused, the defendant herein, is innocent of the crime charged in the indictment and that it is necessary for the State to overcome this presumption by evidence to convince them, beyond a reasonable doubt, that the defendant is guilty of the crime charged against him in the indictment.

33. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that, in consideration of this case, the jury are bound to act and proceed upon the presumption that the accused is an

innocent man, and this presumption must continue throughout the trial.

34. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the defendant, being charged with the crime of murder in the first degree, the State is bound to prove every and all the essential facts necessary to constitute this crime beyond a reasonable doubt before the jury can convict the defendant of the crime charged in the indictment.

35. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that upon the whole case, if the State has failed to prove all the facts beyond a reasonable doubt, the defendant is entitled to be acquitted.

36. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the burden in this case rests with the State, from the beginning to the end of the trial, to establish beyond a reasonable doubt, every fact essential to the conviction of the defendant, and if the State has failed to prove such charge beyond a reasonable doubt, the defendant is entitled to an acquittal.

37. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the unintentional killing of a human being by another without motive, intent, premeditation, is neither murder nor manslaughter.

Assignments of Error.

38. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the questions of deliberation and premeditation, intent and motive, are purely questions of fact, to be determined by the jury from the evidence alone.

39. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that if the jury cannot say, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the act, and cannot say whether, at the time, he was sane or insane, the defendant must be acquitted.

40. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if, at the time the defendant committed the act charged against him, upon struggling with deceased, he was thrown into a state of mind from which he was deprived of his understanding, so as to be unaware of the nature and quality of the act he committed, or so as to be unable to distinguish between right and wrong in reference to that particular act at the time of its commission, this defendant must be acquitted.

41. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if defendant was deprived of his reason at the time the act charged against him was committed, and which resulted from a settled and well-established mental alienation, or from the pressure and overpowering weight of

circumstances occurring before and at the time of the commission of said act, the said defendant is legally irresponsible for it, and must be acquitted.

42. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that if, at the time of the commission of the act, the defendant was under the influence of a diseased mind, and was really unconscious that he was committing a crime, this defendant must be acquitted.

43. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge that the jury, in considering this case, are bound to act upon the presumption that the accused, the defendant, is innocent, and should endeavor, if possible, to reconcile all the circumstances of the case with that of innocence.

44. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that the burden of proof rests with the State in this case, from the beginning to the end of the trial, and the State is bound to prove that the defendant committed the crime charged in the indictment beyond a reasonable doubt, otherwise the defendant is entitled to be acquitted.

45. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge that the jury must be satisfied beyond a reasonable doubt, from the evidence of the case, of the sanity of the defendant at the time of the commission of the act charged in the indict-

ment, and if the State fail to establish the sanity of the defendant at the time of the commission of the act charged in the indictment, this defendant cannot be convicted of any crime and is entitled to an acquittal.

46. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that if the insanity, imbecility, or mental aberration which absolves from crime operated at the moment that the act was committed, that is sufficient in law to absolve from guilt, and this defendant cannot be convicted of the offense charged in the indictment, or any other offense.

47. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that the State must satisfy the jury beyond all reasonable doubt that, at the moment the act alleged in the indictment was committed by the defendant, he had reason, perception and understanding sufficient to enable him to discern right from wrong, and that if he had not, it is the duty of the jury to acquit this defendant.

48. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that if there is a reasonable doubt in the minds of the jury as to whether the act charged in the indictment was committed by the defendant while he was unable to discern between right and wrong, or if the evidence is equally balanced as to this, so that the jury cannot safely and conscientiously determine whether the killing of the deceased was intentional, or was committed by the defendant while he was unable to discern between right and wrong with respect to the act, then this defendant is entitled to the benefit of that doubt and entitled to an acquittal.

Assignments of Error.

49. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if it finds that the defendant is of a mental age of under twelve years, he is presumed to be incapable of the commission of crime unless he is proven by the State, beyond a reasonable doubt, to be capable of the commission of a crime.

50. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that if the jury finds that the defendant is of a mental age of under twelve years, the evidence that he understood the nature or quality of the act charged against him and knew its wrongfulness must be strong and clear beyond a reasonable doubt.

51. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that the burden is upon the State to show that the defendant has intelligence and maturity of judgment sufficient to render him capable of laboring a criminal intent.

52. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury that they have no right to presume a motive from the mere commission of the crime, and have no right to speculate, guess or surmise, or supply any motive for the commission of the act charged in the indictment.

Assignments of Error.

53. That the said Court before whom, &c., at and upon the trial of the issue so joined, in one or more things submitted the case to the jury upon a misunderstanding of the law and evidence.

54. That the said Court before whom, &c., at and upon the trial of the said issue so joined, otherwise erred in ruling upon the evidence.

There are divers other errors in the record and proceedings aforesaid, and in the giving of judgment and passing of sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside.

Wherefore, the said Philip Schilling prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,
Attorney for Plaintiff-in-Error.

BENJAMIN M. WEINBERG,
Of Counsel with Plaintiff-in-Error.

REASONS FOR REVERSAL.

Filed.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* PHILIP SCHILLING, *Plaintiff-in-Error.*	*In Error.* *Reasons for Reversal.*

And now comes the said Philip Schilling, by Harold Simandl and Harry Unger, his attorneys, and Benjamin M. Weinberg, of counsel with plaintiff-in-error, and says that in the record and proceedings aforesaid, and also in the matter recited and contained in the said writ of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error, and the said Philip Schilling says that said judgment should be reversed, and assigns the following reasons or causes:

1. Because the Trial Court denied the motion of the counsel for plaintiff-in-error to sequester the witnesses during the trial.

2. Because the said Trial Court permitted the witness, Dr. John Vail Bisset, on behalf of the State, to testify and make answer to the following questions:

The Court. Did Ryan say anything to you at that time with reference to whether or not he thought that he was about to die?

Objection and exception noted.

Witness. He did.

The Court. Answer that yes or no.

Witness. Yes, sir.

Re-direct examination by Mr. Bernhard.

Q What did he say?

Mr. Simandl. I object.

The Court. Upon what grounds?
Mr. Simandl. The same grounds.
The Court. Overruled.
Q He said, "I am done for?"
Objection and exception noted.

This testimony was incompetent and inaccurate, it being shown by proof that the deceased, Ryan, could not have had sufficient control of his faculties to make an intelligent statement or answer.

3. Because the said Trial Court struck out the answer of the witness, Sarah Schilling, on behalf of the defendant, to the following question:

Q If you know, did he go to school? A He went to school and he came back that the teacher said, "call mother, call mother."

Which evidence was competent as part of the history of the defendant, to be used as the basis of an opinion, by the experts on behalf of the plaintiff-in-error.

4. Because the said Trial Court sustained an objection to the following question asked Dr. Livingston Hinckley, an alienist, called on behalf of the defendant:

Q What did you tell the defendant?
Objected to and sustained.

5. Because the said Trial Court sustained an objection to the following question asked of Dr. Livingston Hinckley, an alienist, called on behalf of the defendant:

Q What did you tell the person who was with him?
Objected to and sustained.

6. Because the Trial Court refused to permit Dr. Livingston Hinckley, an expert, called on behalf of the defendant to testify that he had rendered his opinion bearing upon the defendant's mental capacity seven years prior to the time of trial and sustained an objection to the following question:

Q Seven years ago at this particular time you told us you rendered an opinion. Did you not? A I did.

Q Doctor, did that opinon have any bearing upon this man's mental state? A I think so.

Q Now, Doctor, what was that opinion rendered seven years ago?

Objected to and sustained.

This testimony was entirely relevant and competent and the Court should have permitted the witness to answer said question.

7. Because the said Trial Court compelled the witness, Harry L. Hollingsworth, expert, on behalf of the defendant, to testify to the following question, which was objected to by the counsel for defendant:

Q What would you expect a man who had perpetrated a crime to do—stand by and be caught?

Mr. Simandl. I object. It calls for something that the professor can't answer.

(Argument between counsel and Court.)

The Court. Your objection is not well founded.

Exception noted.

This testimony was incompetent and prejudicial to the interests of the defendant, plaintiff-in-error.

8. Because the said Trial Court would not permit the expert, Harry L. Hollingsworth, on behalf of the defendant, to answer the following question:

Q Now, from your examination of the defendant, can you state whether or not he knew the quality of wrong?

Mr. Bernhard. Objected to.

The Court. Objection sustained. Ask him a hypothetical question including the facts in this case as you understand them.

(Argument between Court and counsel.)

Exception noted.

This testimony was entirely competent and proper and the Court should have allowed the witness to answer it.

9. Because the said Trial Court refused to accept the paper, D. 1 for identification, in to evidence which was offered by the defendant, to which refusal counsel duly excepted.

This paper was a part of the original record of the Court of Pardons, and was entirely competent to aid the jury in determining the bona-fidedness and real value of the defense.

Reasons for Reversal.

10. Because the said Trial Court permitted the witness, J. Wellington Crane, in behalf of the State, sur-rebuttal, to be asked and to answer the following question:

> Q Now, then, from the examination that you made and from the observation that you made after the examinations on the two admissions, I understand you to say that you are able to form an opinion as to whether he was rational or irrational while he was at the institution?
>
> (Argument between Court and counsel and further testimony.)
>
> *The Court.* Objection overruled. You must fix more definitely the date of these examinations.
>
> *By the Court.*
>
> Q When was the first one? A To the best of my knowledge, I would say about 1911.
>
> Q When was the second one? A To the best of my knowledge, it would be sometime in 1915.
>
> *The Court.* You may cross examine him as to the nature of the examinations, if you want to, or hold it until later.
>
> *Mr. Simandl.* I will hold my cross examination until later.
>
> *By Mr. Bernhard.*
>
> Q What is your opinion, Doctor, as to whether he was rational or irrational?
>
> *Mr. Simandl.* I object to that.
>
> *The Court.* Objection overruled.

This testimony was entirely irrelevant, incompetent, immaterial and prejudicial to the plaintiff-in-error.

11. Because the said Trial Court permitted Dr. Walter S. Washington, on behalf of the State, sur-rebuttal, to testify to an examination had of the defendant, wherein questions were asked of defendant and answered by him, without the doctor stating what questions were asked.

This was prejudicial to the defendant, as it would not give to the jury the questions which were asked, but merely stated answers which may have been conclusions drawn by the doctor from a number of questions asked.

This ruling on the part of the Trial Court was erroneous.

Reasons for Reversal.

12. Because said Trial Court charged the jury as follows:

"If, in making an arrest, an officer meets with resistance he is not obliged to retreat or desist. The person having authority to arrest or imprison may repel force with force, and if death ensues in the struggle he will be justified. This is founded in reason and in public utility. For few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone. If the officer meet with resistance and kill the offender in the struggle he will be justified, and if he be killed it will be murder."

13. Because said Trial Court charged the jury as follows:

"To establish a defense on the ground of insanity it must be proved that at the time of committing the act the accused was laboring under such a defect of reason, or mental disability, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. If an accused has sufficient mind to know the difference between right and wrong with respect to the act he is doing, he cannot discharge himself from responsibility by showing that he did the act under the influence of an irresistible impulse."

14. Because said Trial Court charged the jury as follows:

"they went from the alley to the sidewalk on the west side of Norfolk street, down a short distance on the sidewalk, and then diagonally across to the northeast corner of Norfolk street and South Orange avenue; the defendant told Lieutenant Ryan to let him go, otherwise he would regret it. 'I am not going in;' Lieutenant Ryan refused and held him, and defendant reached with his free hand into his right-hand inside coat pocket, took out his revolver and fired four shots at Lieutenant Ryan, striking him in vital parts of the body with at least three of the bullets;"

15. Because said Trial Court charged the jury as follows:

"the defendant ran up South Orange avenue, turned down Jones street and into an alleyway, at the same time

exhibiting his revolver, apparently as a menace to some of those who would follow;''

16. Because said Trial Court charged the jury as follows: ''the State contends that it has shown by the evidence beyond a reasonable doubt that the defendant while under a lawful arrest waited until Captain Cordano was not in a position to assist Lieutenant Ryan, demanded to be set free, and then to effect his escape used a revolver and fired three shots, any one of which would be fatal, into vital parts of Lieutenant Ryan's body; that he conceived the design to kill and wilfully, deliberately and premeditatedly executed it in a manner which constitutes murder in the first degree, as hereinbefore defined, and, therefore, the State contends that your verdict should be murder in the first degree.''

17. Because said Trial Court charged the jury as follows: ''It is contended here that the defendant was feeble-minded—has a defective intelligence. It is my duty to inform you, and your duty to remember, that the law does not recognize every degree of feeble-mindedness as a defense to a criminal charge. The statute enumerates that to constitute murder in the first degree there must exist a specific intent to kill, and that it must be wilfully and deliberately and premeditatedly conceived and executed. These ingredients of murder in the first degree, it is said on behalf of the defendant, were not present because of feeble-mindedness. This is not a defense put in by the defendant, because, as I have stated to you, feeble-mindedness in no respect is a defense of crime. It is an essential ingredient, as I have stated to you, of the crime of murder in the first degree that there should be an intent to take life. Any feeble-mindedness may be considered with reference to the existence of that intent and its wilful, deliberate and premeditated character; and I charge you that if, at the time of doing the act, the evidence shows you that this defendant was so feeble-minded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its wilful, deliberate and premeditated character, then, although it is no defense nor justification, his offense would be murder in the second

degree. But I also charge you that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are merely morally depraved. You should discriminate between conditions of the mind merely blunted by familiarity with wickedness and yet capable of forming a specific intent to take life and carry it out as stated, and such a prostration or condition of the faculties as renders a man incapable of forming the intent and carrying it out."

18. Because said Trial Court charged the jury as follows:

"The State contends that the defendant had sufficient intelligence to know and understand the nature and quality of the act and that it was wrong; that the normal boy of eleven years has sufficient intelligence to commit murder in the first degree; that, at all events, this defendant is above the mental age of eleven years, and that the evidence of Dr. Crane, Dr. Clark and Dr. Washington shows that he is responsible and knows the nature and quality of his act and that it was wrong."

19. Because said Trial Court charged the jury as follows:

"The State contends that the defendant was in Newark armed with a loaded revolver, apparently so skillfully concealed about the person as to avoid detection, not only by Detective Ryan, but by Lieutenant Heller; that he commenced to run the moment he saw Lieutenant Ryan; that when captured he did not try to escape when Captain Cordano was at hand; that he seized the opportunity offered to him to use his left hand and shot Lieutenant Ryan when he was not looking, or could not see, or could not seize the revolver, thus evincing judgment, skill, stealth and ability to grasp an opportunity, the power of selection; that he permitted some of those who might run after him to see the revolver and believe they were in danger, so as to insure his own escape; that he did not immediately try to escape from Newark by the ordinary methods of travel where capture might await him, but followed a winding, roundabout course for a time after the deed; that he went to the home of a friend and about one o'clock in the morning came out, and when arrested told Lieutenant Heller a plausible excuse for being on the street so late

at night; that he made intelligent answers to Dr. Clark and Dr. Washington, and two statements evincing in themselves memory and capacity to narrate most of the circumstances attending this deed, and that while made on two different days they do, in most particulars, agree, and, therefore, that he has the intelligence and mental capacity much higher than the normal boy of eleven years."

20. Because said Trial Court charged the jury as follows:

"The State also contends that the psychological tests are inaccurate and inadequate, because they exclude the history of the subject, his education, surroundings, environment, mental teaching, moral teaching, his training, his discipline, and many other factors that ought reasonably to enter into an accurate estimate of intelligence, and that the very great interest which this defendant has in any verdict which you may render was a strong motive to induce the defendant to give answers or refuse to give answers to the examinations conducted by Hollingsworth in such a way as to produce a result of an estimate of a low grade of intelligence."

21. Because said Trial Court charged the jury as follows:

"In connection with guilt of murder in the first degree the Court should charge you that there was a statute passed in 1919, Chapter 134, page 303, which reads in part as follows:

108. 'Every person convicted of murder in the first degree ** 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.'

"Before this act was on the statute book the duty of the jury was merely to determine from the evidence whether or not the defendant was guilty, and, if so, whether he was guilty of murder in the first degree, second degree or manslaughter, or whatever the evidence warranted, and the statute provided that if a verdict of murder in the first degree was rendered by the jury the Court had no option whatever but to impose the penalty of death in the electric chair. The statute now provides that the jury may render

a verdict of murder in the first degree, if they find a person guilty of murder in the first degree, and in that case the defendant shall suffer the death penalty, but that if they shall recommend imprisonment at hard labor for life, then the Court must impose that sentence. The very important duty is therefore placed upon the jury of deciding whether to render a verdict of murder in the first degree, carrying the death penalty, or render a verdict of murder in the first degree, with a recommendation of imprisonment for life.

As the statute authorizes the jury in this class of cases and gives it the power practically to impose sentence, the jury, it seems to the Court, might properly have some information about the system of the criminal law in this State, what the imposition of a sentence means and how a sentence may be defeated. Over and above this Court of Oyer and Terminer and General Jail Delivery of Essex County, and what it may do as a result of any verdict that you may render, if you render a verdict, there is a Court of Pardons, which is a constitutional court, not restricted or limited in its conduct by this statute or any other. That court exercises what is known as the pardoning power of sovereignty. It may act as a court of pure mercy or grace. It may, for reasons which are satisfactory to that court, modify or change or reduce or abolish or set aside whatever result you may arrive at, whether you fix the penalty of death or whether you fix the penalty of life imprisonment. If a defendant in a case of this character is sent to State Prison for life, that court may change the result of your verdict."

22. Because said Trial Court charged the jury as follows:

"This is a very serious case, because if you find beyond a reasonable doubt that the facts are as contended by the State, it involved, as I stated before, a person who was acting on behalf of the government. On the other hand, if that is not shown beyond a reasonable doubt, it is a very serious charge brought against a person who is not responsible."

23. Because said Trial Court charged the jury as follows:

"In another aspect of this case, where a material fact is within the knowledge of the defendant and he could take the witness stand and deny that material fact which is sworn to by some one else against him and he fails to do so, his failure presents a situation where you have a right to draw inferences against him. The defendant is a competent, but not a compellable, witness in his own behalf, and his failure to testify in his own behalf raises no presumption of his guilt. But, however, where a defendant has specific knowledge of the facts charged to make out his guilt and can specifically deny it, then he may be criticized for not making such denial."

24. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

The defendant requests your Honor to charge the jury, that if the jury do not find beyond reasonable doubt, the fact to be, that the deceased intended to arrest the defendant, and do find that the alleged act was committed in hot blood under great provocation, and without malice, then the jury shall return a verdict of manslaughter.

25. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

The defendant requests your Honor to charge the jury, that if the jury shall find beyond a reasonable doubt that the evidence discloses the fact to be that the deceased knew at the time of the commission of the alleged crime, of the existence of an indictment against the defendant or that a felony had been committed by the defendant, and that the deceased was shot in the performance of his duties by the defendant, and that the jury find that the defendant was under a passion of hot blood and reasonable provocation and shot without premeditation, that in that case, the verdict shall be second degree murder.

Reasons for Reversal.

26. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the jury, after weighing all of the evidence, does not find beyond a reasonable doubt that the deceased was acting in good faith in the performance of his duties, and did not know at the time of the commission of the alleged crime of the existence of an indictment against the defendant, or that defendant had committed a felony and that the deceased was shot by the defendant under a passion of hot blood and reasonable provocation without premeditation, then, in that case, the verdict shall be second degree murder.

27. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the act charged in the indictment is presumed to be second degree murder until the State beyond a reasonable doubt proves an intent to take the life of the deceased, an intent carried out wilfully, with deliberation and with premeditation.

28. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if the State does not prove beyond a reasonable doubt that the defendant wilfully, with deliberation and with premeditation took the life of the deceased, then the defendant must be acquitted.

29. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that if the evidence on the part of the State proves beyond a reasonable doubt that the deceased intended to do bodily harm, then the defendant is guilty of murder in the second degree.

Reasons for Reversal.

30. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if after considering all of the evidence you find the defendant guilty of murder in the first degree, under your oaths as jurors, you may by your verdict, and as part thereof, recommend imprisonment at hard labor for life.

31. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> The defendant requests your Honor to charge the jury, that premeditation means a willful and deliberate intent to take life, and that an intent to do bodily harm is not intent sufficient to support a conviction of first degree murder.

32. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that, in considering this case, after its submission to them, the jury must proceed upon the presumption that the accused, the defendant herein, is innocent of the crime charged in the indictment and that it is necessary for the State to overcome this presumption by evidence to convince them, beyond a reasonable doubt, that the defendant is guilty of the crime charged against him in the indictment.

33. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that, in consideration of this case, the jury are bound to act and proceed upon the presumption that the accused is an innocent man, and this presumption must continue throughout the trial.

34. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the defendant, being charged with the crime of murder in

the first degree, the State is bound to prove every and all the essential facts necessary to constitute this crime beyond a reasonable doubt before the jury can convict the defendant of the crime charged in the indictment.

35. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that upon the whole case, if the State has failed to prove all the facts beyond a reasonable doubt, the defendant is entitled to be acquitted.

36. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that the burden in this case rests with the State, from the beginning to the end of the trial, to establish beyond a reasonable doubt, every fact essential to the conviction of the defendant, and if the State has failed to prove such charge beyond a reasonable doubt, the defendant is entitled to an acquittal.

37. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that the unintentional killing of a human being by another without motive, intent, premeditation, is neither murder nor manslaughter.

38. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury, that the questions of deliberation and premeditation, intent and motive, are purely questions of fact, to be determined by the jury from the evidence alone.

39. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that if the jury cannot say, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the act, and cannot say whether, at the time, he was sane or insane, the defendant must be acquitted.

40. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if, at the time the defendant committed the act charged against him, upon struggling with deceased, he was thrown into a state of mind from which he was deprived of his understanding, so as to be unaware of the nature and quality of the act he committed, or so as to be unable to distinguish between right and wrong in reference to that particular act at the time of its commission, this defendant must be acquitted.

41. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if defendant was deprived of his reason at the time the act charged against him was committed, and which resulted from a settled and well-established mental alienation, or from the pressure and overpowering weight of circumstances occurring before and at the time of the commission of said act, the said defendant is legally irresponsible for it, and must be acquitted.

42. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if, at the time of the commission of the act, the defendant was under the influence of a diseased mind, and was really unconscious that he was committing a crime, this defendant must be acquitted.

Reasons for Reversal.

43. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that the jury, in considering this case, are bound to act upon the presumption that the accused, the defendant, is innocent, and should endeavor, if possible, to reconcile all the circumstances of the case with that of innocence.

44. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the burden of proof rests with the State in this case, from the beginning to the end of the trial, and the State is bound to prove that the defendant committed the crime charged in the indictment beyond a reasonable doubt, otherwise the defendant is entitled to be acquitted.

45. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that the jury must be satisfied beyond a reasonable doubt, from the evidence of the case, of the sanity of the defendant at the time of the commission of the act charged in the indictment, and if the State fail to establish the sanity of the defendant at the time of the commission of the act charged in the indictment, this defendant cannot be convicted of any crime and is entitled to an acquittal.

46. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if the insanity, imbecility, or mental aberration which absolves from crime operated at the moment that the act was committed, that is sufficient in law to absolve from guilt, and this defendant cannot be convicted of the offense charged in the indictment, or any other offense.

Reasons for Reversal.

47. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that the State must satisfy the jury beyond all reasonable doubt that, at the moment the act alleged in the indictment was committed by the defendant, he had reason, perception and understanding sufficient to enable him to discern right from wrong, and that if he had not, it is the duty of the jury to acquit this defendant.

48. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if there is a reasonable doubt in the minds of the jury as to whether the act charged in the indictment was committed by the defendant while he was unable to discern between right and wrong, or if the evidence is equally balanced as to this, so that the jury cannot safely and conscientiously determine whether the killing of the deceased was intentional, or was committed by the defendant while he was unable to discern between right and wrong with respect to the act, then this defendant is entitled to the benefit of that doubt and entitled to an acquittal.

49. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge the jury, that if it finds that the defendant is of a mental age of under twelve years, he is presumed to be incapable of the commission of crime unless he is proven by the State, beyond a reasonable doubt, to be capable of the commission of a crime.

50. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

> Defendant requests your Honor to charge that if the jury finds that the defendant is of a mental age of under twelve years, the evidence that he understood the nature

or quality of the act charged against him and knew its wrongfulness must be strong and clear beyond a reasonable doubt.

51. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge that the burden is upon the State to show that the defendant has intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent.

52. Because the said Trial Court refused to charge the jury with the following request to charge, as requested by plaintiff-in-error:

Defendant requests your Honor to charge the jury that they have no right to presume a motive from the mere commission of the crime, and have no right to speculate, guess or surmise, or supply any motive for the commission of the act charged in the indictment.

53. Because there was no evidence of premeditation.

54. Because there was no evidence of deliberation.

55. Because the said Trial Court in one or more things submitted the case to the jury upon a misunderstanding of the law and evidence.

56. Because the said Trial Court otherwise erred in charging the jury.

57. Because the said Trial Court otherwise erred in ruling upon the evidence.

WHEREFORE, because the aforesaid reasons or some of them constitute error prejudicial to the said plaintiff-in-error, he, the said Philip Schilling, prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,
Attorney for Plaintiff-in-Error.

BENJAMIN M. WEINBERG,
Of Counsel with Plaintiff-in-Error.

Exhibit S. 21.

EXHIBIT S. 21.

DEPARTMENT OF PUBLIC SAFETY.
POLICE DIVISION.

3:00 A. M.

Newark, N. J., July 17, 1919.

Voluntary statement of Philip Schilling.
Residence, 158 E. 22nd St., N. Y. City.
Occupation, Teamster.
Age, 30.

Statement made to

Com. Archibald
Com. McEnroe
" Cozzolino
Act. Chief Corbally
Capt. Connell
Lieut. Harris
Sgt. Conlon
" Donnelly
" Gannon
Lieut. Heller
Capt. Kuhn
Lieut. Godrey
Capt. Cordano

Before making this statement Schilling was warned by Act. Chief Corbally that anything he would say in making statement would be used against him. Schilling said, "I know that; I heard that before."

On Wednesday July 16th, 1919, I left N. Y. between 11:30 & quarter of twelve. I came over on tubes. I had something to eat on Park Place. I did not meet no one there. I went into a moving picture there. I then went up to Richmond & South Orange Ave. I was just standing on corner and I didn't meet no one. I stayed there until about 6:00 o'clock and then went to restaurant. I was with James Jagolin. He came from New York with me. Jagolin called at my house in Ny. Y. and came over with me. He was with me all the time. We had some*thing* to eat in a Jews restaurant on Mercer St. near Springfield Ave. We left the restaurant about 5:30 X We went up on the corner of South Orange Ave. and Norfolk St. I went into a saloon to go to the toilet.

Philip Schilling.

Exhibit S. 21.

I had no drinks in the saloon. I came out on Norfolk St. side and sat on stoop about six thirty. Just me and Jagolin sat there. I was sitting there about 10 or 15 minutes when Paddy Ryan came over to me. I knew him to be a Lieut. of Police. I knew him about 14 years or more. He had a police office with him. I do not know his name. This man is now here and I learn his name is Capt. Joseph Cordano. They were running across toward me from So. Orange Ave. I saw them coming and I got up and ran into a yard and tried to jump a fence. I mean yard in back of saloon. I know the bar tender. This saloon is on right hand side as you come up So. Orange Ave. I went into yard of saloon called the "Transfer.

As I was climbing over the fence Paddy Ryan pulled me down and got a-hold of me. He took me outside of the yard and was crossing the St. Capt. Cordano was in the yard with me and Paddy Ryan told this officer to go and get the other fellow and

Philip Schilling.

this officer then left. Ryan then searched my hip pockets but he didn't find anything. He searched me coming out of the yard. He was walking me across the St. He had a hold of my right hand with his right hand and his left hand in back of my neck. He brought me across the st. to the saloon, near the corner of Sr. Orange Ave. across Norfolk St. to the candy store. I then told him to leave me go as I am not going in. We were about 3 foot from the sidewalk. Ryan hit me a couple of punches in the mouth. I did not resist but I might have jerked but I didn't use my hands or feet to try to get away. My left hand was free. We were tussling around and I pulled a revolver out of my pocket on my right inside pocket of my coat. Ryan saw the gun after I pulled it out and then we started to tussle. As I pulled it out it went off accidentally. I didn't take aim but I had my finger on the tricker. He had a hold of me with his left hand around my

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body. He had ahold of my right hand too. I shot three shots. Ryan let me go after the third shot and he said "I am hit,"

"Lieut. Harris at this time demonstrates to those present just how Ryan and Schilling were in the tussle.

Harris holds Schilling's right hand, left hand in back of neck, holding coat collar. Schilling shows left hand against right part

Exhibit S. 21.

of Ryan's body "and shows how he pulled gun from his pocket).

Ryan after I shot him backed up and I ran. I didn't wait to see him fall. I ran across So. Orange Ave. into Jones St. and into an alley, jumped a fence and into Hayes St. Through Hayes St. over to 14th Ave. and walked up 14th Ave. to Bruce St. From Bruce to Springfield Ave.

I lost my hat before I shot Ryan. I lost my hat in the yard where Ryan first caught me. I walked all the way up Springfield Ave. to a hat store on the right hand side of Fairmount Ave. I paid $1.50 for the cap. They didn't ask no questions.

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Act. Chief Corbally at this time holds a dark brown cap up and asks Schilling if this was the same cap he bought on Springfield Ave. and Schilling said yes it was the hat.

Chief Corbally also holds soft brown hat up and Schilling identified this hat as the one he lost in yard when tussling with Ryan.

I then walked up to 20th St. and Springfield Ave. and over the lots.

Philip Schilling.

Act. Chief Corbally holds 32 cal. blue steel revolver up Schilling identifies it as the gun that He shot Ryan with. I got the gun from a man in N. Y. about two months ago. I had about 10 or 11 rounds of bullets I took this gun out of my pocket and threw the empty shells on the St. alongside of a church on 13th Ave. This was after I reloaded the gun on 20th St. about 2 or three blocks from Springfield Ave. I didn't pay any attention to the streets I went through, until I got to 13th Ave. where I threw

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the shells away. I then wandered around and had nothing to eat. I walked over to Warren St. and was walking around until I came to Jagolin's house, 124 Wickliffe St. I couldn't find Jagolin in the house. I saw the fellow who runs the house and he didn't know whether he was in or not so I went up to Jagolin's room. I came downstairs and out of the house. As I got near Springfield Ave. a man called me back. He said "Come here I want to see you" I asked him what he wanted to see me for and he told me to come over to him until he looked me over. He then took me by

Exhibit S. 21.

the arm and as we got to Wickliffe St. Walter Burns came up with a machine and there was a lot of officers in the machine. I didn't resist as there was too many there. I had the gun in my right hand side of my coat, outside pocket. I had my hand down by my side. I don't know who took the gun away from me. Some of the officers felt my back pockets. I couldn't say who the man

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was who took the gun away from me when I was arrested. This is all I know.

I resisted the arrest when Ryan wanted to arrest me because I knew that I was wanted for a robbery I had committed on 8th Ave. last March when I put a revolver up to a woman's head and robbed her of $5.00. I knew the police were looking for me as I got word from some friend that police were looking for me.

Philip Schilling
158 east 22nd st New York City

Witnesses Thomas J. Corbally
Eugene Heller.
Wm. F. Gannon
Joseph Cordano
Thoem F. Connell
John J. Sweeney
Walter T. Byrnes
Fredk. J. Kuhn
Walter Godfrey

Exhibit S. 23.

EXHIBIT S. 23.

Newark, N. J., July 18th, 1919.

STATE

vs.

PHILIP SCHILLING.

Voluntary statement of Philip Schilling
Residence 158 East 22nd St., New York, N. Y.
Statement taken by

I left New York on July 16th, 1919, between half past eleven A. M. and a quarter to twelve, for Newark, accompanied by James Jagolin, and we stopped in at a lunch room on Park Place for something to eat. From there we went to the Terminal Moving Picture theatre and from there we went up on the hill on Richmond & So. Orange Avenue. From there about 5 o'clock we went on Mercer St. in a restaurant and had something to eat and from there we went up to the corner of Norfolk St. & So. Orange Avenue. We got to that corner about 6:30 and we must have sat around there for about 15 minutes, when I saw Paddy Ryan and another man, whom I knew to be an officer and whom I since learned to be Captain Joseph Cordanno, come up and Paddy Ryan made an attempt to grab me and I ran into a yard and tried to jump a fence, but he got ahold of one of my legs and pulled me back again and was taking me out of the yard and we were tussling around, and Paddy Ryan told Cordonna to chase the other fellow and Cardonna chased him running over to Beacon Street, and we were tussling all the way across the street on Norfolk Street. I wouldn't stand for being arrested. I told him to leave me go otherwise he would regret it. So I pulled a revolver out of my inside pocket and started shooting. I shot 3 times, the second shot he let me go and I seen him step back. I didn't look around to see him fall, I ran away. I ran over to Jones Street into an alley way and jumped over a fence and came out on Hayes Street. I walked as far as 14th Avenue, all the way up 14th Avenue to Bruce St.; over Bruce St. to

New Jersey State Library

Exhibit S. 23.

Springfield Avenue and came to a hat store on the corner of Fairmount Avenue and I bought a cap. Then I walked from there as far as 20th Street. I walked into 20th Street, about two or three blocks, into some lots there and I reloaded my gun and I put the empty shells back in my pocket. Then I wandered through the streets in and out and I came out as far as 13th Avenue & Boston Street and I threw the empty shells away alongside a church. From there I started wandering around the streets over towards Warren Street back and forth. I came back to 124 Wickliffe Street; I wanted to see if Jagolin was there. He wasn't in and I came right down again. I started walking towards So. Orange Ave. when Heller stopped me and asked me where I was goin, so I said, what do you want, what do you want to see me for. Heller walked back with me to the spot where he came from, Wickliff Street, and then Walter Burns came in a machine with a lot of Officers and they arrested me. An officer took the gun away from me. That was the same gun I used to shoot Paddy Ryan with. From there they took me to the Police Headquarters. The reason I wouldn't stand for being arrested was because I was figuring if I got a long time I would never live it out. I knew Paddy Ryan to be an officer and I knew that he wanted me for a robbery charge. The robbery charge was, putting a gun in front of a woman's face and robbing her of $5.00. This was sometime in March, 1919, on 8th Avenue, a few doors up from Broad Street. The woman I robbed was my landlady and she knew me as Harry Young.

Philip Schilling
158 East 22nd St New York
city.

Witnesses

Eugene Heller, Lieutenant of Police
William F. Gannon
Frank Donnelly
Raffaele Capodanno
Walter Godfrey