INDEX

	Page
Certificate of the Chancellor	1
Writ of Error	2
Return to Writ	4
Indictment	4
Pleas	6
Judgment Record	7
Drawing of Jury	10-97
J. Roy Bergen	12
George C. Braumuller	14
Harry E. Bataille	17
Fred F. Ryan	24
Harold E. Shaw	28
Michael J. Ryan	30
Harold J. Butts	38
Louis E. Batchellor	44
Alfred E. Walker	46
Henry W. Adams	48
William F. Dick	51
Charles R. Arndt	55
Louis C. Bassini	58
Henry Cahill	63
Emil E. Argast, Jr.	66
Ames S. Bornt	70
William Bal	73
Terence P. Butler	76
John J. Daley	80
Robert T. Burns	84
David Dalrymple	89
Charles H. Adams	94

PAGE

TESTIMONY.

Witnesses for The State.

John J. Bracken,
direct examination..... 98
cross " 106, 107, 108
re-direct " 106, 108
(recalled) re-direct " 155
re-cross " 157
Dr. Harrison S. Martland,
direct examination..... 109
cross " 123
(recalled) direct " 151, 166
cross " 166
John L. Day,
direct examination..... 127
cross " 130
Jacob G. Ruel,
direct examination..... 130
Morris W. Shapiro,
direct examination..... 134
cross " 140
John F. Bulgran,
direct examination..... 141
cross " 145, 150
Leonard Sachs,
direct examination..... 157
cross " 165
William J. Callahan,
direct examination..... 172
cross " 174
(recalled) direct " 381, 464
Joseph Linarducci, Jr.,
direct examination..... 179
cross " 181
(recalled) direct " 349, 403
re-direct " 379
cross " 407

PAGE

Ernest W. Mierou,
direct examination..... 186
cross " 189
Irene V. McEvoy,
direct examination..... 190
cross " 201
re-direct " 244
Robert M. Hammond,
direct examination..... 253
cross " 257
Charles Spann,
direct examination..... 260
cross " 262
Albert M. Apgar,
direct examination..... 264
cross " 265
Thomas Scanlon,
direct examination..... 265
Robert P. Dennebaum,
direct examination..... 267
Robert A. Templeton,
direct examination..... 268
John White,
direct examination..... 279
cross " 281, 291, 295
re-direct " 284, 298
Alice Hill,
direct examination..... 298
William Raymondo,
direct examination..... 300
cross " 317
Samuel Simioni,
direct examination..... 319
cross " 331, 334
William Cardinale,
direct examination..... 336
(recalled) direct " 458
cross " 462, 463

PAGE

Frank E. Brex,
direct examination..... 350
cross " 363, 374
re-direct " 378
Philip Sebold,
direct examination..... 383
cross " 386, 398, 402
Calvin Goddard,
direct examination..... 407
cross " 432
re-direct " 452
re-cross " 456
Thomas Boland,
direct examination..... 465
cross " 468

Witnesses for Defendants.

Arthur Cort,
direct examination..... 475
cross " 482
re-direct " 520
re-cross " 526
Joseph Calabrese,
direct examination..... 529
cross " 545
re-direct " 580
re-cross " 582

State's Rebuttal.

Philip Sebold,
direct examination..... 582
cross " 584
Warren T. Moffett,
direct examination..... 587
cross " 589

	Page
Harry T. Morley,	
direct examination	590
cross "	591
re-direct "	591
re-cross "	591
Joseph J. Kenney,	
direct examination	592
Frank Brex,	
direct examination	596, 597
cross "	597
Joseph Zeller,	
direct examination	609
cross "	610
Court's Charge to Jury	612
Exceptions to Charge	623
Defendants' Requests to Charge	626
Certificate of Court Stenographers	627
Certificate of Trial Judge	628

Exhibits.

		Off'd	P't'd
S. 1.	Map	101	opp. p. 682.
S. 2.	Map	105	
S. 3.	Bullet	113	
S. 4.	Bullet	121, 171	
S. 5.	Photograph	128, 134	opp. p. 682.
S. 6.	Photograph	129, 134	
S. 7.	Photograph	129	
S. 8.	Photograph	131	opp. p. 682.
S. 9.	Photograph	132	
S. 10.	Photograph	132	
S. 11.	Photograph	133	
S. 12.	Piece of Steel	265	
S. 13.	Automobile Registration No. 3E 4477	268	629

		Off'd	P't'd
S. 14.	Original negative and print of finger prints of William Raymondo	275	
S. 15.	Photographs of Finger Prints	276	
S. 15.	Four steel jacketed bullets	331	
S. 16.	Gun	305, 386	
S. 18.	Statement of Joseph Calabrese to Police	385	632
S. 19.	Statement of Joseph Calabrese to Prosecutor's Detectives	406	642
S. 20.	Test bullet	429	
S. 21.	Test bullet	430	
S. 22.	Statement of Arthur Cort to Police	467	644

Assignment of Errors
Joseph Calabrese 651
Arthur Cort 667

Specification of Causes
Joseph Calabrese 659
Arthur Cort 675

CERTIFICATE OF THE CHANCELLOR.

Filed November 13, 1929.

In Chancery of New Jersey

THE STATE OF NEW JERSEY, *Plaintiff,* *vs.* JOSEPH CALABRESE and ARTHUR CORT, *Defendants.*	*On Indictment and Conviction for Murder.* *Certificate of the 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 Joseph Calabrese and Arthur Cort of the crime of murder in the first degree, and that I have refused to order a writ of error out of the New Jersey Supreme Court for the review of said judgment.

Dated at Trenton, N. J., this 13th day of November, A. D. 1929.

EDWIN ROBERT WALKER,
Chancellor.

WRIT OF ERROR.

New Jersey Court of Errors and Appeals

NEW JERSEY, to wit:

The State of New Jersey to WILLIAM S. GUMMERE, Esq., one of the (SEAL) Justices of the Supreme Court of the State of New Jersey, and to the Judges of the Court of Common Pleas of Essex County, constituting the Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, of the term of September, 1929.

GREETING: Because in the record and proceeding and also in the giving of judgment upon a certain indictment against Joseph Calabrese and Arthur Cort, late of the City of Newark, in the County of Essex aforesaid:

"For that the said Joseph Calabrese and Arthur Cort on the 22nd day of April, in the year of our Lord one thousand nine hundred and twenty-nine, at the City of Newark, in the County of Essex aforesaid, did wilfully, feloniously and of their malice aforethought kill and murder Morris Grossman, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

Pro ut the said indictment whereof, before you, they, the said Joseph Calabrese and Arthur Cort, have been indicted, and are thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Joseph Calabrese and Arthur Cort, as it is said, manifest error hath intervened to the great damage of the said Joseph Calabrese and Arthur Cort, as from their complaint we have received information,

we being willing, in their behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Joseph Calabrese and Arthur Cort, 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, and the entire record of the proceedings had upon the trial, to our Court of Errors and Appeals, in the last resort in all causes of law, to be held at Trenton, on the third day of December next, and this writ, that the record and proceedings as aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, EDWIN ROBERT WALKER, Esq., our Chancellor and the President Judge of our said Court of Errors and Appeals, at Trenton, New Jersey, this thirteenth day of November, 1929.

JOSEPH F. S. FITZPATRICK,
Clerk.

JOHN W. MCGEEHAN, JR.,
Attorney for Defendant, Joseph Calabrese.

CHARLES BECKER,
Attorney for Defendant, Arthur Cort.

A true copy.
JOSEPH F. S. FITZPATRICK,
Clerk.

Presented in open court this 20th day of November, A. D. 1929.

WALTER D. VAN RIPER,
Judge.

RETURN TO WRIT.

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the (SEAL) official seal of said Court and county at Newark, this 2nd day of December, A. D. 1929.

WALTER D. VAN RIPER,
Judge of the Court of Common Pleas
holding the Court of Oyer and Terminer,
Essex County, New Jersey.

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 twenty-nine, 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 Edward W. Campbell, Esmond J. Murray, Henry G. Lambert, Franklin J. Berry, George W. Lethbridge, David M. Caro, Richard A. Hensler, Morris Friedman, Charles L. Wood, Adam Ritter, Joseph Centanni, Frank J. Carlton, George C. Pfreundschuh, Lawrence S. Fagen, Frank A. Stratton, Simon Comando, Thomas Smith, Andrew B. Rodger, John S. Wintermute, Henry Schneider, James A. McGonnell, Arthur L. Jaggard, A. Elston Fink, 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 County, to wit: The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Arthur Cort, Victor Bruno, Dominick Lamoline and Joseph Calabrese on the twenty-second day of April, in the year of Our Lord one thousand nine hundred and twenty-nine, at the City of Newark, in the County of Essex aforesaid did wilfully, feloniously and of their malice aforethought, kill and murder Morris Grossman, 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.

JOSEPH L. SMITH,
Prosecutor of the Pleas.

And on the twenty-first day of May, A. D. Nineteen hundred and twenty-nine, on which day the said indictment was presented by the Grand Jury aforesaid to the said Court of Oyer and Terminer, the said Justice did then and there order the said indictment to be delivered to the

Clerk of the Court of Oyer and Terminer in and for the said 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.

And afterwards, that is to say, at the same session of the Court of Oyer and Terminer holden at Newark on the twenty-third day of May, A. D. Nineteen hundred and twenty-nine, before the Judge aforesaid, comes the said Joseph Calabrese and Arthur Cort in the custody of Conrad Deutchler, Sheriff of the County of Essex aforesaid in the custody in the jail of the county aforesaid, they have been before committed for the cause aforesaid being brought to the Bar of this Court in their own proper persons by the said Sheriff to whom they are also committed and having heard the indictment and being forthwith demanded of and concerning the premises in the above indictment specified and charged upon them how they would acquit themselves thereof, say that they are Not Guilty thereof, and therefore, for good and evil they put themselves upon the country and Joseph L. Smith, Prosecutor of the Pleas, for the County of Essex aforesaid, who prosecutes for the State of New Jersey in this behalf doth the like.

And afterwards, that is to say on the twenty-eighth day of October, A. D. Nineteen hundred and twenty-nine, trial of said cause was moved before Hon. Walter D. Van Riper, Judge, on motion of the Prosecutor of Pleas, a severance of trial was ordered as to defendant Dominick Lamolino, which is ordered postponed without day and that the trial of this indictment as to

defendants Arthur Cort and Joseph Calabrese proceed forthwith.

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 twenty-eighth day of October, A. D. Nineteen hundred and twenty-nine, twelve free and lawful men each of whom shall be a citizen of this State and a resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years by whom the truth of the matter may be better known and who are not of kin to the said Joseph Calabrese and Arthur Cort, to recognize upon their oath, whether the said Joseph Calabrese and Arthur Cort are Guilty of the Murder in the Indictment aforesaid specified or Not Guilty, because as well the said Joseph L. Smith, Prosecutor of the Pleas of the County of Essex aforesaid who prosecutes for the State of New Jersey in this behalf as the said Joseph Calabrese and Arthur Cort have put themselves upon the jury, and the same day is given to the parties aforesaid at the same place, at which day, to wit, the twenty-eighth day of October, A. D. Nineteen hundred and twenty-nine, at the same Term of Oyer and Terminer, holden at Newark, aforesaid in the County of Essex, before the Honorable Walter D. Van Riper, Judge of the Court of Common Pleas, holding the Court of Oyer and Terminer, in and for the said County of Essex, comes as well the said Joseph L. Smith, Prosecutor of the Pleas, who prosecutes aforesaid, and the said Joseph Calabrese and Arthur Cort, in the custody of Conrad Deutchler, Sheriff of the County aforesaid, being brought to the bar in their own proper

persons, by the said Sheriff, and the jurors of the jury by the said Sheriff for this purpose empannelled and returned, after the following challenges, by the State 6, by the defendant Arthur Cort 18, by the defendant Joseph Calabrese 18, for Cause 30, by the Court 6 and by Consent 7, 1 John William Bruce, 2 Warren R. Brown, 3 William J. Bork, 4 Paul S. Bowen.

And afterwards, that is to say on the twenty-ninth day of October, A. D. Nineteen hundred and twenty-nine, trial proceeded and jurors called, 5 Paul J. Braun, 6 John R. Dowie, at this stage of the proceedings, the special panel becoming exhausted, the Court ordered the Sheriff to draw the balance of the jury from the general panel, whereupon the balance of the jury was drawn from the general panel and sworn as jurors; 7 Frederic Andres. At this stage of the proceedings, counsel for the two defendants, challenged the array of jurors, Louis E. Batchelor and Alfred C. Walker, Under-Sheriffs, being sworn to testify, whereupon the Court overruled the said challenge to the array and order the trial to proceed, Juror 8, John Dalton drawn.

And afterwards, that is to say on the thirtieth day of October, A. D. Nineteen hundred and twenty-nine, said trial progressed and Jurors 9, Edward G. Decker; 10 Walter J. Chadwick, 11 George Stahl and 12 Aaron E. Delhagen were sworn, Officers Seth Middleton, James Mucahy, Michael Carr and Patrick Crean being sworn to attend the jury during the trial, the jurors being called came 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, on the sixth day of November, A. D.

Nineteen hundred and twenty-nine, to which day said trial was postponed, at Newark aforesaid, the jury in the meantime being all that time kept together and in the care of the officers of the said court, who were selected and duly sworn by 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 beforesaid, 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, Joseph L. Smith and the said Joseph Calabrese and Arthur Cort, say that the "We find both defendants Arthur Cort and Joseph Calabrese, Guilty of Murder in the first degree."

By request of defendants' counsel, the jury was polled, and each juror for himself said "I find both defendants Guilty of Murder in the first degree," and so they say all.

Whereupon, all and singular, the premises being seen, and by the Court now here fully understood, it is on the twelfth day of November, A. D. Nineteen hundred and twenty-nine, ORDERED and ADJUDGED that the two defendants, Arthur Cort and Joseph Calabrese, suffer death sometime within the week beginning Sunday, December 15, 1929. "And may God have mercy upon your souls."

Judgment signed and sealed November 12, 1929.

WALTER D. VAN RIPER,
Judge.

ESSEX COUNTY COURT OF OYER AND TERMINER.

Monday, October 28, 1929.

STATE OF NEW JERSEY, *vs.* JOSEPH CALABRESE and ARTHUR CORT.	*On Indictment No. 132 Sep. T. 1929 for Murder.*

Before HON. WALTER D. VAN RIPER, Judge, and a jury drawn from a special panel.

For the State appears Joseph L. Smith, Prosecutor of the Pleas, and Simon L. Fisch, First Assistant Prosecutor of the Pleas.

For the defendant Cort appears Charles Becker.

For the defendant Calabrese appears John W. McGeehan, Jr.

Mr. Smith: If the Court please, I desire to move the indictment for murder against the defendants Arthur Cort and Joseph Calabrese. I move for a severance as to the defendant Victor Bruno, who has not been arrested, and also a severance for the defendant Dominick Lamilino, who, since his arrest, showed evidences of insanity, so that this Court committed the defendant Dominick Lamilino to the State Hospital for the Insane at Trenton.

The Court: The motion is granted as to the severance. Are the defendants ready?

Mr. McGeehan: Yes, sir.

Mr. Smith: Then, if the Court please, we might expedite matters if the Court would consider swearing all of the jurors on their *voir dire* in a body, rather than individually.

Mr. McGeehan: I object to that.

The Court: That is a departure from the ordinary procedure.

Mr. Smith: Yes, sir, and if counsel objects I will withdraw the request.

Mr. McGeehan: And I suppose there is no question of the right of each defendant to challenge twenty jurors.

The Court: There has been no question raised yet.

(A juror was called and as the clerk was about to swear him on his *voir dire,* the following transpired:)

Mr. McGeehan: I object.

The Court: You do not object to his being sworn in his *voir dire*?

Mr. McGeehan: Yes, sir.

The Court: On what basis?

Mr. McGeehan: Simply that there is no purpose in swearing the juror except on a specific challenge for cause.

The Court: He is being sworn now simply to tell the truth on this interrogation.

Mr. McGeehan: Yes, but I object to any interrogation.

The Court: To any interrogation?

Mr. McGeehan: Yes, sir.

The Court: I will permit the juror to be sworn.

Drawing of Jury—J. Roy Bergen.

(Before any Jurors were sworn.)

J. ROY BERGEN, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Bergen, what is your business? A I am with Endicott-Johnson, wholesale shoes.

Mr. McGeehan: I object to the questioning of the juror at this time by the prosecutor, or the holding of any conversation with him.

The Court: I will rule that the prosecutor has the right, the same as the defendant has the right, to question the prospective jurors on their *voir dire.* This is not a blanket ruling that he can ask any question that he wants to, or that you can ask any question you want to; the questions that are objectionable in themselves may be objected to when asked.

Mr. McGeehan: Exception.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Have you any conscientious scruples against capital punishment?

Mr. McGeehan: I object to that as improper at this time.

The Court: Overrule.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Would you, in a proper case, where the facts warrant it and under the charge of the Court, vote to return a verdict of guilty of murder in the first degree?

Mr. McGeehan: The same objection.

The Court: Same ruling.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

A Yes, sir.

Q Even though, as a result of that verdict, the defendant would be put to death; would that make any difference to you? A No, sir.

By Mr. McGeehan.

Q Mr. Bergen, have you any conscientious scruples against recommending life imprisonment for a defendant, even though he may be convicted of murder, if, in your judgment, you so recommended it after a consideration of all the evidence in the case? Would you have any scruples against making such a recommendation? A No, sir.

Mr. McGeehan: Excused by the defendant Calabrese.

(Before any Jurors were sworn.)

GEORGE C. BRAUMULLER, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Braumuller, you are listed as a salesman? A Yes.

Q What do you sell? A Butchers' equipment; butchers' furniture and equipment.

Q By whom are you employed? A The National Edge Tool Company.

Q Married? A Yes, sir.

Q Have you any conscientious scruples against capital punishment? A I have not.

Q Would you in a proper case, where the facts warrant it, and under the charge of the

Court, vote to return a verdict of guilty of murder in the first degree? A I would.

Q Even though you knew as a result of that verdict the defendant would be put to death? A I would.

Q That would not make any difference to you, would it? A No, sir.

By Mr. McGeehan.

Q Mr. Braumuller, where do you live, please? A 811 Ridge street, Newark.

Q Are you acquainted with Prosecutor Smith?

Mr. Fisch: I object.

The Court: Sustained.

Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case.

Mr. Fisch: I object to that.

The Court: That is objectionable insofar as it implies an acquaintance with the Prosecutor. It is certainly proper to ask him whether he could render a just verdict.

(Argument.)

The Court: The objection is sustained.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Were you acquainted with a man named Maurice Grossman, Mr. Braumuller? A I was not.

Q In saying that you have no conscientious scruples against capital punishment, you mean that you would follow the law as it exists, in respect to the verdict that you should find upon the evidence, do you not? A I do.

Q Have you any scruples against recommending life imprisonment for a man convicted of murder in the first degree? A I have not.

Q The law is that even if a defendant be convicted of murder, and murder in the first degree, that the jury may, as part of their verdict, recommend life imprisonment, after a consideration of all the evidence in the case. Would you have any prejudice in so recommending life imprisonment? A I would not.

Mr. Becker: Your Honor, I will excuse this juror on behalf of my client, Arthur Cort.

Drawing of Jury—Harry E. Bataille.

(Before any Jurors were sworn.)

HARRY E. BATAILLE, sworn on his *voir dire*.

By Mr. Fisch.

Q Mr. Bataille, what is your business? A Stock clerk.

Q Employed where? A Public Service.

Q How long have you been so employed? A Six years.

Q Are you married? A No, sir.

Q Single? A Yes, sir.

Q With whom do you live? A With my mother.

Q What is your mother's name? A Augusta.

Q Your father is dead? A Yes, sir.

Q His name was what? A Eugene.

Q Have you any conscientious scruples against capital punishment? A No, sir.

Q How old are you? A Twenty-eight.

Q Would you, in a proper case, where the facts warrant it and under the charge of the Court, vote to return a verdict of guilty of murder in the first degree? A Yes, sir.

Q Even though you knew, as a result of that verdict, the defendant would be put to death? A Yes, sir.

Q That would not make any difference to you? A No, sir.

Q That would not influence you at all, would it? A No, sir.

By Mr. McGeehan.

Q Mr. Bataille, if the Court charged you that the law is that if you do find the defendant

guilty of murder, and of murder in the first degree, the jury has the right, after a consideration of all the evidence, to recommend life imprisonment as the punishment for the defendant, in which case life imprisonment shall be the punishment and not execution. Would you have prejudice in voting for life imprisonment in such a case? A No, sir.

Q You have no conscientious scruples then against any verdict of life imprisonment as a punishment for first degree murder, have you? A No, sir.

Mr. McGeehan: Satisfactory.

Mr. Becker: Satisfactory for the defendant Arthur Cort.

By Mr. Fisch.

Q You have been asked some questions with regard to a recommendation to be attached to a verdict of guilty of murder in the first degree. Would you attach such a recommendation to your verdict irrespective of the evidence? A No, sir.

Q Your recommendation, then, would be based upon the evidence, is that it? A Yes, sir.

Q Well, now, in the event that the Court should charge you that the burden of proving the defendant's guilt rests upon the State throughout the whole case, and that you must be satisfied from the evidence beyond a reasonable doubt of their guilt, would you under such circumstances insist that the State prove the defendant's guilt beyond all possible doubt? A Yes.

Q So that irrespective of the charge you would insist upon the State proving the defend-

ants guilty beyond all possible doubt, is that it? A Yes, sir.

Q Even though you were satisfied beyond a reasonable doubt, you would not vote to convict the defendant, you would have to be satisfied beyond all possible doubt? A Yes.

Mr. Fisch: If your Honor please, I challenge for cause.

The Court: Well, Mr. Juror, if the Court should charge you that the burden of proof in the case was upon the State and that it was the duty of the State to prove the defendants guilty beyond a reasonable doubt, describing to you in technical, legal language what a reasonable doubt consisted of, and called your attention to the fact that a reasonable doubt was not beyond all possible doubt, and if the evidence convinced you that the defendants were guilty beyond a reasonable doubt, you would then convict them?

The Talesman: Yes, sir.

The Court: But suppose you felt that they were guilty beyond a reasonable doubt, but there was some possible doubt that they were not guilty, what would you do then? In other words, suppose the Court charged you as a matter of law that everything connected with human affairs was open to some possible doubt, that there was nothing which we humans are connected, but what there is a possibility of doubt, and then said to you at the same time, however, in order to find these defendants guilty, you do not have to be satisfied that there is no possibility of doubt, but you simply have to be satisfied

beyond a reasonable doubt. Now, if you felt, beyond a reasonable doubt, that they are guilty, but still realized that there was a possibility that they might not be guilty. how would you then come to a verdict?

The Talesman: Not guilty, then if there is a doubt.

The Court: If there was a doubt, I mean if you felt that there was a possibility, as distinguished from a reasonable doubt, or if you are reasonably certain, if you are satisfied beyond a reasonable doubt, as I have described a reasonable doubt to you, that the defendants were guilty, but if you still felt that there was a possibility brought about by some possible doubt that they were not guilty, then would you find them not guilty?

The Talesman: Yes, sir.

The Court: In other words, satisfying you beyond a reasonable doubt would not be enough, is that what you mean to tell us; that you would have to be satisfied beyond any possible doubt of the guilt of the defendants, is that right? Is that what you mean?

The Talesman: Yes, sir.

By Mr. McGeehan.

Q Mr. Bataille, if the Judge said to you at the end of the case that it is your duty to convict, if the evidence proves the defendants guilty beyond a reasonable doubt, and the Judge charged you that that was the law, would you then convict, if you were convinced beyond a reasonable doubt that they were guilty? Would you follow the Court's charge as to the law in the case? A Yes.

Q And would you render a verdict based upon the evidence and the charge of the Court? A Yes, sir.

Q And if the Court told you that you must convict if the evidence proves them guilty beyond a reasonable doubt, would you convict if the evidence proved them guilty beyond a reasonable doubt? A Yes.

Q And if the Court told you that if you had a reasonable doubt of their guilt you are entitled to acquit, would you acquit if you had such a reasonable doubt? A Yes, sir.

Mr. McGeehan: I object to the excusing or challenging this juror for cause.

The Court: I do not quite reconcile your statements in your answers, Mr. Bataille. You just told Mr. McGeehan that you would convict if you were satisfied beyond a reasonable doubt. But now, you told me, in answer to my questions that you would not convict unless you were satisfied beyond all possible doubt of the guilt of the defendant, and I explained to you and pointed out to you that from a legal viewpoint there is a difference between a legal doubt and a possible doubt. Now, just what is your attitude?

The Talesman: I don't quite understand you.

The Court: Well, as I tried to point out to you before, the Court will charge you that it is the burden of the State to prove the defendants guilty beyond a reasonable doubt, and that a reasonable doubt is such a state of mind that jurors cannot say, to a moral certainty, that they have an abiding

conviction as to the truth of the charge; that they are not morally certain of it. And I will also charge you, as a matter of law, charge the jury rather, as a matter of law, that the State does not have to prove the guilt of the defendants beyond all possible doubt. In other words, there is a distinction, there is a point at which the jury can say, "We are reasonably certain of the defendant's guilt," or rather, "We believe he is guilty beyond a reasonable doubt, but at the same time, believing he is guilty beyond a reasonable doubt, we realize the possibility of some possible doubt which may make him not guilty." Now, you said to me when I examined you a few moments ago, that you would have to be satisfied beyond all possible doubt; that being satisfied beyond a reasonable doubt would not be enough; that you would have to be satisfied beyond all possible doubt in order to convict, is that right?

The Talesman: Yes, sir.

The Court: But you said to Mr. McGeehan after that you would be satisfied to convict if you were satisfied beyond a reasonable doubt. Now, you see, these two statements do not quite jibe. In other words, if the Court says to you if you, in your mind, find these defendants guilty beyond a reasonable doubt, it is your duty to convict them, what would you do?

The Talesman: Beyond a reasonable doubt?

The Court: Yes, if I charged you, as a matter of law, that if you found them guilty beyond a reasonable doubt, in your mind,

it was your duty to convict them, what would you do?

The Talesman: Convict them.

The Court: Well, what about your idea of wanting to be satisfied beyond all possibility of doubt?

The Talesman: Beyond a possible doubt?

The Court: That is what you would insist on?

The Talesman: Yes, not reasonable doubt.

The Court: Now, is that a final determination? I haven't any desire to confuse you in this thing or to mix you up. You are not on trial. We are just simply trying to find out your attitude. Now, is that a determination that you would have to be satisfied beyond all doubt?

The Talesman: Yes.

The Court: And a satisfaction beyond a reasonable doubt would not be enough?

The Talesman: Yes, sir.

The Court: In spite of a charge to that effect?

The Talesman: Yes, sir.

Mr. Fisch: I renew my challenge for cause, your Honor.

The Court: And you object?

Mr. McGeehan: Yes.

The Court: I will allow the challenge and allow the defendants an exception.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Drawing of Jury—Fred F. Ryan.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After two jurors had been sworn.)

FRED F. RYAN, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Ryan, are you married? A Yes, sir.

Q Have you a family? A Yes, sir.

Q And you live where, please? A 5 Grand avenue, Newark.

Q Have you read anything or have you discussed the occurrence I mentioned in the previous questions to the jurors? A Yes, sir.

Q Which have you done, read it or discussed it? A Both.

Q How recently, Mr. Ryan? A Right after it happened.

Q And you have recently discussed it with anyone? A No, sir.

Q Have you formed any opinion one way or the other in the case that might influence you as a juror or make it difficult for you to sit impartially in this particular case? A From what I have read and discussed, I think, yes, sir.

Q And you feel, then, that you cannot impartially try this case? A I do.

Mr. McGeehan: Under those circumstances, I challenge the juror for cause,

and I think he should be excused by consent.

The Court: What do you mean?

The Talesman: I do not consider that I could sit in impartial judgment on the case.

Mr. Fisch: Why not?

The Talesman: Because of the opinion that I have formed and the discussion I had with people who had been in the neighborhood.

Mr. Fisch: You mean the nature of the crime itself?

Mr. McGeehan: I object. I think the juror has sufficiently informed both the State and the defense of his inability to impartially decide upon the evidence, and in such case the juror ought to be excused by consent.

The Court: I will permit it.

Mr. McGeehan: I object. I think the last question might lead to a possible situation where a mistrial may have to be had.

The Court: You may have an exception.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

By Mr. Fisch.

Q You mean first as to the nature of the crime itself? A Yes, sir.

Q You never formed any opinion, did you, as to the guilt or innocence of these particular defendants? A A I cannot say I formed a direct opinion. I had my own ideas about the subject, yes, sir. I am only stating this from what I have read in the papers of the actual occurrence as it was stated, and from the different people I have met. I have discussed it with them.

Q What I am interested in knowing is whether or not you have formed any opinion as to the guilt or the innocence of these defendants now on trial.

Mr. McGeehan: I object to that. That was the previous question.

The Court: Sustained.

Q Have you formed any opinion as to the guilt or innocence of these defendants which would prejudice your mind to such an extent that you could not follow the instructions of the Court and give a fair and impartial verdict upon the facts, applying the law as you receive it from the Court? A Well, I would have to have all the evidence to decide that, but as I said before, from what I have read and discussed of the matter, I have formed my opinion of it.

Q Well, would that opinion which you have formed, interfere with your duties as a juror to such an extent that you would say that you could not listen to the evidence here, apply the law as you receive it from the Court and decide this case upon the evidence as it is pre-

sented in court, and apply the law received from the Court to that evidence? A Absolutely not.

Q Well, what do you mean by that answer? A Because what I had heard and discussed, possibly there might have been some error in that. I don't know. I am not at all in a position to judge that.

Q Then, you would not permit what you had heard and what you had discussed to interfere with your duties as a juror in weighing the evidence as it is presented in the court room? A No, sir.

Mr. Fisch: I think under those circumstances, if your Honor please, there isn't any evidence that this juror should be challenged for cause should not be sustained.

The Court: The juror feels he is prejudiced, as I understand it.

The Juror: Yes.

The Court: That would interfere with your judgment?

The Juror: Yes.

The Court: I will sustain the challenge.

(The drawing of the jury then proceeded and after three jurors were sworn, the Court took a recess, at one o'clock, for one hour.)

AFTER RECESS.

(The drawing of the jury was continued, and after one additional juror was sworn, making four in all, the Court took a recess until tomorrow, October 29, 1929, at 10 A. M.)

Drawing of Jury—Harold E. Shaw.

SECOND DAY.

Tuesday, October 29, 1929.

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

(The drawing of the jury continued.)

(After 4 Jurors had been sworn.)

HAROLD E. SHAW, sworn on his *voir dire*.

By Mr. Fisch.

Q Where do you reside? A 28 Crescent Road, East Orange.

Q Are you married? A Yes.

Q Have you any conscientious scruples against capital punishment? A No.

Q Would you in a proper case, where the facts warrant it and under the charge of the Court, vote to convict the defendants of murder in the first degree? A Yes.

Mr. McGeehan: One minute. I want to object to that on the ground it is an improper question at this time.

The Court: Why?

Mr. McGeehan: Because there is nothing pending before the Court to entitle that question to be asked, nor is the Prosecutor entitled to know what the juror would do in a certain situation in the case. The only procedure under the law under which questions can be put to the juror is to submit challenges. In the case of Clifford against the State that subject is covered and it is that the refusal to permit the examination

of any juror, "never departed from, so far as we have observed, when objection was interposed." I object to this question and did at the beginning at the swearing of jurors on the ground for cause on any reasonable ground. I do not think that it serves any purpose that is known to our law as being proper in the case.

The Court: I will permit it and allow you an exception for both defendants.

Let the exception for the defendant Calabrese be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Let the exception for the defendant Cort be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

(Counsel argue.)

Mr. Fisch: If your Honor please, I withdraw the question which I asked of Mr. Shaw.

The Court: Any further questions?

Mr. Fisch: No further questions, Mr. Shaw.

By Mr. McGeehan.

Q Did you know Maurice Grossman? A No.

Q Have you heard or read of this occurrence that is the basis for this proceeding? A I did not.

Q You have not discussed it, then, with anybody and therefore, naturally, not formed any opinion one way or the other? A No.

Q Have you any scruples in the imposition of a sentence of life imprisonment upon a man convicted of murder? A No, sir.

Q If the law in this State is that in the event of a conviction of a defendant for murder in the first degree the juror shall have the right to attach to his verdict as a part of it a recommendation for life imprisonment at hard labor, in which case that and no other punishment shall be imposed upon and after a consideration of all the evidence in the case, if that be the law, do you feel that if you should sit upon this jury and if you should find the defendants guilty, that you, if in your judgment as a juror the defendants should be sentenced to life imprisonment, that you could recommend such a sentence? A Yes.

Q Well, have you any doubt upon it? A No, sir.

Mr. McGeehan: Excused by the defendant Calabrese.

(After six Jurors had been sworn.)

MICHAEL J. RYAN, sworn on his *voir dire.*

By Mr. Fisch.

Q What is your business? A Foreman, Western Electric Company, New York City.

Q How long have you been so employed? A Eight years.

Drawing of Jury—Michael J. Ryan.

Q Are you married? A No.

Q Ever been married? A No.

Q With whom do you reside? A My sister. Married sister.

Q Where? A West Orange.

Q How long have you resided there? A Oh, about seven years.

Q Before that? A My parents.

Q Also in West Orange? A Yes.

Q Mr. Ryan, this is a murder case. Have you any conscientious scruples opposed to capital punishment? A I have in a way.

Q Well, in what way? A Why, the way I do not fully believe in it.

Q You do not seem to believe in capital punishment, is that what you mean? A I do with a reasonable amount of doubt.

Q What do you mean by that? A I mean if the evidence showed I would be in favor in a way.

Q Well, you say in a way. What do you mean by that? A Well, I mean if the evidence shows within a reasonable amount of doubt I would not exactly favor capital punishment.

Q Well, if you were satisfied beyond a reasonable doubt of the guilt of the defendants and you knew that if you voted to convict them of murder in the first degree and rendered a verdict of guilty of murder in the first degree that upon the rendering of such a verdict the defendants would be put to death by electrocution, would you vote for such a verdict?

Mr. McGeehan: I think that question ought to have the very words of the statute appended to it, "unless" and then state

what the law is. The question embodies the law as it is today.

The Court: What the question is, it amounts to whether he would vote for a verdict of guilty or not guilty.

Mr. Fisch: Yes, sir.

Q Will you answer the question? A You mean where the evidence shows?

Q (Question read.) A No, I do not think I would.

Q You would not? A No.

Q Well, so that irrespective of the evidence you would not vote to convict the defendants of murder in the first degree with a penalty of death? A No, I wouldn't.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q You have not been in the court room in the previous questioning of jurors? A No.

Q If the Court should instruct you as a juror that under the law of this State today the juror now has the absolute right to make a binding recommendation for life imprisonment in any case, even though it should find a defendant guilty of murder in the first degree, and that if the jury makes such recommendation upon and after a consideration of all the evidence that life imprisonment shall be the penalty imposed by the Court, under such a law do you think you could conscientiously sit and render a proper verdict of guilty or not guilty in a murder case? A I could.

Q And if you sat as such a juror would you consider all of the evidence in the case in ar-

riving at your verdict as to that law as to the guilt or innocence of the defendants? A I could.

Q And having considered that evidence and after a consideration of the evidence it is your opinion, is it not, that you would be inclined to favor life imprisonment? A I would if the evidence showed it.

Q Well, now, you would consider the evidence in arriving at your final verdict, wouldn't you? A I would.

Q As I understand you, when you answered Mr. Fisch's question, you did not know that a juror had the right to recommend life imprisonment.

Mr. Fisch: I object to that. There is nothing to show that.

The Court: Sustained.

Q When you stated, in answer to Mr. Fisch's question, that you do not believe you would bring in a verdict that would result in the death of the defendants and that you could not arrive at a verdict of guilty of murder, if you knew that that would result in the death of the defendants, did you have in mind the statute or the law that I have quoted to you just now?

Mr. Fisch: I object to that. I do not think it makes any difference whether the juror had in mind the statute or the law Mr. McGeehan has just quoted.

The Court: No, I do not think so.

Mr. McGeehan: I will withdraw that question.

Q Could you reach a just verdict, then, having the law such as I stated it to be, and assuming his Honor so charged it at the end of the case, you could reach a proper and just verdict? A I could.

Q And before rendering a final verdict in this court, including a recommendation or lack of recommendation, could you consider all the evidence in the case? A I could.

Mr. McGeehan: I object to excusing this juror.

The Court: Supposing you were a juror in the case and the testimony was all in and you had the charge of the Court and went to the jury room and you had two duties, first, to decide the guilt or innocence of the defendants, and second, fix the punishment, of course, if you found the defendants were not guilty you would acquit them.

The Witness: Yes, sir.

The Court: Now, suppose you found them guilty of murder in the first degree—supposing the evidence convinced you, and under the charge of the Court, and you thought that was the right thing to do and you found them guilty of murder in the first degree, and then you were confronted with the question of fixing the punishment and you had the right under the law as a juror to fix the punishment as either death or life imprisonment, now, could you fix those two punishments and render a verdict on those punishments under the evidence in the case, or are you so prejudiced against the death penalty that you could not consider it impartially?

The Talesman: No, I could consider it impartially.

The Court: And would you finally determine to vote for the death penalty or life imprisonment under the evidence in the case?

The Talesman: Yes, sir.

The Court: Then you would not refuse to vote for the death penalty regardless of the evidence in the case?

The Talesman: Yes, sir.

The Court: Well, by this prejudice you say you have—perhaps you did not use the word prejudice, but meaning or feeling or opposition you have to the death penalty, where would that enter into it?

The Talesman: Well, the evidence has to be very, very convincing to me.

The Court: If you first determined that you left the matter of punishment out until the last and first determined the defendants were guilty, then is your mind in such a condition that you could approach the question of guilt with an open mind?

The Talesman: Yes, sir.

The Court: And so far as the punishment is concerned you could vote for death or life imprisonment?

The Talesman: Yes, I think I could.

By Mr. Fisch.

Q What did you mean in your response to me that irrespective of the evidence you would not vote to convict the defendants of guilty of murder

in the first degree even if the penalty was death? A I did not mean it in that way.

Q How did you mean it? A I mean if the evidence was very, very faulty and without a possible doubt, on a question like that it would be first degree murder and the state laws have to be upheld.

Q Now, you see his Honor has tried to explain to you that in the event that you arrived at the verdict of guilty there would be two duties for you to perform in the jury room, in the first place, as his Honor has explained to you, you would hear and determine all the evidence in the case and weigh it, is that right? A Exactly.

Q Well, then, after you had heard and determined all the evidence in the case and weighed it, it would be your duty to determine, according to the evidence, whether you were satisfied beyond a reasonable doubt that the defendants were guilty—do you understand that? A I do.

Q And if you came to the conclusion that you were satisfied beyond a reasonable doubt that the defendants were guilty of murder in the first degree then it would become necessary for you to pass upon whether or not you would attach to your verdict a recommendation of life imprisonment. Do you understand that? A Right.

Q In the event you did not attach such a recommendation of life imprisonment to your verdict the defendants would suffer the penalty of death by electrocution? Do you know that? A I know it.

Q And in the event you did attach to your verdict a recommendation for life imprisonment such a penalty and no greater penalty could be imposed upon the defendants. Do you understand that? A Yes.

Drawing of Jury—Michael J. Ryan.

Q Now, having arrived at the point in your deliberations where you have determined that the defendants were guilty of murder in the first degree, would you, in determining you should attach a recommendation of life imprisonment to your verdict, take into consideration the evidence in the case?

Mr. McGeehan: I object to that. I think the witness has answered it in answer to my question and in answer to the current question and previously in answer to Mr. Fisch.

The Court: I will permit it. You may answer.

Q (Question read.) A Would I attach a life imprisonment?

Q What is that? A Would I vote for a life imprisonment? Would I be in favor of that verdict if I did reach the other?

Q Yes. Would you be in favor of that without reference to the evidence? A Yes.

Q So that you would attach such a recommendation without reference to the case? A Yes.

Mr. Fisch: I submit my challenge should be sustained.

The Court: Do you mean that?

The Talesman: I believe I do.

The Court: You mean that no matter what the evidence is your verdict would be life imprisonment so far as punishment is concerned?

The Talesman: I believe it would, your Honor.

The Court: All right: I will sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(The drawing of the Jury then continued and after the seventh juror was sworn, the Court took a recess for one hour.)

AFTER RECESS.

(The drawing of the jury was continued.)

(After seven jurors had been sworn.)

HAROLD J. BUTTS, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Butts, you have heard the case that has been referred to in the questions to the other jurors, without repeating them, haven't you? A Yes, sir.

Q Have you, from anything you have heard or read or discussed with anyone, formed any opinion one way or the other of the guilt or

innocence of the defendants in this case? A No, sir, I have not.

Q You did not know Maurice Grossman, did you? A No, sir.

Q What is your business, please, Mr. Butts? A Connected with the Prudential Insurance Company.

By Mr. Fisch.

Q How old are you? A I am in my thirty-sixth year.

Q Married? A Yes.

Q And you have a family? A One child, yes, sir.

Q How long have you been with the Prudential? A Nearly six years.

Q Have you any conscientious scruples against capital punishment? A I am not in favor of capital punishment.

Q You are not in favor of it? A No, sir.

Q And with the fact that you are not in favor of capital punishment—do you think that would prejudice you in your duties as a juror in a case that involved the death penalty? A I believe it would, yes, sir.

Q So that your views on the subject of capital punishment would interfere with your duties as a juror to such an extent that you would not be able to render a fair and just verdict on the evidence in a case where the death penalty was involved? A Yes, sir.

Q So that irrespective of the evidence of a case, you would not vote to convict anyone of murder in the first degree where death would be the penalty, is that right? A Yes.

Q And if you are informed by the Court that you had the option, after coming to the conclu-

sion that the defendants were guilty of murder in the first degree, of either finding guilty of murder in the first degree thereby having them suffer the penalty of murder in the first degree, or attach to your verdict a recommendation of life imprisonment, after and upon a consideration of all the evidence, you would attach that recommendation of life imprisonment in any event? A Yes, sir.

Q Irrespective of the evidence? A Yes, sir.

Mr. Fisch: I challenge for cause, if your Honor please.

By Mr. McGeehan.

Q Mr. Butts, if the Court should charge you that your first duty as a juror was to determine whether or not the defendants were guilty, and of what crime they may be guilty, if they are guilty, and should further charge you that if you find the defendants guilty of murder in the first degree that the jury then has the right, the absolute right, to recommend life imprisonment, even though the jury found the defendants guilty of murder of the highest degree, after and upon a consideration of all the evidence, do you feel that you could first of all, such being the law, determine conscientiously and correctly the guilt or innocence of the defendant? A Yes, I could.

Q And could you after and upon a consideration of all the evidence in the case then vote for or against a recommendation? A I would vote for a recommendation.

Q That is your opinion as to what you would do, is that right? A Yes, sir.

Q But if you did it, you would do it upon and after a consideration of all the evidence in the case? A I would do it after a consideration of all the facts.

Mr. McGeehan: Your Honor, I think that is as much as the statute requires of any juror, and that is what he says, and that is what it is held to mean.

The Court: You say you would do it after a consideration of the evidence, but you have already made up your mind you would do it, haven't you?

The Talesman: Yes, sir.

The Court: And you haven't heard any evidence yet?

The Talesman: I haven't heard any evidence.

The Court: So even if you did it after you had heard the evidence your judgment then would not be influenced by the evidence, would it? It would be the judgment that you now have?

The Talesman: Yes, in regard to capital punishment.

The Court: The evidence would have no effect on you so far as the punishment is concerned?

The Talesman: No, it would not.

The Court: So, assuming that you did find the defendant guilty, could you consider impartially the question of punishment whether it would be capital punishment or life imprisonment?

The Talesman: No, sir.

The Court: Your mind is closed on that?

The Talesman: Yes, sir.

The Court: I will sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After seven jurors had been sworn.)

Mr. McGeehan: I have a challenge to the array upon the ground that the full list of the jurors was not in the box from which the names of previous jurors was taken, and that there is now presented another jury box with another group of names that were not in the box from which the prior jurors were drawn, at the time of the drawing of the same, and I ask that the Sheriff be sworn to establish that.

Mr. Smith: It seems to me that the record ought to be complete to show that the position the State takes is this: We feel that any challenge at this time is improper, and that the challenge to the array should have properly been made when the special panel was exhausted and the drawing of the jurors was being made from the general panel, because counsel for the defendants

have already accepted, without challenge to the array, jurors from the general panel. Now, at this time, they attempt to interpose challenge to the array.

The Court: Yes, but he is not objecting to the jurors drawn from the general panel, he is objecting because he now discovers that all the names of the general panel have not been in the box, that only a part of them have been in the box from which names have been drawn.

Mr. Smith: Of the general panel up to this time?

The Court: Yes, they have been drawing from the general panel for the last couple of hours.

Mr. Smith: Well, what difference does it make if the general panel is what is being used for the purpose of drawing these jurors, and counsel examines them on the *voir dire.*

Mr. McGeehan: The law requires that the challenge be in writing, and may this be considered a sufficient writing (reading): "The defendants Joseph Calabrese and Arthur Cort hereby challenge the array of jurors on the ground that all the names of the jurors serving or drawn at this time were not in the box at the time of the drawing of names of the general panel of jurors. (Signed) John W. McGeehan, Jr., Charles Becker."

Drawing of Jury—Louis E. Batchellor.

LOUIS E. BATCHELLOR, sworn.

Examination by Mr. McGeehan.

Q Sheriff, you are a Deputy Sheriff in the County of Essex? A Yes, sir.

The Court: Under Sheriff.

Q And as such you are in charge of the drawing of the jury in this case? A Yes, sir.

Q And you drew certain names from the special panel served upon the defendants, did you not? A Yes, sir.

Q And at the time those names were drawn were all of the names of said special panel in a box? A Yes, sir.

Q Was that panel exhausted? A Yes, sir.

Q Did you thereupon proceed to draw from the general panel? A Yes, sir.

Q Did you use a box for that purpose? A Yes, sir.

Q Were all of the names of the general panel in that box that you have been drawing from up to this point? A No, sir.

Q And what proportion of the names of the general panel were in that box? A The even numbers were not in the box.

Q And the odd numbers were? A Yes, sir.

Q So that approximately one-half of the jurors serving this term, their names were not in the box? A Yes, sir.

Q And you completed the drawing from that box, have you? A Yes, sir.

Q Now, have you opened another box? A Yes, sir.

Q And that contains approximately one-half of the names of the jurors serving in this term, or for this two-week period? A Yes, sir.

Q And you are about to draw from that? A Yes, sir.

By Mr. Fisch.

Q Sheriff, the box from which you have drawn the names of the general panel of the jurors on the general panel up to the present time, and the box from which you are about to draw the names of the jurors from the general panel, the special panel having been exhausted, do those two boxes contain the names of all of the jurors in the general panel served for this two-week period? A Yes, sir.

Q And one is lettered A and one is lettered B, is that it? A Yes—well, they are not lettered at the present time. Of course, that is the way we regulate the boxes.

Q That is the way you designate the boxes? A These are new boxes, of course.

Q And do you know for how long a period the practice of separating the names of the general panel of jurors into boxes A and B, odd numbers and even numbers, has been in existence in this county for the drawing of jurors? A That I cannot state, but since the 16th of September, since I have been in office, but prior to that I don't know.

Q And is it a fact that these two boxes are used and the names separated in this fashion which you have designated for the purpose of facilitating the drawing of jurors in the various courts in the county? A Yes, sir.

Q So that jurors may be drawn in one court room and in another court room both at the same time? A Yes, sir.

Q And that without interfering with the business of the courts? A Yes, sir.

Q Do you know when that practice began? A No sir, I do not.

Q Or by virtue of what order, if any, that practice was carried out? A No, sir; I do not.

Mr. McGeehan: That is all I have.

ALFRED E. WALKER, sworn.

By Mr. Fisch.

Q You are an Under Sheriff of this county? A I am.

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

Q Do you know what the practice is in this county with reference to drawing of jurors of the general panel? A I do.

Q And will you tell us, please, what that practice is and how long it has been in existence.

Mr. McGeehan: Objected to as irrelevant.

The Court: I will permit it. I don't think it is very relevant.

A You mean in drawing jurors for certain cases in the courts?

Q Can you tell us what the practice is with regard to what box or boxes names of all of the jurors of the general panel serving for the two-week period are placed in? A The general panel is divided into two parts under a law passed by the Legislature, I think, in 1928. One box has been designated as A, and one box has been designated at B, and those boxes are used in one court, and when the other box is busy we go to

the other court with the other part of the panel. In murder cases both panels are brought in, the two boxes into court, and when one has been exhausted, then the other is used.

Q And do you know whether or not that practice is followed in this case? A In this case that practice has been followed. I so instructed the other Under Sheriff to that effect.

Q Do you know whether or not there has been any order? A In the latter part of 1927, after the passage of this Act—I thought it was the first part of 1928—the Chief Justice issued that order to the late Under Sheriff Mills through Judge Dungan and Judge Smith.

Q And that order has been in full force and effect? A Yes, sir.

The Court: There has been a challenge to the array and testimony has been taken, and I will overrule the challenge and allow an exception to both defendants, and ask the sheriff to proceed to draw the names from the general panel, but from the other part than that from which he has been drawing heretofore. The panel which he has been drawing from heretofore has now been exhausted.

Defendants' counsel pray an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(The drawing of the jury then continued.)

Drawing of Jury—Henry W. Adams.

(After 8 jurors had been sworn.)

HENRY W. ADAMS, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Adams, what is your business? A Painter.

Q In business for yourself? A Yes.

Q How long have you been in business for yourself? A Ten years.

Q How long have you lived in this county? A About forty-five years.

Q Do you know the defendant Joseph Calabrese? A No.

Q Or the defendant Arthur Cort? A No.

Q Did you ever know anybody by the name of Dominick Lamolino? A No.

Q Or anybody by the name of Victor Bruno? A No, sir.

Q Have you any conscientious scruples opposed to capital punishment? A Yes, sir.

Q What are they based on? A Oh, electrocution.

Q Well, would those scruples which you say you have which are opposed to capital punishment, do you think they would interfere with your duties as a juror in a case where the death penalty is involved? A Yes, sir.

Q Would they interfere with your duties to such an extent that you would be unable to decide the case without permitting these scruples, which you have, this opposition which you have to capital punishment, to interfere with your verdict? A No, I don't think so.

Q You say that you have scruples which are opposed to capital punishment, is that right?

You are opposed to capital punishment? A To electrocution.

Q Now, your opposition to electrocution, would that interfere with your duties as a juror in a case in which death is involved? A No.

Q Do you think that in spite of your scruples against electrocution, that you could sit in a murder case and render a verdict of guilty of murder in the first degree when you knew that the penalty was death? A I think so.

Q Do you think, Mr. Adams, that in spite of your scruples against electrocution, you could sit in a murder case as a juror and hear evidence and arrive at a verdict of guilty of murder in the first degree when the penalty is death, and render such a verdict? A No.

Mr. McGeehan: I object to that. That is now a statement of the law. The penalty is not death in a conviction of murder in the first degree any more than is life imprisonment. The whole thing should be included.

The Court: One of the penalties is death.

Q So that under those circumstances could you render a verdict of guilty of murder in the first degree where the penalty is death? A No.

Q Irrespective of what the proof or the evidence might be? A Yes, sir.

Q That would not make any difference? A No.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q Would you be willing to render a proper verdict on the evidence as to the guilt or innocence of the defendants? A Certainly.

Drawing of Jury—Henry W. Adams.

Q And if the law allows you as a juror, gives you the right in the performance of your duty as such, to be the sole judge and the absolute judge, after a consideration by you of all the evidence, whether the defendants shall be sentenced to death or to life imprisonment, could you perform your duty under that law as a juror? A Yes, sir.

Q And would you give consideration to the evidence in arriving at your verdict of guilty or not guilty and of a recommendation or no recommendation? A Yes, sir.

Mr. McGeehan: I object to the challenge of the cause.

The Court: But you would never vote for the death penalty, would you?

The Witness: No.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Drawing of Jury—William F. Dick.

(After 8 Jurors had been sworn.)

WILLIAM F. DICK, sworn on his *voir dire.*

By Mr. McGeehan.

Q Have you formed any opinion in this case that would impair your judgment as a juror? A I have not.

Q Have you read it at all or discussed it at all? A If I have I did not until I came into this room this morning.

Q What is that? A I never heard of it until this morning.

Q You discussed it here? A No, I simply heard it.

Q Well, have you formed any opinion in the case from any reason whatever that in your judgment would affect your verdict one way or the other? A I did not.

Q You did not know Maurice Grossman? A No.

Mr. McGeehan: You may examine.

Mr. Fisch: Well, you have finished your examination?

Mr. McGeehan: Well, I am following the principal of examining—

Mr. Fisch: I asked Mr. McGeehan if he finished his examination.

Mr. McGeehan: All right. I will finish.

The Court: All right. We will make that the rule.

Q Have you any scruples against the imposition of punishment of life at hard labor for murder in the first degree? A I would not

have state prison for first degree murder, because I consider life for life.

Q You mean you would be opposed to such a punishment? A Yes.

Q And your mind would not be open to such imposition on the consideration of the evidence? A It might be, but it is strongly against it.

Q And that being so do you think it would impair your judgment. A It might.

Q But you have certain ideas? A Absolutely.

Q And in your judgment if you should find the defendants guilty of murder in the first degree you would not vote for life imprisonment?

Mr. Fisch: I object to that unless the prospective juror is given the benefit of the law.

Mr. McGeehan: I think the prosecutor is right.

Q You have heard the law? A Yes.

Q Well, you remember it pretty well? A I remember it.

Q Well, saving time from repeating it, taking that law into consideration would you in any case where you would find a defendant guilty of murder in the first degree refuse to recommend life imprisonment regardless of the evidence? A Regardless of the evidence.

Q If the evidence was sufficient to convict of murder in the first degree? A Then I would say it is life for life.

Q You mean you would not vote for a recommendation? A Exactly.

Q In any case where you found a first degree verdict? A Yes.

Drawing of Jury--William F. Dick.

By Mr. Fisch.

Q You would follow the law? A I would follow the law.

Q And if the Court told you that if you determined from the evidence the defendants were guilty of murder in the first degree, it was then your duty to consider from the evidence whether or not there should be a recommendation of life imprisonment, would you follow that instruction by the Court? A If the Court so said, yes, I would give it consideration.

Q And you would follow the instructions of the Court in that regard and satisfy your own convictions with regard to whether or not it was the proper law? A I would not say I would. My convictions on that point are very, very strong.

Q But would you follow the law as given to you by the Court in that question in arriving at your determination of the case? A I do think I would.

The Court: I think in fairness to the juror you ought to tell him what the law is.

The Talesman: I heard it.

Q Well, you do not put yourself above the law? A No.

Q And not putting yourself above the law would you follow the law as given to you by the Court in arriving at your verdict? A Yes.

Q And you would consider the recommendation whether the punishment should be life imprisonment or the punishment should be death, you would consider that from the evidence in the case? A I would consider it, but, as I said

before, I am strongly in favor of capital punishment in that respect.

Q But in spite of your being strongly in favor of capital punishment would you obey the law in considering the evidence on the punishment that should be imposed? A Yes.

Mr. McGeehan: I still insist—

The Court: You say you would follow the law. The law is that if you find the defendant guilty of murder in the first degree then you as a juror shall fix the penalty and you can fix one of two punishments, either life imprisonment or death in the electric chair. Now, you have that privilege under the law. Now, are you prejudiced against life imprisonment if you find the defendants guilty of murder in the first degree?

The Talesman: Well, if you call it prejudice, I would.

The Court: Well, suppose you were a juror in this case and you found the defendants guilty of murder in the first degree and that was then disposed of and then you came to the question of punishment, then could you approach the question of punishment with an open mind?

The Talesman: It is not by any means closed.

The Court: It is open to conviction?

The Talesman: Yes.

The Court: And could you approach it with an open mind?

The Talesman: I think I could.

The Court: And you say then that you might vote for life imprisonment?

The Talesman: There is a possibility. Yes, there is a possibility.

The Court: And you might vote for the death penalty?

The Talesman: Yes.

The Court: I will overrule the challenge.

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

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

WALTER D. VAN RIPER,
Judge.

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

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

WALTER D. VAN RIPER,
Judge.

(After eight jurors had been sworn.)

CHARLES R. ARNDT, sworn on his *voir dire.*

By Mr. Fisch.

Q Do you know either of the defendants in this case, Joseph Calabrese or Arthur Cort? A No, I do not.

Q Did you know a man by the name of Maurice Grossman, or a man by the name of Victor Bruno? A I did not.

Q Have you any scruples which are opposed to capital punishment? A Well, I am opposed to capital punishment.

Drawing of Jury—Charles R. Arndt.

Q Would your opposition—do you think your opposition to capital punishment would interfere with your duties as a juror in a case involving murder in the first degree? A Yes.

Q What is that? A No.

Mr. McGeehan: I object to that.

The Court: What is your answer?

The Talesman: I guess I would.

Q You have said you are opposed to capital punishment, is that right? A Yes.

Q Well, this is a murder case. Would you render a verdict of guilty of murder in the first degree if the penalty were death? A No.

Q Under no circumstances? A No.

Q Irrespective of what the evidence might be, is that right? A Yes.

Q You would never render a verdict of guilty of murder in the first degree where the death penalty is involved? A Yes.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q Would you consider the evidence in the case before you reached your verdict? A Yes.

Q You would consider all the evidence in the case before you made your mind up as to the verdict, wouldn't you? A Yes, sir.

Q And you would take that into consideration in voting for or against a recommendation of life imprisonment, and you would consider the evidence? A I would.

Mr. McGeehan: I object to the challenge of the cause.

The Court: What do you mean when you say you would consider the evidence before you decided on what the sentence would be? A moment ago you told the prosecutor you would never vote for the death penalty.

The Talesman: That is what I said, that I would not vote for a death penalty, I would vote for life imprisonment.

The Court: Suppose you were on the jury in a case and the defendants were guilty of murder in the first degree and you were satisfied that they were guilty of murder in the first degree, and then the Court told you as a matter of law, that it was your duty to state that the sentence should be either life imprisonment or death, is there any case under any circumstances where you would vote for death in the electric chair?

The Talesman: No.

The Court: Absolutely none?

The Talesman: Absolutely none.

The Court: Under any circumstances?

The Talesman: Under any circumstances.

The Court: And in no case, is that right?

The Talesman: That is right.

The Court: And if you went into this case would your mind be made up on that point, or would you wait to make up your mind after you heard the evidence in the case.

The Talesman: I would hear the evidence.

The Court: Excused.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After eight jurors had been sworn.)

LOUIS C. BASSINI, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Bassini, do you know anyone by the name of Maurice Grossman? A I think not; no, sir.

Q Where do you live? A 28 Columbia avenue.

Q And you think you knew someone by that name? A I don't think so.

Q Have you formed any opinion one way or another as to the guilt of the defendants in this case? A I have not.

Q Or discussed the case? A I have not.

Q Mr. Bassini, you have been in this room, or were you among the gentlemen who just came in? A I just came off a jury case now.

Q If the law of this State is that a juror in a murder case shall first determine the guilt or innocence of the defendant, and so vote, and if the defendant is guilty be convicted of murder, then the jury shall have the right, after and

upon a consideration of all the evidence in the case, to recommend life imprisonment, in which case that and no greater punishment would be inflicted, could you approach that question, if there were a conviction of the defendant, with an open mind on the question of whether or not to recommend life imprisonment? A The way you put it, I think so.

By Mr. Fisch.

Q What is your business, Mr. Bassini? A Well, at the present time I am out of business. I expect to go in shortly.

Q What business? A The piano business.

Q You are a piano salesman, are you? A A manager.

Q A manager for what company? A William A. Griffith Piano Company.

Q And how long were you a manager there? A About five years.

Q You are married, I suppose? A No, sir; I am a widower.

Q You live at 28 Columbia avenue with whom? A Licki, Albert Licki, a retired man.

Q You board there? A Room and board there.

Q Have you any conscientious scruples opposed to capital punishment? A I think I have to a certain extent.

Q And would those scruples, which are opposed to capital punishment, would they interfere with your duties as a juror in a murder case? A If the case warranted it and the preponderance of the evidence was that way, probably it would have no effect.

Q Probably it would have no effect? A Yes, sir, probably.

Drawing of Jury—Louis C. Bassini.

Q Well, assuming that they proved the defendants guilty beyond a reasonable doubt, would your opposition to capital punishment interfere with your duties as a juror in determining their guilt or innocence or of convicting of murder in the first degree? A I think it would.

Q It would? A Yes, sir.

Q So that this opposition that you have to capital punishment would interfere with the proper performance of your duties in a murder case where the death penalty is involved?

Mr. McGeehan: I object to that as calling for the juror's opinion as to what his proper duties were.

Mr. Fisch: In the performance of your duties as a juror in a murder case where the death penalty is involved.

Mr. McGeehan: The same objection.

The Court: Overruled.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

A Well, I think I would do my duty.

Q Well, you told me just a moment ago that you thought your opposition to capital punishment would interfere with your arriving at a verdict of guilty of murder. Now, is that right or isn't it? A Well, in a measure that is right. It would all depend upon the evidence.

Q You are the only one who would know. You say maybe it is right. Is it or isn't it? A I think I would be fair about the matter.

Q Assuming that the law is that after you arrive at a verdict of guilty of murder in the first degree, that the jury then, that you have the right to determine after and upon a consideration of all the evidence, what the punishment would be, that is, whether the defendants should be put to death by electrocution or whether the defendants should suffer imprisonment at hard labor for life. Would you oppose the consideration of that proposition, the imposition of the penalty, after and upon a consideration of all the evidence? A I would be opposed to capital punishment.

Q And would your opposition to capital punishment interfere with your determination of that proposition, from the evidence? A I think it would.

Mr. Fisch: I challenge for cause.

Mr. McGeehan: I object to the discharge of the juror for cause.

The Court: Would it interfere, Mr. Bassini, to the extent that you could not consider that as the verdict you might render?

The Talesman: I might consider it, I would not say that, yes, I might.

The Court: Having decided in your mind that the defendants were guilty, if you did

decide that, and then if you come to the question of fixing the punishment of life imprisonment or death in the electric chair, is your prejudice against death in the electric chair so strong that that would be out of the question?

The Talesman: I think it would.

The Court: Sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After eight jurors had been sworn, an adjournment was taken until tomorrow, Wednesday, October 30, 1929, at the same time and place.)

Drawing of Jury—Henry Cahill.

THIRD DAY.

Wednesday, October 30, 1929.

Continued pursuant to adjournment.
Present: Counsel as before stated.

(The drawing of the jury was continued.)

(After eight jurors had been sworn.)

HENRY CAHILL, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Cahill, what is your business? A Pipefitter.

Q In business for yourself? A No, sir.

Q Employed by whom? A Westinghouse Lamp Company.

Q How long have you been so employed? A Seven years.

Q This is an indictment for murder. Have you any conscientious scruples against capital punishment? A Well, I don't believe in the death penalty.

Q And would your disbelief in the death penalty, would that prejudice you in any way or interfere with your duties as a juror in a case where the death penalty is involved? A I kind of think it would.

Q In other words, because of your disbelief in the death penalty, if you were chosen as a juror in a murder case, irrespective of what the evidence might be, you would never vote to convict of murder in the first degree where the death penalty was to be imposed? A No, sir.

Q So that if the Court told you that if you came to the conclusion, from the evidence, that the defendant was guilty of murder in the first degree, and the jury had the option, after and upon a consideration of all the evidence, to impose either the death penalty or the penalty of imprisonment for life at hard labor, would you under those circumstances, irrespective of the evidence, vote to oppose the death penalty in view of your disbelief in the death penalty? A No, I would not.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q Mr. Cahill, if the Court charged you that if you sat as a juror in this case your duty would be to first determine whether the defendants are guilty or not guilty, and that if you should find the defendants guilty, that then the jury would have the right to add to their verdict a recommendation for life imprisonment, upon and after a consideration of all the evidence in the case, and that if such recommendation were attached to the verdict, that that and no greater punishment would be inflicted, even though the jury found the defendants guilty of the highest degree of murder—you understand? A Yes, sir.

Q Now, if the Court should charge you that, first of all, do you think the jury, having that right, that you could conscientiously decide one way or the other, the guilt or innocence of the defendant as to the first part of your verdict? A Yes, sir.

Q Now, Mr. Cahill, if you should so decide, if you should decide the defendants are guilty,

then would you, upon and after a consideration of all the evidence in the case, then give consideration to whether or not to append a recommendation to your verdict? A Yes, sir.

Q These scruples, or opinions, or dictation of your conscience, with respect to capital punishment, they would enter into your verdict, would they not? A Yes, sir.

Q And do you feel that you could act conscientiously and render a verdict in this case, with the law being as it is, upon and after a consideration of all the evidence, and would you give the evidence that consideration? A I would.

Mr. McGeehan: I object to the challenge for cause, your Honor. I don't think the State has any more right to have one field of thought on that subject exclusively, on the jury, any more than the defendants have a right to have the other field of thought.

The Court: I don't think either side has a right to have an exclusive field of thought.

Mr. McGeehan: But the juror has said that he would consider the evidence and that is sufficient to qualify him, and the State should exercise a peremptory challenge.

The Court: Would your verdict, insofar as it refers to the sentence, be based upon the evidence in the case, or would it be based upon the prejudice which you now have against capital punishment?

The Talesman. I think it would be prejudiced.

The Court: It would be based upon the prejudice?

The Talesman. Yes.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After eight jurors had been sworn.)

EMIL E. ARGAST, Jr., sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Argast, you were not previously called, were you? A No, sir.

Q Are you familiar with the case that is about to be tried, Mr. Argast? That is, do you know what it is about from hearing the questions to the other jurors? A Yes.

Q Have you formed any opinion one way or the other in this case that might influence you as a juror? A No, sir.

Q Have you read any newspaper articles in reference to the case? A I have.

Q When, please? A Yesterday.

Q Last night? A Yes, yesterday morning, and of course when it happened, because I live in Irvington and heard all about it.

Q Did anything that you read or anything that you discussed create any opinion or prejudice in your mind? A No, sir.

Q You say you read an article yesterday. Do you remember in what paper that was? A Why, that was in the Morning Ledger.

Q And that is the only one you read yesterday? A Yes.

Q And anything else that you may have read or heard, or anything else, does not leave anything in your mind that you cannot dislodge and consider the evidence? A No, sir.

Q Now, did you know a man by the name of Maurice Grossman? A No, sir.

Q And have you any feeling or opinion or scruples or whatever you might call it, against the principle of imposing life imprisonment at hard labor on a man who may be convicted of murder? A No, I have not.

By Mr. Fisch.

Q How old are you, Mr. Argast? A Twenty-four.

Q Married? A No, sir.

Q With whom do you live? A Why, with my parents.

Q Father and mother? A Yes.

Q And what is your business? A Tool maker.

Q By whom are you employed? A The L. and L. Manufacturing Company.

Q And where is their place of business? A On Springdale avenue in Ampere.

Q How long have you been so employed? A Oh, about a year.

Q Have you any conscientious scruples opposed to capital punishment? A Yes, sir.

Q And would those scruples interfere with your duties as juror in a murder case where the death penalty is involved? A Yes.

Q So that these scruples would render you biased and interfere with your duties as a juror in a murder case where the death penalty is involved? A Yes.

Q And if the Court were to instruct you that it is the law that if the defendants are—that the jury determines that the defendants are guilty of murder in the first degree, the jury may then, after and upon a consideration of all the evidence in the case, determine upon the penalty, that is to say, whether to render a death penalty or whether it should be life imprisonment at hard labor, you would be unable to determine that proposition without doing violence to your scruples opposed to capital punishment, is that right? A That is correct.

Q And irrespective of the evidence, you would not vote for a verdict of guilty of murder in the first degree without attaching a recommendation of life imprisonment? A That is right.

Mr. Fisch: I challenge for cause.

Mr. McGeehan: Mr. Argast, these scruples are a judgment of your conscience?

The Talesman: Yes, sir.

By Mr. McGeehan.

Q And if the Court charges you that you, as a juror, have a right, upon and after a consideration of the evidence, even though that

evidence showed a defendant to be guilty of the highest degree of murder, murder in the first degree, the jury shall have the absolute right to make a recommendation for life imprisonment, which is binding and effective, you feel that you could conscientiously sit in such a case, such being the law? A Yes, sir.

Q Now, if you sat as a juror, would you impartially decide the issue of guilt or innocence of the defendants upon the evidence first of all? A Yes, I would.

Q And when you came to a conclusion, would you come to it after and upon a consideration of all the evidence? A Yes, sir.

Q And upon and after a consideration of the evidence you would consider the question of whether you should make a recommendation or not? A Well, in that case, I don't believe in capital punishment, and naturally I would recommend life imprisonment.

Q I understand that. With that opinion in your mind you would still consider the evidence, even though you would be inclined to vote for life imprisonment? A Yes, sir.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Drawing of Jury—Ames S. Bornt.

(After eight jurors had been sworn.)

AMES S. BORNT, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Bornt, you have heard, sitting in the court room, what this case is about, have you not? A Yes.

Q And have you any opinion with respect to this case that has been formed from anything you discussed with anyone or anything you have read? A No, sir.

Q Have you read about this case? A Yesterday morning in the Ledger, that's all.

Q And you have not formed any opinion, one way or the other, that would impair your verdict? A No, sir.

Q You did not know Maurice Grossman, did you? A No, sir.

Q And you have heard counsel's questions to the various jurors, embodying the law as to juries and murder cases? A Yes, sir.

Q Do you feel that you could conscientiously try this case and reach a verdict with respect to the guilt or innocence of the defendants based upon the evidence alone? A Yes.

Q Have you any opinion with respect to, or contrary to, the imposition of life imprisonment as a punishment for murder? A No.

By Mr. Fisch.

Q What is your business, Mr. Bornt? A Clerk.

Q Clerk where? A Newark Tube Company.

Q Where are they located? A 560 Ferry street, Newark.

Q How long have you been employed? A Eighteen years.

Q Are you married? A No, sir.

Q And never have been married? A No, sir.

Q With whom do you live? A My sister and brother.

Q And where do you live? A 172 Grafton avenue.

Q Do you know the defendant Joseph Calabrese? A No, sir.

Q Or the defendant Arthur Cort? A No, sir.

Q Did you ever know a man by the name of Dominick Lamolino? A No, sir.

Q Or a man by the name of Victor Bruno? A No, sir.

Q Have you any scruples which are opposed to capital punishment? A I have.

Q Would those scruples which you have opposed to capital punishment, interfere with your duties as a juror in arriving at a just and fair verdict in a case involving the death penalty? A They would.

Q Would they interfere with your duties, do you think, to such an extent, that irrespective of what the evidence might be in a case, you would never vote to convict the defendants of murder in the first degree where the death penalty was to be imposed? A No, sir; I never would.

Q So irrespective of the evidence, if you had the opportunity to attach a recommendation of life imprisonment to your verdict, you would do so? A Yes, sir.

Mr. Fisch: I challenge for cause.

Drawing of Jury—Ames S. Bornt.

By Mr. McGeehan.

Q What is this scruple or feeling, what does it consist of in your mind? What is the opinion that you have? A That I cannot sentence a man to death.

Q Is that really a dictate of your conscience? A Yes, sir.

Q If the law gave you the right, sitting as a juror in a murder case, upon and after a consideration of all the evidence, and even though that evidence should show a defendant to be guilty of murder in the highest degree, murder in the first degree, the law still gave the jury the right after considering all the evidence, to recommend and cause life imprisonment to be the punishment, would you conscientiously sit in a murder case under that law as established in our State? A Yes, sir.

Q Would you conscientiously decide, as a juror, the question of the guilt or innocence of the defendant? A Yes, sir.

Q Would you be able to conscientiously consider the evidence when you came to the point of your consideration of a recommendation or no recommendation, would you consider the evidence, before passing upon entire verdict? A Yes.

Q If the Court charged you that you had the right to recommend life imprisonment, upon and after such a consideration of the evidence, do you feel that you could conscientiously sit upon and decide this case? A Yes.

Mr. McGeehan: I object to the discharge of this juror for cause, your Honor. I think he is able to do the very thing that our statute contemplated, when it was passed.

Drawing of Jury—William Bal.

The Court: You could not conscientiously decide the question of punishment as between life imprisonment and death, could you?

The Talesman: No, sir.

The Court: There would be nothing left for you to decide, would there?

The Talesman: No, sir.

The Court: Sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After eight jurors had been sworn.)

WILLIAM BAL, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Bal, you are a manufacturer and in business for yourself? A I am.

Q You were not acquainted with anyone by the name of Maurice Grossman, were you? A No, sir.

Q Have you any opinion formed from having read anything or having discussed anything with reference to this case? A I have not.

Q You feel that your mind is entirely open? A Yes, sir.

Q So that you could render a verdict on the evidence alone, is that right? A Yes, sir; absolutely.

Q Have you any opinion formed in your mind that would affect your judgment on the question of recommendation or no recommendation under the law that you have heard given to the other jurors? A Well, the only opinion that I would have, I would be imposed to capital punishment. I would not, under any circumstances, convict a man to be killed.

Q And if the law of this State, however, Mr. Bal, has given the jurors sitting in a murder case, the right of absolute and final determination on the question of what punishment shall be imposed in this State for one convicted of murder in the first degree, to the extent of enabling the jurors to determine whether it shall be death or life imprisonment, after considering all the evidence, if the law is to that effect, do you feel that you could conscientiously then sit on a murder case in this State? A Why not, I would exercise that right.

Q In other words, you would take into the jury box with you the feeling that you entertain? A Absolutely.

Q And before you voted on that question you would consider all the evidence in the case? A Sure.

Q And you could decide the guilt or the innocence of a defendant upon the evidence, could you not? A Undoubtedly.

Q And in so doing you would consider all the evidence in that respect? A Absolutely.

By Mr. Fisch.

Q And after having considered all the evidence of the case, with reference to the guilt or innocence of the defendants, you would not have any difficulty in coming to a conclusion as to whether they were guilty or innocent, would you? A I don't think so.

Q And once that matter was settled and determined, and you should come to the conclusion that the defendants are guilty of murder in the first degree, then if the Court told you at that stage of the proceedings in your deliberations it would be your duty, before attaching any recommendation for life imprisonment, to consider the evidence in the case, and that if after and upon a consideration of the evidence in the case, the jury should attach a recommendation of life imprisonment, that punishment and no greater penalty could be imposed, as far as that feature of the case is concerned, your mind is already made up? A Absolutely.

Q So irrespective of what the evidence might be, you would never vote to convict the defendants of murder in the first degree without attaching a recommendation? A No, I would not convict under any circumstances for execution.

Q Irrespective of what the evidence was? A Yes, I have conscientious scruples against it.

Q So, you would not take into consideration the evidence at all in the question of fixing the penalty? A No, sir; not in fixing the penalty.

Mr. Fisch: I challenge for cause.

The Court: Sustained.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After ten jurors had been sworn.)

TERENCE P. BUTLER, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Butler, did you know anyone by the name of Maurice Grossman? A No, sir.

Q Have you formed any opinion in this case, one way or the other, as to the guilt or innocence of the defendants? A I hold an opinion; I have read about the case.

Q Well, have you formed any opinion with respect to the guilt or innocence of the defendants? A I have, sir; to certain conditions.

Q Would such opinion as you have formed prejudice you in the hearing of the case, or could you decide it according to the evidence and the law? A My opinion would have a great effect upon me.

Q Have you any opinion with respect to the propriety of imprisonment at hard labor for

life in state prison as a punishment for murder? A No, sir.

Q You are not opposed to that, are you? A No, sir.

Q In respect to the case, you have read about it, have you? A I have, sir.

Q Recently? A I have, sir.

Q Have you discussed it with anyone? A I have sir, in a general way.

Q That is, with members of your family or friends of yours? A Members of my family, acquaintances and so forth.

Q Now the opinion that you have formed, is that such an opinion that after listening to the evidence in the case and hearing the witnesses and hearing the charge of the Court as to the law, would it affect your final judgment? A I am satisfied, sir; as to the question of guilt.

Q That is what you meant by having an opinion? A Yes, sir.

Q That opinion, would that still exist regardless of what the evidence in the case might be? A My opinion would have a great bearing on it.

Q If you heard the evidence, would you decide it upon the evidence or what you have read in the newspaper? A I don't know if I could change my opinion, because I have really made up a personal opinion already from reading and from what I know about the case.

By Mr. Fisch.

Q Well, this opinion you have formed, have you formed an opinion as to the guilt or innocence of these particular defendants, Calabrese and Cort? A I have formed an opinion as to the punishment and the guilt of the crime.

Q That is, if the State were to prove to you beyond a reasonable doubt the guilt of these particular defendants, is that what you mean? A Yes.

Q But you have not formed any opinion, have you, with reference to the guilt or innocence of these two men, Cort and Calabrese, have you? A I have a fixed opinion, sir; as to the punishment.

Q But I am now asking you whether you have any fixed opinion as to the guilt or innocence of these two men, with reference to this crime? A No, sir.

Q What is your business? A I am a watchman, sir.

Q Employed where? A City Hall.

Q Then, so far as your opinion is concerned, it did not deal with any individuals connected with this case? A No, sir.

Q Have you any conscientious scruples which are opposed to capital punishment? A I have, sir.

Q Then, you are opposed to capital punishment? A Yes, sir; under no condition would I be willing to vote to take a man's life.

Q No matter what the evidence was? A Yes, regardless of the evidence, that is my conscientious opinion.

Q It would not make any difference what the Court charged you as to the law or what the evidence was, even if you determined that the defendants were guilty of murder in the first degree, you would not be a party to a verdict that would send them to their death by electrocution? A With all due respect to the Court, I would not, sir. I could not convince myself to take another man's life.

Q And that would be in conflict with your scruples and your conscience? A It would, sir.

By Mr. McGeehan.

Q So that this opinion that you have formed, that is engraved in your mind.

Mr. McGeehan: Satisfactory.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q You could decide the guilt or innocence, if you had the right to give a man life imprisonment, could you not? A Yes, sir.

Q And would you consider all the evidence in the case to decide the guilt or innocence first, would you be able to do that all right? A I would do it to the best of my ability.

Q And having done that, and upon and after a consideration of all the evidence in the case, then would you give to consideration whether to recommend life imprisonment or not? A I would be willing to recommend life imprisonment, but I would not be willing for electrocution. I could never convince myself to that.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

After eleven jurors had been sworn the Court took a recess for one hour.

(After eleven jurors had been sworn.)

THIRD DAY.

AFTER RECESS.

JOHN J. DALEY, sworn on his *voir dire*.

By Mr. McGeehan.

Q Mr. Daley, you are a mechanical engineer by profession? A Yes, sir.

Q Are you connected with any company or are you in business for yourself? A With the Ingersoll-Rand Company in New York City.

Q Have you discussed this case or read about it, Mr. Daley? A I saw the headlines, but it did not interest me so I did not read it.

Q When did you read the headlines in regard to it? A Some months ago when it occurred.

Q Have you read any account of the murder in the last day or two? A No.

Q So that there is nothing that would influence you in this case, outside of the evidence and the charge of the Court as to the law, and you have no opinion of it that you have formed? A No, no opinion.

Q Have you any opinion that would impair your ability to deliberate impartially in this case

on either the question of the guilt or innocence of these defendants, or if the jury found them guilty, the nature of the punishment to be inflicted? A Yes, the nature of the punishment.

Q You have opinions in respect to that? A I have.

Q Is that opinion such as would be exercised regardless of the evidence in the case or the law as the Court would give it to you? A Yes, it is a dictate of my conscience.

Q What is the dictate of your conscience, Mr. Daley? A That it is not within the province of us to send a man to his death.

Q That is, that it is not within the province of the State or other men? A Yes, sir.

Q Now, that is a feeling that arises from your conscience and your consideration of the morality of that act, is that right? A That is right.

Q Do you feel, however, Mr. Daley, that if the law of this State, as established by our legislature in that respect, makes provision that in the event that a person is convicted of first degree murder, that the jury may determine the punishment to be inflicted upon that person, so that upon and after a consideration of all the evidence in the case it has the absolute right as a jury of twelve men, to determine that punishment, whether it shall be life imprisonment at hard labor in state prison or death of a defendant— A I said that I would not give my vote toward one of those alternatives.

Q Now, I wanted to make that preliminary to the question. Assuming that that is the law, do you feel, having that right as a juror, even if the defendant be convicted of the highest degree of murder, having the right to recommend and compel life imprisonment, that you could then

conscientiously sit in this case if you had that right? A I would like you to repeat that question.

Q You heard the question, the beginning part of it, didn't you? A Yes, sir.

Q If you have a right, as a juror, to recommend life imprisonment, in which case that and no greater punishment shall be inflicted upon a defendant convicted of murder in the first degree, would you then conscientiously sit upon a jury, and first of all render a proper verdict based upon the evidence as to the guilt or innocence of the defendant? A Yes, sir.

Q That far you could go? A Yes.

Q Now, if you sat upon a jury which finds the defendant of murder in the first degree, and if you have that right, to either render your verdict in that way, without a recommendation, in which case death is the punishment of the defendant, or if you have the right on the other hand to recommend life imprisonment, do you feel that in such case, having that right as a juror, you could conscientiously sit and determine the guilt or innocence?

Mr. Fisch: I object to that on the ground that it does not embrace the law, that is, the recommendation must come upon and after a consideration of the evidence in the case.

The Court: Overruled.

The Talesman: No, I think the question covers so much that I have already made my one point clear.

Q You mean that you would be inclined to vote for life imprisonment? A Yes, I would not only be inclined to vote, but if having one

of the two alternatives I would vote for life imprisonment.

Q And you would do that after and upon a consideration of all the evidence in the case? A I would.

By Mr. Fisch.

Q No matter what the evidence disclosed, you would never vote for a verdict of murder in the first degree unless there was attached to it a recommendation for life imprisonment? A That is correct.

Q So that recommendation would be attached to your verdict in any case of murder in the first degree, irrespective of the evidence? A Murder in the first degree, yes, sir.

Mr. Fisch: I challenge for cause.

The Court: Sustained.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Drawing of Jury—Robert T. Burns.

(After eleven jurors had been sworn.)

ROBERT T. BURNS, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Burns, you are a machinist, are you? A Yes, sir.

Q Employed by whom? A Edison General Manufacturing Company.

Q How long have you been so employed? A Twenty-two months.

Q How old are you? A Thirty-four.

Q Married? A No, sir.

Q With whom do you live? A My mother.

Q Do you know the defendant Joseph Calabrese? A No, sir.

Q Or the defendant Arthur Cort? A No, sir.

Q Did you ever know a man by the name of Dominick Lamolino? A No, sir.

Q Or a man by the name of Victor Bruno? A No, sir.

Q Have you any conscientious scruples which are opposed to capital punishment? A Yes, sir; in certain cases.

Q In certain cases? A What I mean is that I don't think I would ever take more than one life for one.

Q So that even though the law might be that all persons who participated in a killing, which is perpetrated in an attempt at robbery, are equally guilty, and guilty of murder in the first degree, you would not impose capital punishment on all of those persons? A Well, I would impose capital punishment, but not the death penalty.

Drawing of Jury—Robert T. Burns.

Q Well, capital punishment is the death penalty? A Well, it is life imprisonment, too, isn't it?

Q No, it is not. Capital punishment means the taking of one's life by means and power of the law. You would not impose the death penalty on more than one person, no matter how many persons participated in the killing? A No, sir.

Q And in the robbery from which the killing resulted? A Not more than one person.

Q So that if you were to sit on this jury, and the Court were to charge you that all persons engaged in the perpetration of a robbery, from which a killing resulted, were equally guilty, and were guilty of murder in the first degree under our law, you would refuse to find them guilty of murder in the first degree and render such a verdict without attaching a recommendation of life imprisonment, is that correct? A Yes, sir.

Q No matter what the evidence was? A I always thought that capital punishment meant life imprisonment, too.

Q No, it does not. Let us call it the death punishment and then we will understand one another. If the Court should charge you, as I have just related in my previous question, would you refuse to render a verdict of guilty of murder in the first degree which would carry with it the death penalty as against all defendants? A Yes, sir.

Q No matter what the evidence was, that wouldn't make any difference? A No.

Mr. Fisch: I challenge for cause.

Drawing of Jury—Robert T. Burns.

Mr. McGeehan.

Q Well, Mr. Burns, you would not know the respective parts played in the situation that is being testified to by witnesses until you heard those witnesses, would you? A No, sir.

Q And you are giving your opinion as to what you would do based upon what the evidence might show, aren't you? A Yes.

Q So, you would consider the evidence, wouldn't you? A Yes, sir.

Q And you have certain ideas as to how you would act under certain phases of the evidence, haven't you? A Yes, sir.

Q But your decision then as to the guilt or innocence, or as to the penalty, would depend upon the evidence, wouldn't it? A Yes, sir.

Mr. McGeehan: I don't think this juror is properly challenged for cause, your Honor.

The Court: Suppose two men were tried for murder, and the Court should charge, as a matter of law, that if they were guilty at all they were both equally guilty, could you decide from the evidence then that they were both guilty of murder in the first degree?

The Talesman: I could.

The Court: Then, if you should decide they were both guilty of murder in the first degree and you had the right, as a juror, to vote for the punishment in the case, and there was one of two punishments to vote for, either life imprisonment or the death penalty, are your scruples against either one of those, so far as you could not vote impartially?

The Talesman: No, I am not prejudiced against the death penalty when there is one, but where there is more than one I am.

The Court: Suppose there were two men on trial and you believed they were both guilty of murder in the first degree, and that question as to their guilt was decided, and then you had to decided what the punishment would be, whether it would be death in the electric chair or whether it would be life imprisonment. Now, you would refuse to vote for the death penalty?

The Talesman: Yes, sir.

The Court: Regardless of what the evidence was?

The Talesman: As I said before, I thought first degree murder that meant life imprisonment, too.

The Court: I thought we had cleared that up. I thought we had cleared up that little misunderstanding, let us not worry about that then. Now, would you refuse, regardless of what the evidence was, to vote for the death penalty of two men where one man was killed?

The Talesman: Yes.

The Court: That is what you mean, is it?

The Talesman: Yes, sir.

The Court: And it wouldn't make any difference what the evidence was, you would do that?

The Talesman: Yes.

The Court: Refuse to vote?

The Talesman: Yes.

The Court: And you have made up your mind to that before the case started, without having heard any of the evidence?

The Talesman: I think before the case started.

The Court: You are starting out now with that fixed opinion in your mind?

The Talesman: That is the way I always believed.

The Court: I mean you have that fixed opinion in your mind now?

The Talesman: Yes.

The Court: Is there any evidence or any law that would change that opinion in your mind?

The Talesman: I don't think so.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Drawing of Jury—David Dalrymple.

(After eleven jurors had been sworn.)

DAVID DALRYMPLE, sworn on his *voir dire.*

By Mr. McGeehan.

Q Mr. Dalrymple, have you discussed this case or read about it in the newspapers at all? A I have.

Q When, please? A I believe it was around last April or May.

Q That is a long time ago? A Yes, sir.

Q Have you discussed it or read about it in the papers within the last couple of days? A Only I saw it in the papers that the jury would be chosen.

Q And was that last night, did you read that in last night's Evening News, do you know? A No, I believe it was in the Ledger yesterday morning.

Q You did not read any article in the News, then, that you remember? A No.

Q At any rate, anything that you have read, has that created any prejudice in your mind in this case so that you could not sit impartially as a juror? A Well, at the time this happened I lived near there.

Q And did you know Maurice Grossman, by the way? A Well, I know where his place was, I did not exactly know him.

Q You did not know him personally at all? A No.

Q Then, you discussed it at the time, did you? A Yes.

Q And did you form any opinion of it? A Well, no, not necessarily.

Q And do you feel that any opinion that you have obtained, or anything you read, or any

conversation you had, would influence you in the case at all? A No, because I haven't the full details of the case.

Q Do you think you could decide it upon the evidence and the evidence alone, and eliminate completely from your mind any opinions or ideas or conclusions that you had previously formed, if you are sworn as a juror? A Yes, sir.

By Mr. Fisch.

Q You are a taxidermist, are you? A Yes.

Q How old are you? A Twenty-nine.

Q Married? A Yes.

Q Have you a family? A Yes, sir.

Q Have you any conscientious scruples which are opposed to capital punishment? A I have.

Q And would those scruples which you have, opposed to capital punishment, interfere with your duties as a juror, in arriving at a verdict in a murder case where the death penalty is involved? A I don't believe in the death penalty.

Q Do I understand you correctly when I say that my understanding of the situation, as far as you are concerned, is that you would not vote for the death penalty under any circumstances? A I would not.

Q No matter what the law might be on the subject? A No, sir.

Q And no matter what the evidence might be in the case, is that right? A That is right.

Q Irrespective of the evidence you would never vote to convict anybody of murder in the first degree where the death penalty would result from that conviction? A No, sir; I would not.

Q And if you had the opportunity to attach a recommendation of life imprisonment, to your verdict, you would attach such a recommenda-

tion, regardless of the evidence? A Yes, sir; I would.

Q And such a recommendation would not be based upon a consideration of the evidence at all? A No, sir; it would not.

Q But upon your opposition to capital punishment? A Yes, sir; that is right.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q Would you render your verdict as to guilt or innocence and as to a recommendation or no recommendation, upon and after a consideration of all the evidence in the case? A Certainly.

Q And if the law gives you the right after having heard and considered all the evidence in the case, the absolute right as a juror to use your judgment and render your verdict upon what is proper to be done, and if the law gives you the right to recommend life imprisonment, would you vote that way after having considered the evidence? A Yes, sir.

Mr. McGeehan: I object to the challenge of the juror for cause.

By the Court.

Q Would you be governed at all by your prejudice? A Well, I would be voting on the evidence as far as life imprisonment is concerned, but in the case of the death penalty I would be opposed to it.

Q I know, but you just told Mr. McGeehan that if you fixed the punishment you would consider the evidence. Now, would you fix the punishment as a result of the consideration of

the evidence or would you fix the punishment because of your opposition to the death penalty?

Mr. McGeehan: May I, your Honor, object to the question, because I don't think the statute goes any farther than to say that the jury may, upon and after a consideration of all the evidence in the case, attach a recommendation for life imprisonment, and I think that a jury having once considered the evidence, is not controlled at all by other events in rendering the determination as to whether or not to attach to a verdict a life imprisonment recommendation, but upon and after a consideration of the evidence—

The Court: What does it mean when it says "upon and after a consideration of the evidence?"

Mr. McGeehan: It means that the jury are the absolute and sole judges, and that there may enter into it all their experiences and thoughts as human beings, which is naturally carried into any jury box on a decision of facts, and it would render its recommendation upon and after a consideration, but beyond that there is no requirement under the statute stating what the evidence shall contain to make that recommendation for life imprisonment. The very facts of the situation contemplate a conviction of first degree murder, but in spite of that, the right is in the jury to determine the punishment.

The Court: If a man starts out with a definite, fixed idea in his mind as to what punishment he is going to inflict, without

hearing the evidence, then he cannot inflict the punishment upon and after a consideration of the evidence.

(Argument.)

The Court: What I am trying to find out from this juror is whether or not he will consider the evidence. I will allow an exception to my question.

Mr. McGeehan: No, I don't want one, your Honor.

(Question read.)

A Well, naturally, I would go by the evidence so far as saying whether they were innocent or guilty.

Q But we are not talking about that now, that phase of it is out of the way. What about the punishment? A Well, the punishment, naturally I would go by the evidence.

Q In fixing the punishment? A In fixing the punishment, excepting capital punishment.

Q Of course, you see, you only have two chances. You either have to vote for life imprisonment or the death penalty. Now, what would determine your action in that? A The evidence.

Q Then, is it possible that in some cases you might vote for life imprisonment and in other cases you might vote for the death penalty?

Mr. McGeehan: I object.

A I would never vote for the death penalty.

Q Then, you would refuse to vote for the death penalty in any case of first degree murder, regardless of what the evidence was? A I would.

Q That is definite, is it? A Yes, sir.

Q And final? A Yes, sir.

Q And is there any testimony or any law that could change your mind on that point? A I don't believe there is.

The Court: I sustain the challenge.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(After eleven jurors had been sworn.)

CHARLES H. ADAMS, sworn on his *voir dire.*

By Mr. Fisch.

Q Mr. Adams, what is your business? A Clerk, Metropolitan Life Insurance Company, No. 1 Madison avenue, New York.

Q How long have you been employed there? A Thirty years.

Q Have you any conscientious scruples which are opposed to capital punishment? A Well, I don't like capital punishment, sir.

Q None of us do? A No, I suppose not.

Drawing of Jury—Charles H. Adams.

Q Have you any conscientious scruples which are opposed to it? A Well, I would not vote for capital punishment.

Q What do you mean you would not vote for it? A If I was impaneled as a juror.

Q In other words, if you are impaneled on a jury in a murder case, where the death penalty was involved, you mean you would not vote to convict the defendant of murder in the first degree because the death penalty was involved? A Yes, sir.

Mr. McGeehan: I object to that. That is not so. That is not the correct exposition of the law.

The Court: He has already answered.

Q Now, if you were sworn as a juror in this case, and if it became your duty to determine what punishment should be meted out to the defendants, in the event that you found them guilty of murder in the first degree, and you were informed by the Court that the law is that they may either be electrocuted, if the jury found them guilty of murder in the first degree, without attaching any recommendation of life imprisonment to the verdict, or that in the event that the jury, upon and after a consideration of all the evidence in the case, attached a recommendation for life imprisonment, such punishment and no greater punishment could be imposed, would you approach that question, the question of what punishment should be imposed, with the prejudice you have against capital punishment? A I would.

Q And then, irrespective of the evidence of the case, you would determine that question, the

question of the punishment? A I would, yes, sir.

Q In other words, the punishment, then, would be determined by you from the opinion you now have, which is opposed to capital punishment? A Yes, sir.

Q And you have not heard any of the evidence up to the present time? A No, sir.

Q So you have already fixed in your mind what the punishment would be in the event you found the defendants guilty of murder in the first degree? A Yes, sir.

Mr. Fisch: I challenge for cause.

By Mr. McGeehan.

Q What is your business? A Clerk with the Metropolitan Life.

Q This opinion that you have would not prevent your deciding the guilt or innocence of the defendants in the first place, would it? You could decide on the guilt or innocence of the defendants, if you knew that you had, as a juror, the right to determine the punishment, couldn't you? A Well, in no case would it be for capital punishment.

Q But you could decide the guilt or innocence first of all, couldn't you? A Well, in my best judgment.

Q Now, you would in any case recommend life imprisonment, is that right? A Well, naturally.

Q Now, would you do that after you had considered all the evidence? You would consider the evidence before you did that, wouldn't you? A I would have to hear the evidence.

Mr. McGeehan: I object to the challenge.

The Court: Sustained.

Defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

(The drawing of the jury was then continued and completed.)

Mr. Fisch opens in behalf of the State.

(The Court thereupon took a recess until tomorrow, Thursday, October 31, 1929, at the same time and place.)

FOURTH DAY.

Thursday, October 31, 1929.

Continued pursuant to adjournment.

Present, counsel as before stated.

JOHN J. BRACKEN, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Bracken, you are a civil engineer and surveyor, are you? A Yes, sir.

Q And have been for how many years? A About thirty-two years.

Mr. McGeehan: We admit Mr. Bracken's qualifications as an expert in that line.

Q And did you, at the request of the Prosecutor's office, make the maps that are on the wall of the court room here? A Yes, sir.

Q Will you first please refer to the map which is nearest to you and tell me whether it is drawn to scale? A It is.

Q And what scale is it drawn to? A One-quarter inch on the map is equal to a foot on the ground.

Q And the direction of the arrow points? A North.

Q And what are the red markings on the map? A The red markings are the brick buildings on the corner.

Q And what is the brown marking on the map? A That is the cement sidewalk.

Q And what does the map represent? A The map represents the southeast corner of Sanford avenue and Lenox street.

Q And for all practical purposes, Sanford avenue runs north and south, is that correct? A Yes, sir.

Q Lenox street runs east and west? A Yes, sir.

Q And the brick buildings which you have represented, so far as Sanford avenue are concerned, are on the east side of Sanford avenue? A They are.

Q And so far as Lenox street is concerned, are on the south side of Lenox street? A Yes.

Q And I notice that you have little shaded designs upon the edges of a blue line. A Those are trees that are around the curb there at the corner.

Q They are around the sidewalk? A Just—this is a pole here, one is a pole and the others are trees.

Q And the bracket which is shown on the opposite side of Lenox street, on the other side of Sanford avenue, what does that represent? A That represents the electric light and the poles there on the corner.

Q The pole is on the sidewalk? A Yes, sir.

Q And the electric light? A Extends out into the road about 12 feet.

Q What kind of a light is that? A An arc light, one of the large City of Newark lights.

Q And what is the width of Lenox street? A The width between curbs is 30 feet and the sidewalk is 10 feet.

Q And the place where you have the heading, "Sanford avenue," does that represent the street where vehicles pass? A That is the

street where vehicles pass, and this is the curb line of Sanford avenue (indicating).

Q And I notice that you have designated on the map white openings cut into the red drawing. Will you be good enough to tell the Court and jury what that represents? A That represents the enterings to the different stores, one on the corner, one in the middle of the building and one on the south side of the building.

Q What kind of a store is at the corner? A It is a chain store, one of the Great Atlantic, I think, or one of the other chains.

Q A grocery store? A A grocery store.

Q And the store next southerly to that? A That is a drug store.

Q What is the number of that? A It is given there, the number is down below on the other map, 658.

Q I notice you have a marking here 50 feet 6 inches. What does that represent? A That is the front of the building, the distance over the front of the building.

Q That is from the corner? A From the corner to the south end of the building.

Q To the south end of the building on Sanford avenue? A Yes, sir.

Q Can you tell us the distance from the entrance to the drug store to the corner of the building? A I can.

Q The corner of Lenox street and Sanford avenue? A To the center of the entrance, 25 feet, the entrance is right in the center of the building, you might say.

Q And can you give us the width of the sidewalk on the easterly side of Sanford avenue in front of the drug store? A Eighteen feet and a half.

Q Can you give us the distance from the entrance to the drug store to the tree which I have indicated, being at the curb and being just south of the entrance to the drug store? A Nineteen feet taking it from the front of the entrance, the little step that you step into.

Q On a straight line? A On a straight line.

Q Now, I notice that you have outlined in a broken line an octagonal drawing just towards the entrance to the drug store and to the south of it. Will you tell us what that represents, please? A That is the entrance into the cellar, it is an areaway with an iron door over the top.

Q And is that flush with the sidewalk? A Flush with the sidewalk.

Q Now, can you give us the distance from the building line, the line of the building to the door leading into the drug store, to the entrance to the store? A Four feet.

Mr. Fisch: I offer the map in evidence.

Q When did you make the map? A The survey was made April 27, 1929, and the map was made shortly after that.

Mr. McGeehan: I have no objection to the map being put in evidence.

Mr. Becker: And the same for Cort.

(The map was received in evidence and marked Exhibit S. 1 of this date.)

Q Now, Mr. Bracken, I call your attention to the other map which is on exhibition on the wall of the court room, and ask you whether or not that map is drawn to scale? A It is, yes.

Q And what is the scale of that map? A The scale of the map is marked on the back, in the corner here, one inch on the map is equal to a foot on the ground, or in the interior of the store.

Q So that it is drawn to a larger scale than Exhibit S. 1? A Yes, sir.

Q When did you make that map? A That map was made the same time, they were both made together shortly after the measurements.

Q And the arrow of that map is pointing? A North.

Q And what does that map represent? A That map represents the interior of the drug store known as 658 Sanford avenue.

Q And the articles that are shown on that map and marked, what do they represent? A Why, they represent the different show counters, the soda water, they are all marked, counters, cash registers, show cases, cigar cases, pen and pencil cases, scales and other different objects that were in the store, tables, telephone booth, they are all marked, Counsellor, every one of those things.

Q In other words, the objects there are as they are marked? A Yes, sir.

Q Now, I notice these maps were put up on this board yesterday. A Yes.

Q Now, at that time was there a radiator sketched on these maps? A No, sir, the radiator was not on.

Q And did you sketch the radiator? A I sketched the radiator in.

Q Now, you say you have a radiator on the right side of that drawing? A Yes.

Q Is there another radiator in the store on the other side? A On this side, do you mean?

Q Yes. A There was a radiator on the other side.

Q Are you sure about that? Can you refer to your notes? A Yes. I have it shown here.

Q Are you sure about that, Mr. Bracken? A Yes.

Q When you leave the stand will you be good enough to go up there to Sanford avenue and look it over and see whether or not you are right about that radiator? A Can I get the key to get in there?

Q Yes. You can get the key. Referring just a minute to Exhibit S. 1, do you know whether or not there is any grade to Lenox street? A Yes, there is quite a grade.

Q What is the percentage of that grade? A I cannot tell you, but the percentage is at least three or four feet to the hundred.

Q And which way does it slope? A To the east. It falls from Sanford avenue down.

Q Now, when you go up there to look at this radiator, will you be good enough to get that exact grade? Now, coming back to this map I am questioning you about, I notice what appears to be a door in the outline, and will you be good enough to tell me what that is, adjacent to the show case in back of the counter on which is situated the cash register? A That is going into the rear room. I would call it where he mixed his drugs.

Q Prescription department? A Yes.

Q What kind of a door is it? A Swinging door.

Q And does it go from the top of the partition to the floor? A No, there is an opening in between.

Q How big is the door? I do not mean the width of it, I mean the length of it? A The height?

Q The height? A I would say about five feet.

Q What I want to know is there a door within a frame such as the ordinary door we have in the court room? A Swinging door.

Q Like the doors they had in the old-time saloons? A Yes.

Q And the show case which you have marked adjacent to this swinging door that we have been talking about? A Yes.

Q What kind of show case is that? A It has drugs in it and there is a counter in the rear where he mixes his prescriptions.

Q Are you able to see from the front of the store in back of that show case? A No. You can see up to it.

Q So that show case continues all the way across and to the east at the telephone booth? A Yes.

Mr. McGeehan: When was this made?

The Witness: April 27, 1929.

Mr. McGeehan: Of course, this would not be admissible unless the State shows that the movable objects were in the same position.

Mr. Fisch: We will connect it up.

Q And the door leading into the store, what kind of a door is that? A That is a regular door you see on the front of any store.

Q And it opens? A Opens inwardly, swings in.

Q And the lines directly in back of the window, what do they represent? A They represent a partition in the back of the show case.

Q Is this also a little swinging gate? A Yes.

Q That is back of the cigar case? A Yes.

Q And walking back there you get in back of the soda counter? A Yes.

Q And candy case? A Yes.

Q And cash register? A Yes.

Q Now, that cash register was located where? A On the southeast of that counter in the rear of the store.

Q And where was the portion of the cash register that opens, the drawer? A It opens on this side.

Q That is in the back of the counter? A I think it was on the side of the counter.

Q Are you sure about that? A I am not sure about that.

Q It was as is represented on the map? A Yes. Either this side or from the rear.

Mr. Fisch: I would like, if your Honor please, to offer in evidence this map with leave to have Mr. Bracken make a physical examination today with reference to the radiator and with leave for him to make the change as may be indicated by that radiator by the actual location of the radiator in the building.

The Court: The actual location at the time of the crime?

Mr. Fisch: Yes, sir.

The Court: All right, it may be marked.

(Map marked Exhibit S. 2.)

Cross examination by Mr. McGeehan.

Q Mr. Bracken, at the time you made this map were you accompanied by anyone? A Yes, two of my assistants.

Q And do you know whether or not the objects which are movable upon that map are shown—how long they had been in that condition? A Well, I imagine—

Q Not what you imagine. A Well, from my observation they were in that position some time before I took the measurements.

Q Of course, anybody who was familiar with the place or worked, or knew where the objects were previously, pointed them out to you? A There was not, with the exception of one of the prosecutor's men who had been up there once before who let me in.

Mr. Fisch: Had the store been locked when you got there?

The Witness: It was locked.

Q At any rate, the only movable objects in that store were counters and cash registers and such? A Why, those counters would be hard to move.

Q Heavy? A Heavy. They were large counters and there were only one or two small ones. You could tell by the impression on the floor if they had been moved. They had not been moved some time prior to the time I took my measurements.

Re-direct examination by Mr. Fisch.

Q What kind of floor is in that store? A It is a wooden floor.

Q Will you look at that? A Yes, I have not been up there since April.

Q Do your notes show? A No, I haven't marked the floor.

Cross examination by Mr. Becker.

Q Mr. Bracken, can you tell me the distance from that drug store to the curb on the southerly side of Lenox street? A Yes, to the center is 35 feet along the front of the building.

Q Now, I notice that indication, the marking that indicates the tree? A Yes.

Q What distance is that tree with the line of the building? A Which one?

Q The one on the southerly side of Lenox street.

Mr. Fisch: That is the tree on the southerly side of Lenox street most westerly on Lenox street?

The Witness: That is about 3 feet in off the side of the building.

Q Did you note the size of that tree at the time you made the drawing? A Yes. It is a small one. I would say it is one about 15 feet high and about six or eight inches in diameter. Maybe not quite that.

Q How old would you think that tree was?

Mr. Fisch: Are you an expert?

The Witness: No.

A Possibly five or ten years old.

Q What is the distance, Mr. Bracken, from the partition which you spoke of, to the point of the store, the partition from which you said

there was a view of the front of the store, what is that distance? A That distance is marked on the map, 28 feet.

Q It is shown upon it? A Yes, sir.

Re-direct examination by Mr. Fisch.

Q I did not get your answer. A From the front of the store to where you could observe the distance, it is marked on the map.

Q Yes, that is 28 feet. I want to know what the distance is from the front of the counter at which the cash register is located, to the front of the store, the front door? A 24 feet.

Cross examination by Mr. Becker.

Q Mr. Bracken, did I understand you to say that the height of that tree was about 15 feet? A Now, from my observation I would say about that height.

Q Did you notice the spread of the foliage? A I would say that was about 10 feet in diameter. I could refresh myself, I think, by going up there, if you wish me to.

Q There wouldn't be any leaves on it now? A Yes, there is, but you could tell the foliage because the spread of the twigs or the limbs that the leaves are on would be almost similar with the spread of the leaves.

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

Direct examination by Mr. Fisch.

Q Dr. Martland, you are the chief medical examiner of this county? A I am.

Q And have been for how long? A Since June, 1925, I have been County Physician, and Medical Examiner since, I think it was, February, 1927.

Q Dr. Martland, did you have occasion to perform an autopsy on a body which had been identified to you as the body of one Maurice Grossman? A I did.

Q And when and where did you perform that autopsy? A On April 26, 1929, at O'Mara's morgue, Newark, New Jersey, at 10:30 o'clock in the morning. The autopsy was started approximately five and a half hours after death.

Q I show you a photograph and ask you if this is a photograph of the person upon whom you performed that autopsy? A Yes, sir, this is.

Q And does that photograph represent the condition of the deceased person at the time of autopsy? A It does.

Mr. Fisch: I offer the photograph in evidence.

Mr. McGeehan: I object to that as a gruesome and unnecessary exhibit, in view of the available testimony of Dr. Martland as to the cause of death and the condition of the body in that autopsy.

The Court: I suppose it is perfectly proper, Mr. McGeehan. I don't quite see the necessity of it, but I suppose if the

State insists on putting it in it is proper evidence.

Mr. McGeehan: There is one decision in which Justice Minturn wrote the opinion—I cannot cite the case off-hand—in which he held that it was objectionable to put in gruesome, what he called unnecessary and gruesome exhibits, as being an influence that may have its effect, and that it is unnecessary to put it in evidence, in view of the other evidence, and I think it is objectionable—

The Court: You may make the offer, Mr. Prosceutor, but I will not rule on it now.

Mr. Fisch: I have made the offer, your Honor. Your Honor might want to see the picture to determine whether it is gruesome or not.

The Court: No, I don't want to see it.

Q Dr. Martland, will you be good enough to tell us what your autopsical examination revealed. A I found the body of a white man about 38 years of age, approximately 5 feet 5 inches in height, a naked body, about 190 pounds in weight. He had brown hair which was slightly bald in the posterior frontal region here and in the midparietal region there (indicating). The body was cold and rigor mortis was beginning to set in. The body showed evidences of three penetrating revolver wounds. Wound No. 1, which I have described as wound No. 1 was a wound on the right forearm, situated about 4½ inches below the elbow joint, which is about here (indicating), on the outer side of the forearm. This wound is a round wound, having a diameter of 3/16ths of an inch and with a slightly reddened

border about 1/16ths of an inch. There was no blackening of the free edge. There were no surrounding powder marks or burns around this wound, but I did not see the clothes of the deceased, as he died approximately four days after the shooting, and the clothes were at the hospital. This wound passed across the forearm to the inside and came out about 2 inches below the elbow joint, producing a wound about ¼, an elliptical wound, about ¼ to ½ inch in size, with the fat tissue projecting out of the wound, showing it was coming out this way. The distance through the forearm was about 3 inches. There was extensive bruising of the skin down to the wrist. That wound in itself was not a serious or fatal wound. Now, it is impossible to state whether that wound passed through the body and did not enter it again, or whether it entered the body again. In this case that depends on the position of the arm at the time of the shooting. The arm, for instance, was like that (indicating). It may have passed on and not re-entered the body. There are only two bullet wounds in the right side of the chest, either of them, which I am about to describe, could correspond with the exit of this first wound, depending entirely upon the position of the arm, so that this wound could have re-entered the body again in either one of these two wounds which I will now describe. Wound No. 2, which I am now describing, entered the right chest about 6 inches below the arm pit, about over the 9th rib and in the mid-axillary line, which is the line drawn from the arm pit here up about here (indicating). This wound entered the right side of the chest, fracturing the 9th rib, passing through the space over the right lung known as the pleural cavity in

the costo-phrenic space, and passing downwards and to the left, passing through the diaphragm and entering the abdominal cavity and situated between the upper surface of the liver and the diaphragm was found a .32 calibre steel-jacketed bullet from this wound.

Q I show you a bullet and ask you whether or not that is the bullet to which you refer as having been found in the wound which you have just described? A Yes, sir, that is the bullet.

Mr. Fisch: I offer the bullet in evidence.

Mr. McGeehan: Doctor, what is the card attached to that, or the envelope attached to that?

The Witness: Shall I read it?

Mr. McGeehan: Is it in your writing?

The Witness: The name is in the writing of Mr. Ginley, my clerk. The calibre is in my writing, the identification mark on the bullet is my writing.

Mr. McGeehan: So that writing was made up in your office?

The Witness: Yes, made up in my office, I have marked the bullet on the front. That mark is made in my own handwriting.

Mr. McGeehan: Your identification mark is this?

The Witness: The X on the front, yes, sir, that is my mark.

Mr. McGeehan: Is that any special kind of a mark or is it just a cross?

The Witness: Just a cross.

Mr. McGeehan: There is no feature to this cross that would enable you to distinguish it from any other one?

The Witness: No, sir.

Mr. McGeehan: From your recollection of it, this is the bullet that you saw?

The Witness: Yes.

Mr. McGeehan: I have no objection to it.

Mr. Fisch: You have no objection to it being placed in this envelope?

Mr. McGeehan: I did not examine it for that purpose.

Mr. Fisch: Well, I will show it to you to make sure.

Mr. McGeehan: No objection.

(The bullet is received in evidence and marked Exhibit S. 3 of this date.)

Q Doctor, had you completed your description of the wound in which you found the bullet S. 3? A Not quite.

Q Will you continue, please? A The wound of entrance in this wound, No. 2, was a little less than ¼ inch in diameter, which is the usual size for under a .38 calibre bullet. There were also no surrounding powder marks or burns on the skin in this wound of entrance, but I did not see the clothes. That is all to that wound.

Q The bullet you found lodged where? A Between the upper surface of the liver, it is hard to show, and the diaphragm, having passed slightly downward and to the left.

Q Was the wound, would you say, doctor, that the wound inflicted by that bullet was or was not a fatal wound? A Yes, this wound is a—can be a fatal wound. It is a wound in which recovery is also possible.

Q Now, then, will you be good enough to describe what you call wound No. 3? A Wound

No. 3 is situated 2 inches below wound No. 2 and a little in front of it, as in the anterior axillary line.

Q On the right side? A On the right side, 2 inches below. This wound of entrance is a little larger, being 5/16ths of an inch in diameter, but there was inserted into it by the surgeon a small gauze wick, and that is what caused gaping of the wound.

Q A gauze wick? A A gauze drain.

Q Iodoform gauze? A The skin around this wound was bruised for the distance of about an inch, due to hemorrhage of the skin underneath. There were no powder marks or burns to this wound. This wound then passed backwards, downwards and to the left about in that direction (indicating), it passed through between the 9th and 10th ribs into the lower part of the chest cavity without injuring the lung. It passed downwards through the diaphragm, to the right lobe of the liver, coming out of the under surface of the liver, producing a large lacerated wound about an inch and a half in size. It passed through the right kidney producing a large hemorrhagic tract through the kidney and the bullet was found in the back on the right side about 1 inch to the right of the midspinal line, about opposite the third lumbar vertebra, about here. The position of the bullet where it was found being about 3 inches lower than where it entered the chest.

Q Would it help you, in your explanation or illustration—I see you have been going through some gyrations trying to get around to your back—would it help you to show just the course of that bullet, where you found it and the place where you found it, using my body as an ex-

ample? A Yes. It is on the right side. Assuming that he is about the height and weight of the deceased, the first wound I would say is about here (indicating). The second wound is about there (indicating). The place where the bullet was found in this wound—

Q That is wound number— A Wound number three, which I call wound number three, is about here under the skin. So the direction of that wound would be in line—of course, I cannot make it there—about that way, passing through between the ninth and tenth ribs, between the pleura over the lungs going downwards through the diaphragm, passing through the liver, passing through the right kidney and being held under the skin of the back here.

Mr. McGeehan: What was the course of wound No. 2?

Witness: Wound No. 2, goes almost directly to the left, very slightly backwards, and only for a distance of about three inches where the bullet is found between the diaphragm and the liver. I should say that the direction in that position depending entirely upon the position of the deceased at the time of the shooting, whether he was erect or not, passed that way, and this wound passed about this way.

Q Both of them taking a downward course in the body? A Yes, but if the deceased was bent over, you see it is almost horizontal. It all depends upon the position of the man at the time of the shooting.

Mr. McGeehan: Would you mind marking the point of entry and exit of wound No. 1?

Witness: The first wound was about four and a half inches below the elbow. We will say about here, and then without fracturing the bone, it passed over the skin and flesh on the inner aspect a course of about three inches about two inches below the elbow. That would be about there (indicating). So that —bend your arm—

Q Sure. A (Continuing) That could be opposite that wound or even opposite that wound, or it could have gone out through the body depending on the position of the arm.

Q Now, then, doctor, what kind of a bullet did you find in wound No. 3, as you describe the wound? A A .32 calibre steel jacketed bullet, similar to the other bullet.

Q A .32 calibre what? A Steel jacketed bullet.

Q Have you your notes made at the autopsy? A Yes.

Q Will you refer to them and see if that is right, whether it is a .32? A This is the bullet found under the skin in the back. Yes. I have marked it here as a .32 calibre bullet in my notes.

Q Now, doctor, you have testified without a reference to your notes with reference to Exhibit No. 3, a steel jacketed bullet, and your testimony was that this bullet was found in what you have described as wound No. 2, is that correct? A No, that is not correct.

Q You want to correct that, then? A Yes.

Q After referring to your notes? A Yes.

Q Now, then, I show you again Exhibit S-3, a steel jacketed bullet and I ask you to tell us, please, where that bullet was found in the body of the deceased. A The steel jacketed bullet is the bullet which is produced by what I have described as wound No. 3, which is found in the back on the right side and which went through the right kidney and liver. The location is not marked on the location of that bullet because as I remember in this case, one was a lead bullet and one a steel bullet, and from the notes the steel bullet was wound No. 3.

Q But the steel bullet was found at the end of wound 3? A Yes.

Q What bullet was found at the end of two? A What I have described in the notes is a .32 calibre lead bullet. That was found in wound No. 2, between the diaphragm and the liver.

Q Now, I show you a bullet and ask you whether or not it is the bullet you found in wound No. 2? A Yes, that agrees with this, the bullet found in wound No. 2.

Q You are sure about that? A Yes.

Mr. Fisch: I offer that bullet in evidence.

Mr. McGeehan: That is marked with an X the same as the other?

Witness: Yes:

Mr. McGeehan: And your identification of it is based on the marking?

Witness: Yes.

Mr. McGeehan: And the reference to it on the envelope?

Witness: Yes.

Mr. McGeehan: Has that been in your possesion ever since you marked it?

Witness: Yes, those bullets were in my possession and no one else's until the time it was delivered to the Prosecutor's office on May 1, 1929. They were delivered to Detective William J. Callahan by me. He signed a receipt for them.

Mr. McGeehan. Which is the marking on it?

Witness: It is right in the butt. You see that it is a very deep butt. It is hard to mark.

Mr. McGeehan: Now, doctor, if you identify that by a mark of X in that butt, you must be able to see it for that purpose. Can you see it in there?

Witness: It is pretty hard to see now.

Mr. McGeehan: At any rate, doctor, without a magnifying glass you cannot say it is the same bullet?

Witness: No, I cannot say, I must say that I cannot see it.

Mr. McGeehan: And the bullet you put in there was marked with an X?

Witness: Well, I think certainly I must have marked it, because I marked the envelope, unless I first marked the envelope.

Mr. McGeehan: Well, you certainly cannot identify that as the bullet?

Witness: No, I cannot identify it.

Mr. McGeehan: Now, when you mark an X upon these bullets, do you do it with a sharp instrument?

Witness: Yes, sometimes with a pin. I mark them on the butt to avoid destroying

any evidence of the rifling so the experts can determine.

Mr. McGeehan: The butt there is recessed?

Witness: Yes, there is a very deep recess.

Mr. McGeehan: So it is not a point that can be rubbed against anything and eliminated very easily?

Witness: No.

Mr. McGeehan: Of course, I object to the offer of it in evidence.

Mr. Fisch: I would like to ask a question or two further:

Q The bullet you removed from the wound of the deceased, did you put it in an envelope? A Yes.

Q And is the envelope which I am showing you the envelope which you put the bullet in? A Yes.

Q And did you deliver the bullet in that envelope to Detective Callahan? A I did.

Q And you say it was a lead bullet and do you know whether or not this deep recess that you speak of might now be filled with wax? A Yes, it might be, but I think if I marked it there, it ought to show.

Q Well, do you think you marked—your marking might be covered by wax? A It might.

Q Do you know whether or not when persons handle bullets for the purpose of determining rifle marks on them, if they put them on the nubs of wax? A Yes.

Mr. McGeehan: I object to that.

The Court: He has answered. He said yes.

Q Could you determine whether or not the inside of that was filled by wax or some soft substance by taking the head of a pin without destroying the bullet itself? A I can do it with a toothpick.

Mr. McGeehan: I object to that having anything done that might possibly scratch it.

The Court: Do you object to the question?

Mr. McGeehan: I object to the suggestion that it be done. I suppose a toothpick would not scratch it.

Witness: I do not think so.

Mr. McGeehan: If you feel it wouldn't—

Witness: It is pretty soft lead. I do not believe it would scratch it.

Mr. McGeehan: Can't you see whether there is a coating of wax there?

Witness: It looks a little greasy there.

Mr. McGeehan: You can see the surface of the lead?

Witness: Well, it looks like the surface of the lead.

The Court: Was the bullet you delivered to Callahan the bullet you took from Mr. Grossman's body?

Witness: Yes, sure.

The Court: You are positive of that?

Mr. Fisch: Yes. Your Honor, it is simply a question of trying to save a little more time.

The Court: Couldn't you save it that way?

Mr. Fisch: I do not think so, because the bullet goes through a long series which would

be necessary to connect it up, whereas if the doctor can identify it by taking a toothpick, which he says he does not believe would scratch the bullet—

The Court: Go ahead and examine it that way.

Juror No. 6: May I offer a suggestion for removing that wax?

The Court: Yes, you are a chemist?

Juror No. 6: Yes. A little solvent.

The Court: Why not let the doctor finish his testimony and then let him take the bullet and see if he can discover any identifying marks and then come back.

Mr. McGeehan: No objection to that.

Witness: I have testified to bullets that I have not marked at all, but kept them in my possession and at the trial turned them over, because I was afraid to interfere with the gun expert.

Mr. Fisch: I ask that the bullet be marked for identification.

The Court: Let it be marked.

(Marked S. 4 for identification.

Q Now, with reference to what you have called wound No. 3, can you tell us whether or not that was a fatal wound? A Yes, that was a fatal wound, and wound No. 2 is a fatal wound, because wound No. 2 has produced an infection in the pleural cavity with a beginning pleuracy over it. Wound three has produced a serious wound of the kidney and liver with a beginning peritonitis and hemorrhage.

Q Now, doctor, of course you were able to determine the cause of death, were you not? A Oh, yes.

Q What was the cause of death? A The cause of death was two revolver wounds of the right chest, one penetrating the chest and abdomen, producing an infection of the pleural cavity. The other penetrating the chest and cavity and abdomen and producing intestinal hemorrhage and internal peritonitis.

Q Did you find any bruise marks on the body? A Yes.

Q Where? A On the left forehead two and a half inches above the left eye brow was a laceration of the scalp one and a quarter inches in length slightly oblique and closed by three horsehair sutures. Just above that and to the right were four small brush abrasions, that is, reddish abrasions of the skin, from a quarter to half inch in size, two of which had small lacerations about a quarter inch in size. In the scalp in the back on the right side there was a large hemorrhage, about three inches in size but no underlying fracture of the skull. I attributed that to a fall.

Q Were there any other marks on the head? A No.

Q To what did you attribute the marks you have described in the parietal region? A Possibly a fall. Even a blow could have done it. In addition there was a surgical incision made at the surface that started on the right side of the abdomen about two and a half inches below the ribs and passed down for seven and a half inches. This wound was closed by tension sutures and a continuous suture and its upper part contained a packing of six feet of iodoform gauze to stop the bleeding.

Q What other marks did you find? A I think that is all.

Q Did you find any marks on the right arm outside of the bullet wound, the right forearm? A No, it was black and blue down to the wrist, but I attribute that to the penetrating wound of the forearm.

Q May it also have been caused by beating upon it with a blunt instrument? A Some of it might be due to that. There were no brush abrasions of the skin; that was a bruising.

Q And in your opinion, doctor, might the bruise, the marks which you found on the head, the brow, near the parietal region, might that have been caused by blows from some blunt instrument? A The marks described on the left forehead could be that.

Cross examination by Mr. McGeehan.

Q Doctor, what was the total distance within the chest or body of the deceased that bullet No. 2 traveled? A About 3 inches.

Q Altogether? A Yes, it fractured the rib and was stopped for some reason.

Q It fractured a rib in its course? A The 9th rib, yes, sir.

Q And how far did bullet No. 3 travel within the body? A To the inside of the body, about 6½ to 7 inches. It is greater when you measure the muscles, it is absolutely through the body cavity, about 6½ to 7 inches.

Q Now, doctor, I understood you to say at the beginning, before you consulted your notes, that wound No. 2 was by a steel-jacketed bullet and wound No. 3 by a lead bullet, and then I understood your notes indicated that it was

the opposite. Is that right? A Yes, sir, that is right.

Q May I see the notes which you referred to and from which you refreshed your recollection in that respect? A Could we mark these with a red pencil or something? Situated about ½ inch to the right of the midspinal line, about 2 inches from the high spot of the crest of the illium, a bullet that can be felt beneath the skin, surrounded with subcutaneous hemorrhage, .32 calibre steel-jacketed bullet, that is from wound No. 3.

Q That is from No. 3, that is where you found the end of that wound? A Yes, sir.

Q How about the other wound, doctor? A The .32 lead bullet being found—

Q So that there is no question from your notes? A Yes, sir. Right below the surface of the right lobe, .32 lead.

Q So there is no doubt that No. 2 was lead and No. 3 was steel-jacketed? A Yes, sir.

Q Now, doctor, was the deceased a well-built man? A Yes, sir, he was quite a beast for his height, very heavy and muscular, 190 pounds.

Q Now, tell us, doctor, was there any bone struck by the bullet which passed through the forearm? A No, it passed through the skin and subcutaneous tissues and muscles in front of the bone without fracturing the bone.

Q So that the course of the bullet could not, from your experience, cause any destruction of the shape in its passage through that forearm unless it struck a solid object? A No, ordinarily it would not.

Q Now, that wound was 3/16th of an inch in width where it entered the forearm, wasn't

it? A 3/16ths of an inch in diameter, yes, sir.

Q And where it left that arm it was about a quarter to one-half inch. Is that right? A It was an elliptical wound about ¼ to ½.

Q That was due to the angle at which it left the skin or the surface of the skin, wasn't it? A Possibly, the exit is frequently larger than the entrance.

Q Yes, unless it comes out at right angles to the skin it would not have the exact size? A Yes, but if it comes out with its nose first it creates a larger wound.

Q Because of the angle? A It might not be because of the angle, it might be due to the tissues. It could come out on a straight line without being deflected and produce a larger wound than where it entered.

Q Doctor, you have testified that the cause of death was bullet wounds. That, of course, was the thing, or they were the things that superinduced some other condition. Isn't that right? A It is rare than an individual dies absolutely of a bullet wound. He dies of hemorrhage or he dies of shock or he dies of peritonitis, if you want to look at it that way.

Q That is what I want to get at. A But to my mind he died of bullet wounds.

Q Unquestionably. That is not what I have in mind, doctor. What I want to try to determine is which of these bullet wounds caused the death or caused the condition that preceded death and resulted in the death of this man. Now, he had peritonitis, you said, as a result, or at the point where the last bullet which you spoke of, No. 3, was lodged? A No, the peritonitis could be produced by either one, because they both penetrated the diaphragm.

Q Could you tell which of those bullets produced that peritonitis? A Oh, no, no one under the blue canopy of the heavens could.

Q I think if you cannot, doctor, no one can. Now, doctor, in this case, what, in a layman's language, was the immediate cause of his death? What was the condition, either a hemorrhage or a septic condition, or whatever it was, that caused him to die, in your judgment, from your autopsy? A It is a combination between sepsis and hemorrhage.

Q A combination of both? A Yes, sir.

Q Could the hemorrhage that existed there of itself cause death? A Oh, yes.

Q And the septic condition of itself could cause death? A Yes, sir.

Q I suppose either one would react upon the heart directly, wouldn't it? A Yes, sir.

Q You cannot tell which of these bullets produced the sepsis, can you? A No, I cannot.

Q Can you determine in your autopsy the location and extent of the hemorrhage? A Most of the hemorrhage in this case is from the wounds of the liver and the kidney produced by bullet No. 3, and also produced by bullet No. 2 or 3 in the chest cavity. The chest cavity contained over a pint of brownish blood which was infected.

Q In other words, the hemorrhage condition certainly was produced, to some extent, or to the major extent, by No. 3, with a possibility that some of it was due to No. 2. Is that right? A Yes, I think you can say this, that the hemorrhage from the liver and the kidney was produced by No. 3, it was not produced by No. 2, that we are sure of. The abdominal hemorrhage and the hemorrhage in the chest cavity could be produced by either 2 or 3.

Q So that in this case the conditions, one of which did cause death, either sepsis or the hemorrhage, it is entirely possible that No. 2 did not, that bullet No. 2 did not produce such condition, isn't it? A Yes, No. 2 could not have gone through the structures it did without doing some—producing some hemorrhage, but it may have produced very little.

Q But No. 3 you are sure is the bullet that probably produced the greater contributing cause of death from the standpoint of the results in the autopsy? A It produced the greatest hemorrhage, yes, sir.

Q Now, doctor, this wound upon the back of the head, I think you said, in your opinion, probably could come from a fall? A It looks like it most probably did, from its situation here, rather low down, it looks as if he struck the back of his head.

Q And no lacerations accompanied it? A No lacerations and no fracture of the skull.

Cross examination by Mr. Becker waived.

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

Direct examination by Mr. Fisch.

The Court: I suppose you admit this witness' qualifications as a photographer?

Mr. McGeehan: Yes.

Q You are a police photographer of the City of Newark? A I am.

Q And did you make any photographs in connection with this case of an automobile? A I did.

Q Will you examine the photograph that I am now showing you and tell me whether or not you made that photograph? A I did.

Q Where and when? A I made it on May 1st at Boettner's garage, New Jersey Railroad avenue.

Q And was the automobile covered with any substance at the time you photographed it? A It was.

Q What was the substance? A Fingerprint powder.

Q Now, is that shown on the photograph? A It shows white. It is shown on the doors and on the rear fender, the front fender and the front of the hood.

Q And that photograph shows what portion of the automobile? A The front and the left side.

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

(The photograph was marked Exhibit S. 5 for identification.)

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

Q What does that represent? A It is the rear and the right side of the same automobile.

Q Was there any substance on the portion of the automobile as shown in that photograph? A There is.

Q What is it? A It is fingerprint powder.

Q And how is it shown on the photograph? A White, and on the back, the rear windows, the side windows and doors and fender.

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

(The photograph was marked Exhibit S. 6 for identification.)

Q By the way, with reference to Exhibit S. 6 for identification, was that taken at the same time and place as Exhibit S. 5 for identification? A It was.

Q And who was present at the time the photographs were taken? A I and the garage man.

Q Now, I show you another photograph, which I have shown to Dr. Martland, and on which the Court has not yet ruled, and which I have offered in evidence, and ask you whether or not you made that photograph? A I did.

Q Who was present when the photograph was made? A Dr. Martland and the morgue keeper and Mr. Ginley, Dr. Martland's secretary.

Q Does it truly represent the object of which you took the photograph? A It does.

Mr. Fisch: If the Court please, I renew my offer, and if your Honor is not prepared to pass on the offer at this time I will ask that the photograph be marked for identification in some manner.

The Court: Let it be marked for identification.

(The photograph was marked Exhibit S. 7 for identification.)

Q Exhibit S. 7 for identification is a photograph of the deceased? A Yes, sir, Grossman.

(Cross examination waived by Mr. McGeehan.)

Jacob G. Ruel, for the State, direct.

Cross examination by Mr. Becker.

Q Could you tell us when those photographs were taken? A On or about May 1st.

JACOB G. RUEL, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q You are connected with the Newark police department? A I am.

Q And you are one of the official photographers of the department? A I am.

Q And did you at the request of the Prosecutor's office, and the police department, make some photographs of the vicinity of Sanford avenue and Lenox street? A I did.

Q When did you make those photographs? A 23rd of April, 1929.

Q I show you a photograph and ask you whether this is one of the photographs which you made? A It is.

Q What does it represent? A The front of the building at Sanford avenue and Lenox, taken from the southwest corner of Lenox avenue, showing across Sanford avenue.

Q Lenox street, you mean? A Lenox street.

Q Can you, by referring to Exhibit S. 1, which is this map, show us on the map the place where your camera was located when the photograph, which we have just been inquiring about, has been taken, and indicate by an arrow the direction in which the camera was pointed? A The corner is not on there.

Q Well, will you give us the point on the map which would represent the corner as extended? A (Marked).

Q Does the arrow point in the direction in which the photograph was taken? A Taking the south side of Lenox street and the east side of Sanford avenue.

Q Will you be good enough to mark that point there C. S. 8? A (Marks as requested).

Mr. Fisch: I offer the photograph in evidence.

(Same is received and marked Exhibit S-8 of this date.)

The Court: Can't we put all these photographs in?

Mr. McGeehan: Of the location?

The Court: Yes, I assume that is what they are, various views of the store, isn't it?

Mr. Fisch: Yes.

Mr. McGeehan: I don't think it will be necessary to show the direction of the camera as to each one.

Mr. Fisch: Only for the purpose of orientation, and this is all for the benefit of the jury—they were not there.

The Court: It is going to be very hard for the jury, two days from now, to remember where the camera was placed when a particular photograph was taken.

Mr. Fisch: That is why I have asked the witness to mark C. S. 8 on the map to correspond with the exhibit number.

Q Is this another photograph which you took? A Yes, sir.

Q Will you mark on the map the place where your camera was placed? Will you take that photograph and mark it C. S. 9, with an arrow showing the direction in which your camera was pointed? A (Marks).

Mr. Fisch: I offer the photograph in evidence.

(The same is received in evidence and marked Exhibit S. 9.)

Q Is this another photograph which you took? A Yes, sir.

Q Will you please indicate on the map, Exhibit S-1, the place where the camera was situated when you took this photograph and marked C. S. 10, and indicate by an arrow the direction in which it was pointed? A (Marks).

Mr. Fisch: I offer this photograph and ask that it be marked Exhibit S-10.

(The same was received and marked Exhibit S-10.)

Mr. McGeehan: I assume there is nothing on any of these photographs excepting the buildings and the street, no movable objects.

Mr. Fisch: There is an automobile in this one.

Mr. McGeehan: It is not an automobile figuring in any way in the case, it is just an accidental presence there?

Mr. Fisch: I presume so.

Q Did you make a photograph of the interior of the store? A I did.

Q Is this the photograph which you made? A Yes, sir.

Jacob G. Ruel, for the State, direct.

Q Now, referring to Exhibit S. 2, can you indicate on that map, please, the way your camera was located when you took this photograph and mark it C. S. 11, and indicate by an arrow the direction in which the camera was pointed. A (Marks).

Q So that the photograph was taken right at the entrance, at the door? A Yes, sir.

Q With the door open? A Yes.

Mr. Fisch: I offer it in evidence.

(The same is received and marked Exhibit S-11 of this date.)

Q When you took this photograph, Exhibit S-11 did you see a cash register in the store? A I did.

Q Where was it located? A In the rear of the store on the counter, in back of the soda water fountain.

Q Can you see it on this photograph? A Part of it, right there.

Q You can just see the edge of it, can you? A Yes, sir.

Q And the rest of it is obscured? A Yes, sir.

Q By what? A By candy and the soda-water fountain and whatever was on the counter.

(Cross examination waived by both defendants.)

MORRIS W. SHAPIRO, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Shapiro, in April of this year, where were you living? A 50 Milford avenue, Newark.

Q And at that time were you the owner of an automobile? A Yes, sir.

Q What kind of an automobile was it? A A Chrysler.

Q What model? A Sedan.

Q And what year? A I think it was a '27 or '26.

Q Do you remember the registration number of it? A I think it was 4477, something like that.

Q And did it have a 3-E before the 4477? A Yes, 3-E.

Q I show you Exhibit S. 5 for identification and ask you whether or not that is a photograph of the automobile which you had? A Yes, sir.

Mr. Fisch: I offer the photograph in evidence.

(Exhibit S. 5 for identification was marked Exhibit S. 5 in evidence.)

Q I show you Exhibit S. 6 for identification and ask you whether or not that is another view of the automobile which you had? A Yes, sir.

Mr. Fisch: I offer Exhibit S. 6 for identification in evidence.

(Exhibit S. 6 for identification was marked Exhibit S. 6 in evidence.)

Q Now, these photographs which you have identified of this automobile, which we have been talking about, Mr. Shapiro, did you have that automobile on the night of April 21st? A Do you mean did I own it or use it?

Q Did you have it or was it in your possession on the night of April 21st? A I don't remember whether I did.

Q Did you leave it somewhere? A Well, I left it in front of the house.

Q What time was it when you left it in front of the house? A Some time in the afternoon.

Q Of the 21st of April? A Yes, sir.

Q And did you continue to leave it there, or did you move it from that spot? A No, sir.

Q When was the next time you went for the automobile?

Mr. McGeehan: I object to this. I know the object of it from the Prosecutor's opening and I object to it upon the ground that it is improper to prove a separate transaction, amounting to a crime, against the defendant or defendants.

The Court: Of course it is, if it is simply for the purpose of proving another crime, but I assume, from the Prosecutor's opening, it will be connected up with one of the defendants in this case.

Mr. McGeehan: That, I think, makes it objectionable, because the—merely because a transaction may be criminal does not entirely exclude it. If it is connected with the charge of the indictment and it is necessary to prove that charge in the indictment to show the other charge, but I cannot see the necessity of proving any other

alleged crime on the question of ownership or non-ownership of the automobile used in the holdup. It certainly would not be important to determine whether guilt or innocence existed. I think it would be of just the same effect whether it was a car purchased and paid for by the defendants as one which may have been stolen.

The Court: Yes, but it is evidently important in this case to show the connection of at least one of the defendants with this particular car.

Mr. McGeehan: I cannot see the propriety of it.

The Court: Well, I don't know, I can imagine a situation where the car figures very prominently, and it is important to show who was with the car.

Mr. McGeehan: I think that could be done certainly, but I don't think it matters whether whoever was with the car got it honestly or dishonestly, so far as the charge in this case is concerned.

The Court: That is true, Mr. McGeehan, but there evidently isn't any other way to show that this defendant was with this car. Isn't that the situation, Mr. Prosecutor?

Mr. Fisch: Yes, your Honor. We are not attempting to prove any other crime than this. The stolen car is not material in this case.

Mr. McGeehan: All this witness is called to prove is that the car was stolen from him, and I don't think it is necessary or proper, and I don't think it is important in this case.

The Court: I will overrule the objection and allow you an exception.

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

WALTER D. VAN RIPER,
Judge.

(The last question was read.)

A I discovered it was missing the next afternoon, the afternoon of the next day.

Q Now, then, did you see the automobile again after that? A I saw it about a week later.

Q Where? A At Boettner's garage on New Jersey Railroad avenue.

Q And were you able to identify it as your automobile? A Yes, sir.

Q In what manner were you able to identify it was your automobile? A Well, the general appearance of the car and the license tag.

Q What? A Well, the car itself, I recognized my car when I saw it.

Q The general appearance and the license tags? A Yes, sir.

Q Was there anything particular with regard to the fenders that you were able to identify the car by? A I think one of the rear fenders was bent.

Q Was bent? A Yes, sir.

Q Did you find some keys and papers in the car? A Yes.

Q Whose were they? A Those belonged to me.

Q Now, before you had left the car in front of your home, did you notice anything with regard to any dents in the fenders? A I don't remember any dents.

Q Do you remember anything about the headlights of the automobile? A I think something was wrong with one of the headlights, I am not sure.

Q Do you know which one? A I don't know which one.

Q Well, now, did you commit to writing a statement with reference to this matter? A Yes, sir.

Q On the 11th of May, 1929, is that right? A I don't remember the exact day, but I made a statement.

Q Well, is this the statement which you made at that time, Mr. Shapiro? A Yes, sir.

Mr. McGeehan: I object to the witness' looking at the statement, it is improper to show a writing to the witness except on two conditions, and neither of those exist here. One is where the witness states he needs a statement to refresh his recollection, and the other is where the Prosecutor says he is surprised by testimony of a contrary nature.

The Court: Quite true, and I assume the Prosecutor is now going to justify the showing of the statement.

Mr. Fisch: Correct. Mr. McGeehan is just a little bit ahead of me.

Mr. McGeehan: I object to it as being illegal to show that paper at this time not pleading surprise.

The Court: The witness has only been asked to identify the paper, if that is his signature. There is no question about the identification of the paper.

Q Now, do you think by reference to that statement, which was signed by you on the 11th of May, just a couple of weeks after this occurrence, that you would be able to refresh your recollection as to the headlights of your car that was taken? A Yes.

The Court: Is it necessary to refresh your recollection?

The Witness: It has been so long, I do not think I would remember it now.

The Court: Well, it is necessary?

The Witness: Yes, sir.

Q Then I show you the paper and ask you to read it and tell us after you have read it whether or not your recollection has been refreshed on the subject? Have you read the statement? A Yes.

Q Does it refresh your recollection on the subject? A Yes.

Q Now, having read it, and your recollection having been refreshed, can you tell us what the condition of your headlights were at the time just before your car was taken from in front of your house? A The right headlight was not burning.

Q The right headlight would not light? A And the two rear fenders were bent.

Q Now, then, the car was returned from Boettner's garage? A Yes.

Q And when it was returned to you, did you find anything wrong with the car, the mechanism of it? A Well, they fixed it up for me.

Mr. McGeehan: I object to that as immaterial.

The Court: All right. He said they fixed it up for him.

Q What was fixed? A I do not know what was done to it. The insurance company took care of it.

Q Well, was the radiator broken or the rear end broken?

Mr. McGeehan: I object to that as leading.

A I do not remember exactly, but the insurance company took care of everything that was necessary.

Q Well, it was fixed at Boettner's garage and you don't know what was done with it? A No.

Cross examination by Mr. McGeehan.

Q Were your own license plates on? A Yes.

Q The same plates you had always used? A Yes.

Cross examination by Mr. Becker.

Q Mr. Shapiro, when did you first leave the car in front of your home? A Sometime in the afternoon.

Q Of April 21st? A Yes.

Q Sometime in the afternoon, and did you leave it for the entire afternoon? A Yes.

Q Did you leave it there overnight? A Yes.

Q Was it there the morning of April 22nd? A Why, I did not look for it until the afternoon.

Q Of the following day? A Yes.

Q When did you know of your own knowledge that the car was stolen? A Sometime around noon my wife called me and told me the car was not there.

Q Told you the car was missing on April 22nd? A Yes.

Q And you do not know who stole it? A No.

Q You did not know that the car, if it was stolen, or what had happened to it, you did not know just what happened to it until your wife called you up on the 22nd of April, is that right? A Yes.

JOHN F. BULGRAN, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Bulgran, where do you live? A At the present time I live 8 Lakeside Drive, Madison.

Q Won't you keep your voice up? A It is a pretty tough job right now.

Q And in the month of April, 1929, where were you living? A 660 Sanford avenue.

Q Newark? A Yes.

Q And what is your business? A At that time I was a mechanic for the Sundry Electric Company.

Q Now, 660 Sanford avenue, where is that with reference to the Grossman drug store? A The entrance to that is not on that map. It is on Lenox street, the entrance to the apartment.

Q So, 660 Sanford avenue, is that the same building where the drug store was in? A Yes.

Q Did you live over the drug store in the same house? A I did not. If this was filled in, that would be the same building. On the same floor with the drug store.

Q That is on the first floor? A Yes.

Q And what part of the street would be reached in leaving your home, would you go out on Sanford avenue? A And I come out on Lenox street.

Q But the entrance on Lenox street is known as 660 Sanford avenue? A Yes.

Q Do you remember the morning of April 22nd? A Yes.

Q And about what time did you leave your home that morning? A Well, between eight and nine, after eight.

Q I show you a photograph, Exhibit S. 8, and ask you to show us the entrance to your apartment on that photograph? A The entrance is on Lenox street.

Q Just behind the tree that is shown on the photograph there, is that right? A Yes.

Q Am I pointing to the proper place? A Yes.

Q Now, you say you left your home that morning about what time? A Between 8 and ten after 8.

Q Now, when you came out was there anything that attracted your attention? A The thing that attracted my attention was a car, being there was no garages up in that district, there were three people who had cars there, and if there was an odd car in the morning, we used to wonder who was the owner.

Q What kind of a car was it? A Chrysler.

Q What type? A Sedan.

Q Do you know what color it was? A Blue.

Q Now, your attention having been directed to this Chrysler sedan, did you see anybody in or near the car? A There was one man standing outside of the car with his foot resting on the running board of the car, but the door was not all the way closed or all the way open.

Q Was there anybody in the car? A There was others in the car, but it being a rainy morning, I could not see through the windshield clear.

Q Do you know how many were in the car? A Two in the front and one in the rear.

Q Three in the car and one man— A Outside.

Q Where was that car situated? A On Lenox street.

Q And where was it facing? A Toward Stuyvesant avenue.

Q That is, the back of it was toward Sanford avenue? A The back of it was toward Sanford avenue.

Q That is, it was on the same side of the street as your house? A Yes.

Q And with reference to the corner of Sanford avenue and Lenox street, where was it located? A The easiest way for me to say that was that the rear end of the car was right even with the last part of the National Grocery window. The front part of it was right up against the back of my Chevrolet coupe.

Q You had your car there? A It was right behind mine.

Q And you were going out in your automobile? A I was.

Q Will you say the rear of this car— A Was diagonal with this window.

Q Was diagonal with the end of the window of the National Grocery on the Lenox street side? A Yes.

Q And the end of the window which is on Stuyvesant avenue is just a block east of Sanford avenue? A Yes, a block on one side.

Q Yes, it is east of Sanford avenue? A Yes, sir.

Q Did you know the deceased, Morris Grossman? A Yes.

Q Now, on the morning of April 23, did you speak to anybody about what you had seen on the morning of April 22nd?

Mr. McGeehan: I object to that as incompetent.

Q Answer yes or no.

Mr. McGeehan: One minute. I object.

The Court: I will admit it.

A Yes.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q To whom did you speak?

Mr. McGeehan: I object to that as being hearsay, whether the conversation is given or not. It is not probative of anything.

The Court: I will admit that.

A Dectective Apgar.

Q As a result of the conversation, did you go anywhere? A Not that morning.

Q Well, did you go anywhere at any time as a result of the conversation? A I talked to him that morning and I did not see him again until the 25th.

Q Then when you saw him at that time did you go anywhere? A Police Headquarters.

Q Then did you go anywhere else? A Boettner's garage.

Q That is on Railroad avenue? A Yes.

Q And did you see anything there that you had previously seen? A Yes.

Q What was it? A A Chrysler sedan that I had seen on the morning of the 22nd.

Q Did you identify it at that time? A Yes.

Q I show you Exhibit S-5, and S-6 and ask you whether or not those are photographs of the automobile that you saw at Boettner's garage and the automobile you saw on the morning of April 22nd on Lenox street and Sanford avenue? A Yes, sir.

Cross examination by Mr. McGeehan.

Q How long did you live there, Mr. Bulgran? A Oh, I lived there a period of four months, I guess.

Q And where did you work at that time? A The Sundry Electric Company.

Q What time did you get to business as a rule? A A quarter of nine.

Q Where was the place of business you were going to? A Avenue C.

Q Avenue C in Newark? A Yes.

Q In the Down Neck section of Newark? A Yes.

Q So that you had a little over a half an hour to get from the Western end of the city to the Eastern end? A Yes.

Q Were you going to drive to the downtown section? A No.

Q Well, which route did you take? A Down Clinton avenue to Broad and South and then down South to Parkhurst.

Q Well, you did not have very much time to make it. A At that time I had a position if I was late it did not make any difference.

Q If you were a few minutes late it would not hurt you? A No.

Q But you tried to get there regularly every day? A Yes.

Q And you tried to get there a quarter to nine? A Yes.

Q And this car that you were going to use was parked on Lenox street? A Yes.

Q Right in front of your door? A Not exactly, about ten feet up.

Q And that door was how many feet down from Sanford avenue? A It is in the center of the building.

Q I know, but how far is that, is it fifty feet? A Oh, just about twenty-five to thirty feet.

Q I think you showed us on the picture. A I can show you better here.

Q Well, that is a little better than twenty-five or thirty feet from the corner? A Yes. I am a poor judge of distance.

Q What would you estimate it, looking at the picture? A Between forty and fifty feet.

Q And your car was about ten feet nearer to the corner than that door is? A Yes.

Q This other car that you speak of was then parked somewhere behind you? A Right behind me.

Q Both of them facing toward Stuyvesant avenue? A Yes.

Q Now, when you went out, were there other cars besides yours and that car parked on Lenox street? A Yes.

Q How many of them? A Two.

Q And the thing that made you notice this other car was the fact that you had never seen it there before? A Yes.

Q That was the only thing that drew your attention to it? A Yes.

Q You got into your car, I suppose? A Yes.

Q And started up the motor and drove away? A Yes.

Q And you did not look at the men in that car? A Well, it was none of my business who they were I did not bother to look so much.

Q And just wondering whether there was a new tenant around there and some of them had left the car in the street, is that right? A Yes.

Q Now, you did not take the number of that car? A No, I did not take time to bother. I had no cause to take it down.

Q It was a regular standard Chrysler? A Yes.

Q Dark blue in color? A Yes.

Q You see a great many cars like that, don't you? A Yes.

Q When you were taken by the detective down to Boettner's garage, you saw a Chrysler sedan there of the same general appearance as the one you had seen on the 22nd of April? A Yes.

Q And because it was the same model, or type of car, and the same car, you believe it was the same one you had seen, isn't that right? A When I identified the car at Boettner's garage, I identified it by a smash on the rear fender.

Q This car was parked behind your car and you went from your door not straight out to your car, but ten feet on an angle, and just looked at that car and wondered what it was doing there and whose it was and got into yours—you did not make much of an examination of the rear fenders? A I beg to differ. I worked for an automobile concern as appraiser, and I have a general habit of looking at other cars on the road.

Q In other words, you have a personal interest in it? A Yes.

Q Sometimes it looks like a prospective customer, is that right? A Yes.

Q Now, on this car, on the picture that is in evidence, S-6, is that mudguard or fender on the rear about the same as it was when you saw it or is that repaired from the picture? A No, sir; it is the same.

Q The same? A. Yes, but this is pretty well rippled in here.

Q Pointing to the top of the mudguard. Well, now— A The fender in that picture is not as deep as I can remember it on that morning.

Q Well, of course, on this picture you see a lot of white—I do not know what you call it—paint or white substance.

Mr. Fisch: It has been testified to as being finger print powder.

Q. Yes. You see that, don't you? A. Yes.

Q And of course, some of that is on the mudguard here in the rear? A Yes.

Q And it was not very much dented—I mean it was not ripped and hanging off, or in a condition that was unusual on any car, was it? A No, sir.

Q Did you go behind and take a look at the fender in the rear and mudguard? A No.

Q Just glanced at it as you got into your car? A Yes.

Q Beyond that fact, you would not be sure that that was the same car would you, except that it was a Chrysler that was blue and had some disfigurement on the right mudguard? A I would not say that, because I have a slight recollection of the license plate on the car.

Q You have a slight recollection of that too? A Yes.

Q Because you were in that business? A No, but it is not the same number as the car. It was not a 3-E, it was a 4-E, but I do not know what the rest of the number was.

Q But you do remember it was a 4-E? A I can possibly be wrong.

Q All right. Whatever your recollection is, it is that it was a different one than this one? A I would not say that.

Q Well, you said it was a 4-E? A I remember there was an E, before the license, with another number, it could have been a 4, 3 or 2.

Q Was there something before the E? A There was something before the E. That is a slight recollection I have.

Q And when you said 4-E, before instead of 3-E, was that your recollection that there was a 4? A I would not say it was a 4, or I would not state it was a 3. There was another number before the E.

Q You did not take the number down? A No.

Q You did not look at it for the purpose of making a note of it? A No.

Q Just looked at it the same as you would any other car and have a recollection there was an E? A Yes.

Q And of course, you know a great number of Essex cars have an E on them? A Yes.

Q So that did not help you identify this car? A No.

Q And the mudguard did not differ a lot from the mudguards on the street? A Not positively.

Q And you had to rely entirely upon its being a Chrysler? A I am relying upon my memory.

Q Are you sure it was a Chrysler? A Yes. I could not help that, because if I backed up about an inch I would have backed into the radiator.

Q You would not be sure that the car you saw in the garage was the same car you saw in front of your car? A Yes.

Q Merely because of the similarity and type of the car? A Yes.

Cross examination by Mr. Becker.

Q Where was this Chrysler car relative to the rear of your car? A Right behind it; right up against the back end.

Q Which license plate did you see? A The front.

Q The front? A Yes.

Q Wasn't that front license plate right up against your car? A There was another car in front of me. I had to look back. There was only about two inches of moving space to get out of there.

Dr. Harrison S. Martland, recalled, direct.

Q And did you pull up in the rear of this blue Chrysler? A No, sir; when I got out of my parking space I went on down the hill.

Q Where did you stand when you saw this rear damaged fender? A I gave the car the general over-look as I come out the front door. I did not go out the front door, I come out of the back door.

Q How long did you look at the car? A I should judge about three or four minutes. I had a good heavy brief case which took me three or four minutes to carry from the back door.

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

Direct examination by Mr. Fisch.

Q Dr. Martland, have you since you left the witness stand had an opportunity to examine Exhibit S. 4 for identification under a strong magnifying glass? A Yes, I have.

Q And have you had an opportunity to determine whether or not on the butt of the bullet, Exhibit S. 4, there was any substance? A Yes, there was.

Q And what is the substance? A Apparently considerable wax with concentric lines in the wax as if it had been revolved on some point.

Q Now, have you with you some chloroform or ether? A I have.

Q And will you be good enough so we are not spending the time of the jury while you are doing it, to step down and go over to the window and attempt to remove the wax substance without damaging or injuring the bullet in any way

with the application of chloroform or ether? A Yes.

Mr. McGeehan: I think before this is done that it ought to be shown that is a fact, if it be a fact, that whatever substance is upon that bullet came there since Dr. Martland last had it in his possession, because of course if that bullet had that on at the time he had it and had that wax substance in it, or upon it, it would not be proper to remove it now.

The Court: Well, now, you may ask him now.

Mr. McGeehan: Doctor, you just used a powerful microscope or magnifying glass to determine whether or not there is a foreign substance in the butt, I think you call it, of that bullet, is that right?

The Witness: Yes.

Mr. McGeehan: By the use of that you were able to determine that there is or probably is such a substance.

The Witness: Yes.

Mr. McGeehan: Now, you did not know without the use of the magnifying glass that there was a wax substance in there?

The Witness: Well, with the naked eye it looks greasy at the end, but with a magnifying glass it looks still greasier and there is concentric lines.

Mr. McGeehan: You never previously examined that for the purpose of determining the question of whether there was wax or grease on it?

The Witness: No, there was no grease on the bullet when I first saw it except human grease on the outside.

Mr. McGeehan: Well, now, doctor, how do you know that you did not make an examination when you had that bullet in your possession to find out whether there was any grease or wax in there?

The Witness: No.

Mr. McGeehan: And that first came to your thought or mind when it was visible there was no X there?

The Witness: Yes.

Mr. McGeehan: Now, you do not know of your own knowledge whether or not whatever substance is there was there before it left your possession or after, are you?

The Witness: It was not there before it left my possession, because I am reasonably sure and the envelope states that I marked the butt of that bullet.

Mr. McGeehan: But you do not remember marking it?

The Witness: I do not exactly remember it, because I marked so many.

Mr. McGeehan: But you marked on your envelope that you did mark an X in the butt of the bullet?

The Witness: Yes, that is what the envelope states, and usually it is there.

Mr. McGeehan: And on the other one it is there?

The Witness: It is there on the other one.

Mr. McGeehan: What I am getting at, you know, having previously looked especially at the butt of that bullet you do not remember that it is in the same condition with respect to grease or wax that it was at the time you turned it over?

Mr. Fisch: I object to that. The doctor has already answered that and said there was no wax or grease on the butt of that bullet up to the time it left his possession.

The Court: I will permit the question.

The Witness: Well, if I marked this individual bullet, I certainly would notice any appreciable amount of foreign substance there when I marked it, which I do not recall doing.

Mr. McGeehan: You do not recall one way or the other the bullet you had had wax substance in it?

The Witness: Well, I am assuming I marked that bullet, and if I marked the bullet I did not see any large amount of wax like this bullet shows.

Mr. McGeehan: Your Honor, it seems to me that it is perfectly easy for the State to show whether or not there has recently been put upon that bullet some wax—I presume possibly for examination purposes, and if that be shown, and the person familiar with that says that he did change the appearance of the surface, insofar as the wax is concerned, why, it might be proper to remove it, but I don't think the condition should be changed.

The Court: The only purpose is to enable the doctor to locate his identifying mark.

Mr. McGeehan: Suppose he is not certain if the wax is there or not. He said "I made an X on it," he says, "I am pretty certain. I would have noticed if there was some wax on it." Suppose the bullet that he marked, if he marked it, were to have had at that time a waxy condition, or the bullet that came out of the body, and an X were marked on it, to remove that condition of that surface at this time, unless it were put on since, would be to destroy the value of it as evidence.

The Court: It would not destroy the value of the bullet as evidence, because the bullet has no value as evidence unless it can be identified as the particular bullet, and the only thing which this is allowing him to do, is to permit the doctor to identify whether it is the particular bullet. I will allow you an exception and permit it to be done.

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

WALTER D. VAN RIPER,
Judge.

JOHN J. BRACKEN, recalled in behalf of the State.

Re-direct examination by Mr. Fisch.

Q Mr. Bracken, did you go up to this drug-store up on Sanford avenue, No. 658, since you have been on the stand? A Yes, sir.

Q And did you make an examination of this store with reference to whether or not there is

a radiator in the store on the right side as you enter the door? A I did.

Q And is there or isn't there? A Yes, there is.

Q And it is not shown on Exhibit S. 2, is it? A No, sir.

Q Now, is there also a radiator shown in the place which should be shown on the map? A There is, yes.

Q So that you just neglected to show that additional radiator? A That is it.

Q When you step down from the stand can you easily mark in that radiator? A I can, yes, sir.

Q And while you were there did you determine what kind of a floor there was in that store? A In the front of the store there is a wooden floor and on the wooden floor is inlaid linoleum, and in the rear, in the back, in the prescription department is a wooden floor, in back of the counter it is wood.

Q So the rear of the store, in back of the prescription department, and in back of the counters it is wood floor and in the front it is wood with inlaid linoleum? A Yes, sir.

Q Now, I ask you also if you would be good enough to determine for me the grade of Lenox street, the percentage of grade. A The grade on Lenox street is 4 per cent., 4 feet in 100.

Q So that in every 100 feet there is a drop of 4 feet, is that right? A Yes, sir.

Q And I think, Mr. Bracken, Mr. Becker asked you to try to find out the dimension of some trees. Did you do that? A I did.

Re-cross examination by Mr. Becker.

Q Mr. Bracken, did you examine or measure that tree? A Yes, sir.

Q What is the height and the dimension and the width of the foliage? A Well, as I said, in diameter it is 6 inches, and it varies as you go up. I have taken it about the height as you look at it, and about to the top it is 20 feet in height, and the diameter of the spread of the foliage, as we call it, would vary between 10 and 12 feet. I stated from my observation it was 10 feet.

By Mr. Fisch.

Q What was the height of this radiator that you were going to draw on this map? A One foot and two inches. It is a very low radiator and sets close to the ground.

LEONARD SACHS, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Sachs, what is your business? A Insurance broker.

Q Where do you live? A 658-660 Sanford avenue.

Q And is that the same house in which Grossman's store was located? A Yes, sir.

Q And the same house in which Mr. Bulgren lived, is that right? A Yes, sir.

Q And the entrance to that house is on Lenox street? A Yes, sir.

Q And were you living there in the month of April, 1929? A Yes, sir.

Q Do you remember leaving your house on Monday, the 22nd of April? A Yes, sir.

Q About what time did you leave? A About twenty after eight.

Q And where were you going? A To get the car, to go up Lenox street.

Q Now, did you notice anything on the street that attracted your attention? A Yes, I noticed an automobile.

Q What kind of an automobile? A A Chrysler, four-door sedan, color blue.

Q And where was it standing? A It was about one-half way between our doorway and the corner of Sanford avenue.

Q And what street? A Lenox street.

Q On which side of the street? A The south side.

Q That is on your side of the street? A Yes, sir.

Q And did you notice whether there was anybody in the car or not? A There were four men in it.

Q What caused you to pay any particular attention to that car? A Well, in the first place it was a strange car. Some of the tenants in the house used to park their cars overnight, but this was a strange one, and there were four men in it and it struck me kind of funny there would be four men that time of the morning doing nothing.

Q Did you notice anything about how they were dressed? A They all had caps on, the rest I could not tell, I don't remember.

Q And did you notice anything about their features? A Only one. The man in the left rear corner.

Q What did you notice about him? A Well, he had a dark complexion, had a thin face, fairly long, you might describe it.

Q And would you say you would be able to recognize some or any of the men that you saw in that automobile that morning? A I only had a recollection of the one, the other three, in the first place I did not pay particular attention, and in the second place I could not see them, a couple of them had their backs turned towards me.

Q Did you look at the license plate of this automobile? A I did.

Q Did that make some impression on you? A Yes, sir.

Q Now, subsequently, did you go anywheres with reference to what you had seen that morning?

Mr. McGeehan: Objected to as immaterial and not binding on the defendants.

The Court: I will permit it.

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

WALTER D. VAN RIPER,
Judge.

Q Well? A Yes, I went somewhere.

Q Where did you go?

Mr. McGeehan: I object to that on the same ground.

The Court: The same ruling.

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

WALTER D. VAN RIPER,
Judge.

Leonard Sachs, for the State, direct.

A On Friday I went down to police headquarters and I was asked to look through the Rogues Gallery—

The Court: Never mind what you were asked.

Q What did you do?

Mr. McGeehan: I object to that as not being evidential of any fact except the witness' action.

The Court: I don't want you to tell in detail what you did or how you did it. You can ask if he can identify it. It is perhaps leading, but I will permit it in that way.

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

WALTER D. VAN RIPER,
Judge.

Q Did you identify anybody?

The Court: Answer that yes or no.

Mr. McGeehan: Of course that objection applies to the new question.

The Court: Yes.

A That would be kind of hard to answer.

The Court: Can't you answer that yes or no?

The Witness: It would be hard.

Q What is your answer?

The Court: He said he cannot answer it yes or no.

Mr. Fisch: I did not think he could.

Q Well, after you went down to police headquarters where did you go? A Up to the East Orange City Hall.

Q With whom?

Mr. McGeehan: I object to that unless it bears upon some facts in the case.

The Court: I will permit it.

A I drove my own car and followed the car in which there were two detectives.

Q And what did you do in the City Hall in East Orange?

Mr. McGeehan: I object to that as immaterial. What he did there has no bearing on the facts in the case and as not in the presence of the defendants, and we are not bound by his speech or actions.

The Court: Don't tell us anything that you said there or that anybody else said. You can tell us what you did.

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

WALTER D. VAN RIPER,
Judge.

A I looked at a Chrysler automobile which was in the garage, and I also looked at some pictures in the Rogues Gallery.

Q Now, after having looked at those pictures and having looked at an automobile, were you able to identify that automobile? A I was not.

Q Were you able to identify any of the pictures?

Mr. McGeehan: I object to that as immaterial.

(Question withdrawn.)

Q After having looked at those pictures in East Orange, where did you go? A I went about my business.

Q Now, then, subsequently did you go to Boettner's garage? A On Saturday, the next day.

Q Did you see an automobile there? A I did.

Q And were you able to identify that automobile? A Not positively. It was the same type, color and appearance as the one I had seen on that morning.

Q I show you Exhibits S. 6, S. 5 and I ask you whether or not that is the automobile you saw at Boettner's garage?

Mr. McGeehan: I object to that. I have no objection to asking him if that is the automobile he saw in front of his house, but what difference does it make whether he saw it in Boettner's garage?

The Court: I suppose the next question will be is it the same automobile that he saw in front of his house. I will permit the question.

A What was the question?

The Court: Is that the automobile you saw in Boettner's garage?

The Witness: It seems to be, yes, sir.

Q And is that the automobile which you say seems to be the automobile or looks like the auto-

mobile which was in front of your house on the morning of April 21st?

Mr. McGeehan: I object to that. The witness hasn't said that but Mr. Fisch said that.

The Court: The objection is sustained. I don't think he said that, Mr. Prosecutor.

Q Can you tell us, with reference to the automobile which you saw at Boettner's garage, the photographs of which I am now showing you, and the automobile that was in front of your house on the morning of April 22nd— A (Interrupting.) It was the same make, the same color, it was a four-door sedan, and it was the same model.

Q Do you remember anything about the license number? A It was an Essex County license, and it had a number in the front of it, that is in front of the E.

Q You say that you looked at some pictures in the Rogues Gallery? A Yes, sir.

Q Did you pick any pictures out?

Mr. McGeehan: I object to that as absolutely hearsay and not binding on the defendant, his actions or speech or statement. Picking out a picture is the same thing as a statement.

The Court: Objection sustained.

Q Did you do anything there in looking over these pictures with reference to the men that you had seen at the corner of Lenox street and Sanford avenue on the morning of April 22nd?

Mr. McGeehan: Objected to.

The Court: Answer it yes or no.

A I did.

Q What did you do?

Mr. McGeehan: I object.

The Court: Sustained.

Q Who was present when you were examining the pictures? A About a half a dozen men, detectives, I believe.

Q Did you know the names of the detectives? A Not offhand.

Mr. Fisch: Is Detective Apgar in court or Detective Rogers?

Mr. McGeehan: I have no objection to your asking him a leading question.

Q Are those the two detectives, Apgar and Rogers, who were present? A In East Orange they were present. I don't know about Newark.

Q I am talking about East Orange. A Both were there.

Q When you were in East Orange and looking over those pictures did you see the pictures of any of the men, or pictures that looked like any of the men that you had seen in the morning on Lenox street?

Mr. McGeehan: I object to that as absolutely of no evidential value in any way at all.

The Court: Sustained.

Leonard Sachs, for the State, cross.

Cross examination by Mr. McGeehan.

Q I understood you to say, Mr. Sachs, that you could not be sure that the car that you saw at Boettner's garage and the car that you saw on the picture is the identical car that you saw on Lenox street? A I cannot be positive about it.

Cross examination by Mr. Becker.

Q Mr. Sachs, you left your home at 8:20 in the morning and where was your car? A My car?

Q Yes. A In the garage in the rear of 157 Richelieu Terrace.

Q Where?

The Court: In the rear of 157 Richelieu Terrace.

Q And where is Richelieu Terrace relative to Sanford avenue? A It runs parallel to Sanford avenue and it is one block west.

Q And do you recall the weather that morning? A To my recollection it was clear.

Q Clear on the 22nd of April, clear weather? A Yes, sir.

Mr. McGeehan: I ask that the testimony of this witness be stricken from the record as being of no evidential value at all and not being connected with the car of which the State put pictures in evidence.

The Court: Motion denied.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

DR. HARRISON S. MARTLAND, recalled.

By Mr. Fisch.

Q Now, Dr. Martland, since you last left the witness stand, did you do anything with reference to Exhibit S. 4 for identification? A Yes, sir, I went into the other room and dropped the bullet in a paper cup and poured about one-half ounce of ether over it, and shook it around and tried to remove some of the apparent grease which is in the butt of the bullet, enough until I could distinguish easily with a hand glass a cross mark in the butt of the bullet. It is not very plain, but it can be seen.

Q Is that the cross mark on that bullet by which you identify it? A I identify this bullet, yes. The wax is not completely removed yet, and it is very difficult to see, you have to get it in the right light, but it is there.

Q You say there is still some wax in there? A Yes, sir.

Q But you are certain that the cross mark is there, that your identifying mark is there and that that is the bullet? A Positively.

Mr. Fisch: I renew my offer, I offer Exhibit S. 4 for identification in evidence.

By Mr. McGeehan.

Q Doctor, your identification of this bullet is based entirely upon the presence of the cross

there? Is that right? A Yes, and the presence in an envelope which I have marked, and the cross on the butt.

Q Now, there appears to be visible to the naked eye a slight scratch in the butt of the bullet, slightly off the center point of it. The cross that you saw with your magnifying glass, is it a large or a small one with relation to the butt of this bullet? A It occupies, perhaps, the fine ends of the line, goes over three-quarters of the side of the butt, or at least one-half, anyway.

Q Doctor, in removing the wax or whatever was there, was there any possibility of scratching this? A No, sir.

Q Inside just now? A No, I just wiped it out with a soft bandage, carefully.

Q I show you what appears to be quite a bright mark, visible to the eye, or at least to my eye, in this light? A On the rim?

Q No, near the center. A That's right, that is the cross.

Q Is that the cross? A That is the cross. If you get it in the right light, it is visible.

Q You can see it clearly there, because it is shiny, I mean, it is rather bright? A It is rather bright, it depends upon which why the bevel strikes the light, sometimes it is bright and sometimes it is not.

Q And that showed up when the wax came off? A Yes, sir.

Q And it is not a deep cross like the one made on the steel jacketed one? A It probably goes much deeper than we think it does, if it was enlarged and photographed.

Q Doctor, what would you estimate is the size of this cross, as you can see it from your

magnifying glass? A You mean one of the arms of the cross?

Q In other words, would you say it was a cross of about 1/16 of an inch in size, or is it a larger one? I don't know whether I can see it with my naked eye, that is what I want to get at. A Well, the very plain arms under the magnifying glass are at least one and one-half sixteenths, or possibly two-sixteenths and the other arms would go much deeper than that, probably, but they cannot be seen plainly because of some grease filling in to it.

Q Doctor, the butt in there is pretty dirty and sort of dull, isn't it? A Yes.

Q And this little cross is a little smaller than the one on the steel jacketed bullet, isn't it? A Yes, it is much smaller, because that bullet is much harder to mark.

Q Which one? A The lead one. This is a very deep conical butt, I usually mark them with the sharp point of a compass, with a scratch at the bottom, and this is a harder surface—

Mr. Fisch: When you refer to this, you mean Exhibit S. 3?

The Witness: S. 3, it is very much harder to mark, and the arms of the cross extend out almost to the middle of the surface.

Q But the cross on the lead bullet is a great deal smaller than the cross on the steel jacketed one? A Yes, sir.

Q Wouldn't you say that it is less than one-half the size of the one on the steel jacketed bullet? A Yes, I would say about one-half, as far as I can see it.

Dr. Harrison S. Martland, recalled, cross.

Q And it just appears over to the side of the center? A A little to the side of the center.

Q Now, lead cuts easily and deeply, doesn't it, doctor? A Yes, sir.

Q This is not cut deeply, is it? A It depends on what you mean by "deeply."

Q This is a slight scratch compared with the marking on the steel jacketed bullet? A I think perhaps some of it goes as deep as this scratch here, maybe deeper. It is hard to see, that's all.

Q And that came out after the liquid removed something? A Yes, sir.

Q Did all of that wax come out, doctor, that was in there? A Oh, I suppose there is considerable wax still in there, something of a foreign body.

Q Can you tell whether there is any wax underneath where that cross is, I mean by your magnifying glass? A I don't think so, I think we are down to bare lead where the cross is, I think the cross is a distinct cross in the lead.

Q You don't see any more wax there then, your cross, underneath where the wax is? A Well, between the arms of the cross there may be a little wax, yes, but the cross itself is in the lead.

Q Looking into this butt, doctor, it is easy to find the cross that you referred to, because they are the only shiny lines in there, aren't they? A I believe it is true, yes, sir.

Q You can see it with the naked eye, can't you? A I must confess that if you get it in a certain light you can see it with the naked eye.

Mr. Fisch: You don't mean to insinuate that Dr. Martland put any shiny lines on that, do you?

Mr. McGeehan: I don't mean to insinuate anything or answer any questions of the prosecutor put in that manner, your Honor. I am conducting a proper examination and the prosecutor cannot curry favor in that manner with the jury and get away with it.

The Court: I have not heard any insinuations.

Mr. McGeehan: Of course not.

Q Doctor, you usually mark them and put them in an envelope, don't you? A Yes, sir.

Q How long has this been out of your possession? A My records—I have stated in my previous testimony, since May 1st.

Q That is shortly after you made your autopsy and removed the bullet? A Yes, sir.

Q A good many months ago, that is what I am trying to get at? A Yes, sir.

Q And since that time you have not seen it until today, have you? A That's it, yes, sir.

Q You very seldom have any difficulty in finding any marks that you put on a bullet, do you, when you mark it with an X?

Mr. Fisch: I object to that, if the Court please.

Mr. McGeehan: Wait until I finish the question. I don't want to compete in lung power or bellowing with the prosecutor.

(Question read.)

The Court: Sustain the objection.

Q Do you usually mark—what I am getting at—your own identification, doctor, it is usually

an X, or it is sometimes some other kind of mark, do you usually mark deep enough so as to be easily visible? A Yes.

Q And in this case it is not so easily visible? A I think if it had not been overlaid with the wax it would have been easily visible.

Q You think the wax is what causes this? A Yes, sir.

Q Can you be sure, in your own mind, doctor, that this is the same bullet that you took out of the body? A Yes, I am sure.

Q You are sure? A Sure as I can be sure, it is my opinion that this is the bullet that I removed from the body.

Q Does the size of the marking, doctor, the smallness of that X and its position, indicate anything to you at all? A Yes, it indicates that this bullet was a very difficult bullet to mark on account of the deep hollow in the butt and the sharp convexity of the apex.

Q That is, you sometimes do use a small X? A Yes, it is not spread all over, but it sometimes is put on the bottom.

The Court: Let the bullet be marked in evidence.

(Exhibit S. 4 for identification is marked S. 4 in evidence.)

By Mr. Fisch.

Q I want to know the substance that you used in removing the wax? A Ether.

Q You used that ether with some gauze, did you? A I shook it around in a paper cup with ether until with a magnifying glass we could begin to see something and then I carefully wiped it with a little bit of gauze and dried it.

Q And in your opinion, did that ether or the gauze scratch the bullet in any way? A No, sir.

Mr. McGeehan: I think while it is fresh in their minds, I would like the jury to look at the two bullets.

The Court: I have no objection to letting them look, but it will take some little time and it might just as well be done after recess as it can be done now.

Recess for one hour.

After Recess.

WILLIAM J. CALLAHAN, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q You are a county detective attached to the Prosecutor's office? A I am.

Q And also attached to the homicide bureau in that office? A I am.

Q I show you Exhibit S. 4, this lead bullet, and ask you if you have seen that before? A Yes.

Q When was the first time you saw it? A On the first day of May, 1929.

Q The first of May? A At the laboratory of Dr. Martland.

Q And in whose possession was it when you first saw it? A Dr. Martland's.

Q And what, if anything, did he do with the bullet in your presence? A He took the bullet

from this envelope and marked it at the base of it with a small cross, and then placed it in the envelope and turned it over to me with another bullet in another envelope and I signed a receipt for it.

Q And when he marked it at the base of it, did you see the bullet with a mark on it? A I did.

Q And then when it was put in the envelope and turned over to you and you signed a receipt, what did you do with the bullet? A I brought it to our office and turned it over to Lieutenant Linarducci.

Q And Lieutenant Linarducci is in charge of the homicide bureau in the Prosecutor's office? A He is.

Q And did you have the bullet again in your possession? A On the 15th day of June, 1929, Lieutenant Linarducci instructed me—

Mr. McGeehan: Never mind.

Q As a result of the instructions, what did you do? A I took the bullet to Colonel Goddard's laboratory, 225 West 25th street, New York.

Q That is, the steel jacketed bullet and this lead bullet? A Yes.

Q Now, with reference to the bullet S. 4, when you took the bullet over to Major Gorrard's laboratory, did you observe the bullet when you got it over there? A I did.

Q What did you observe as to the marking on the bullet? A I called the Colonel's attention that the bullets were marked on the base by the County Physician.

Q Did you see the mark at that time? A I was pointing it out to the Colonel.

Q And was it the same mark you saw the doctor make on it on the first of May? A Yes.

Q And what did you see Major Goddard do with reference to this bullet? A He put this under a comparison microscope. At the base of the comparison microscope the bullet is held in a small chock. The fact that that chock has a wax side there and the purpose of the wax is not to destroy any markings or lines on the bullet. He had that in there probably three-quarters of an hour to an hour.

Q Then do I understand that the base of the bullet was put into the wax which held the bullet into place at the microscope? A Yes.

Q And after he had completed his examination did you receive the bullet into your possession again? A I did.

Q From whom? A From Colonel Goddard.

Q And after you received it in your possession, was it disturbed in any way by you? A No.

Q What did you do with it? A Returned it to Lieutenant Linarducci.

Q In the envelope? A In the envelope.

Cross examination by Mr. McGeehan.

Q Then you are sure that Dr. Martland marked both of the bullets that were turned over to you? A In my presence.

Q He used the same instrument for marking both? A Yes.

Q What was that instrument? A A sort of long—it looked like a medical instrument, of silver or steel.

Q And a pointed instrument? A Yes.

Q Fairly large? A Well, about two and a half or three inches.

Q Now, when you got the bullet back from the Professor—the Major in New York, did you observe the markings on them then? A No, sir; I didn't.

Q You did not look at them at all? A No.

Q And the marking that was on the bullet when you saw it after getting it from Dr. Martland was plainly visible to you, was it not, on both bullets? A Yes.

Q You could see it with ease? A Well, I recall seeing it very well.

Q Well, do you remember what the markings looked like? A Well, they were sort of an X.

Q Have you a recollection of these particular markings now, what they looked like then? A Well, I recollect very well his marking them.

Q Do you recollect looking at the markings and showing them to Major Goddard in New York? A Yes.

Q Now, from your recollection—having done that, does there live in your memory what those markings appeared like? A Why, yes.

Q Were they both well defined marks? A They were.

Q About equal depth? A Well, that I could not say.

Q You did not have any difficulty or have to look closely or carefully for the markings? A No, sir.

Q Now, the steel jacketed bullet, you have seen these today? A Not today, no, sir.

Q Well, I mean within the last few days have you looked at them? A No, sir, I have not.

Q Well, the markings on those two bullets, do you remember whether they were about equal size or depth? A No, I do not, I know they were seen well enough.

Q They were clearly marked? A Clearly marked.

Q Now, I show you the steel jacketed bullet, and is that the kind of cross you saw on it at the time? A Yes.

Q Well, now, was that the kind of X on the other bullet? A The other one was more up to the edge, up here (indicating). While marking the bullet, he had difficulty in marking it.

Q You heard the examination of Dr. Martland today? A I did.

Q And you heard me ask him whether the mark is off the center and toward the adge. They are marked S. 3 and 4. One is marked lead and the other steel jacketed. Now, of course, you heard Lieutenant, my question to Dr. Martland with respect to where that marking is, didn't you? A Yes, sir.

Q When you saw the lead bullet put in the wax base under the microscope, did you have any fear of the passing of that mark on it?

Mr. Fisch: I object to that.

The Court: Sustained.

Q And did not look for it afterward to see whether it was there or not? A No, sir.

Q Was it black inside, this lead bullet, do you know? A Previous to the test or after?

Q Yes, previous to the test. A Well, it was some black, yes, it was not real bright, outside of the cross was bright, the marking on it was bright.

Q Do you remember the size of that cross at all, Mr. Callahan? A Outside of seeing it was small, no, sir.

Q Of course, you heard today the questioning bringing out that it was small. What I want to get at is this: Do you remember it was small from your recollection of it before or because your mind was refreshed by the questions to the doctor? A No, sir, I don't think I could say whether the smaller cross is on the lead bullet or the smaller cross is on the steel, but I can say both bullets had a cross on them.

Q There was nothing, though, that made you feel that the lead bullet was marked more lightly than the steel was? A Not otherwise than Dr. Martland referred to it as being a hard bullet to mark when he had it in his hand at the laboratory.

Q Now, I show you this lead bullet and ask you to look at that. Can you see a crossmark? A Yes, sir.

Q Hard to see, isn't it? A Well, probably not.

Q Probably not hard to see? A No, sir.

Q I mean you have got to look pretty closely to see it, don't you? A No, I think I can see it very well.

Q Was that just like it looked after Dr. Martland gave it to you? A No, it looks a little darker.

Q It looks darker. Does it look just as deep as it looked when Dr. Martland gave it to you? A Yes, but the line cannot be seen so brightly there, it looks just as deep.

Q Do you know from your experience what material there is on the part where the steel jacket was marked? A No, sir, I do not.

New Jersey State Library

Mr. McGeehan: I don't think that the jurors have looked at the bullet.

Q Now, this wax that it was put in, how deep was that wax? A This is a block, you would have to get how large it is from the Colonel, because it is in the back of a chock, it is more of a protection for the projectile placed in there. You cannot see it very well by looking into it. You have got to look at the end in back. It has a wax background.

Q Is the bullet stood up like? A No, in this manner (indicating).

Q Pointing horizontally? A That's it, and the test is put on this side.

Q And what they call the butt of the bullet, is that stuck into anything? A That is in the wax well in back of the chock.

Q Now, is the bottom of the bullet resting on anything at that time? A It is caught in the chock.

Q That is the edges are caught in the chock? A Some gauze or something he has there which holds that bullet up.

Q Well, there is something clamping the bullet, isn't there? A That I cannot say either. The wax holds it horizontally or that gauze which comes over it holds it, I don't really know.

Q You are not sure? A No, sir.

Q So you don't know whether it is stuck in the wax deep enough to reach to the bottom of the hole in the butt or the recession in the butt? A No, I do not.

Cross examination by Mr. Becker waived.

JOSEPH LINARDUCCI, JR., sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q You are a county detective attached to the Prosecutor's office? A Yes, sir.

Q And bear the rank of lieutenant and are in charge of the Homicide Bureau in that office, are you not? A Yes, sir.

Q And Detective Callahan is connected with that bureau, is he? A He is.

Q You are his superior? A Yes, sir.

Q Did you or did you not receive from Detective Callahan Exhibit S-4, the lead bullet that we have been talking about. A I did.

Q When did you receive it from him? A On or about the 1st of May.

Q Did you examine it when you received it from him? A I did.

Q What, if anything, did you observe with regard to any markings that were on it? A An identification mark which Callahan told me had been made by Dr. Martland.

Q Where was that mark? A On the base of the bullet.

Q What kind of a mark was it? A A cross.

Q Have you seen the bullet today? A I have.

Q And is that the same mark that you saw on it at that time? A Yes, sir, excepting that I don't know that it is quite as clear now as it was when I first received it.

Q Now, then, after you received it from Detective Callahan, what, if anything, did you do with it? A Placed it in the file.

Q Was it in your possession? A Not in my physical possession, but it is in the file, which is locked, the file is locked and the key is kept in my desk.

Q The key is kept by you? A Yes, sir.

Q And was the bullet in the envelope which has been marked Exhibit S-4? A Yes, sir.

Q And resting in that envelope it was there in this file which you have control of and which was locked and which you have the key for? A Yes, sir.

Q How long did it remain there? A Until some time early in June.

Q Then what became of it? A I gave it to Detective Callahan along with Exhibit S-3 and a revolver and some ammunition.

Q And did you observe anything about the bullet at the time you gave it to Detective Callahan? A Yes, sir, I did.

Q What did you observe about it at that time? A I took both bullets out of that envelope to look them over and put them back in their respective envelopes.

Q And what, if anything, did you observe? A I noticed the identification marks on both bullets.

Q Were they the same then as when Detective Callahan had originally turned them over to you? A Yes, sir.

Q And did you again receive them back from Detective Callahan? A Yes.

Q When? A Later on that day.

Q Now, when you received them back from him later on that day did you observe anything about them? A I did.

Q What did you observe about them? A I observed that S-4 had a foreign substance in the

base so that the identification mark was not, could not be seen.

Q Did you at that time know what that foreign substance was? A Well, I thought I did, because I had seen previously some of the operations of Major Goddard.

Q You were familiar with the manner in which the bullets are placed under a microscope for examination, are you? A I have seen Major Goddard do that several times, go through the operation.

Q And after they were returned to you, to your possession by Detective Callahan, what did you do with them? A I put them back in the file.

Q Before you put them in the file, what did you do with them, if anything, with reference to the envelope? A I put them back in their respective envelopes.

Q In the file? A Yes, sir.

Q Did you lock it? A Yes, I did.

Q And did the key remain in your possession? A Always is.

Q And where have they been since that time? A In the file.

Q In your possession? A Yes, sir.

Q Until they were offered in evidence in this case and presented to Dr. Martland on the witness stand? A Yes, sir.

Q At any time while they were in your possession did anybody put any markings on any of these bullets? A No, sir.

Cross examination by Mr. McGeehan.

Q Lieutenant, all of your bullets that you receive from Dr. Martland arising from autopsies are marked with an X on the butt? A No, sir.

Q What? A No.

Q Most of them? A Yes. I would say most of them.

Q And, of course, that X is not any peculiar kind of X so that you could tell one from another, is it? A No.

Q It is just a regular cross when the identification is made out? A Dr. Martland, I am satisfied—

Q I am not asking you what you are satisfied with; I am asking you is it a fact that that is so? A Yes.

Q What reason was there for you looking for that mark in the butt of the bullet, why did you look at that and remember until now that you had seen it in each of these? A Because it is part of my investigation; part of my work in the proper preparation of the case.

Q All right. Now—

Mr. Fisch: Have you finished your answer?

The Witness: Yes.

Q Lieutenant, you have charge of this case, haven't you? A Yes.

Q And you say that you knew this—sometime before this case began that that mark that you were so particular to look at back in June or May, had become obliterated by wax or some other thing? A Yes.

Q Did you know that during the time that Mr. Fisch was examining Dr. Martland and up to the time that he was turned over to me for cross examination? A I did.

Q Did you suggest to Mr. Fisch that he ask Dr. Martland anything about the absence of that

X? A No, not exactly that. What I did say to Mr. Fisch when Dr. Martland could not distinguish his identification mark, that that base of the bullet had some wax in it when it came back from Major Goddard.

Q What I am getting at is this: You were sitting at the counsel table? A Yes.

Q You knew the envelopes were marked to the effect that the bullets were identifiable with an X, that is, it says it on the outside of the envelope? A Yes.

Q And you knew that that bullet was presented to Dr. Martland for the purpose of his identifying it as the bullet he took from the body of the deceased, is that right? A Yes.

Q And you knew that the one thing that identified it—withdraw that. That one of the things that identified it and which was put on there for the purpose of identifying it was missing from view at least upon that bullet so it could not be seen when you looked at it, didn't you? A Yes.

Q And you suggested nothing to be asked Dr. Martland in explanation of that until after I brought it out on cross examination and I looked at that bullet; isn't that so? A I suggested nothing, only that I told Mr. Fisch when Dr. Martland could not find his identification mark that the base of that bullet contained some wax which was probably put there by Major Goddard in his examination of the bullet.

Q As an explanation for the absence of the X on the butt of the bullet so far as the eye, or a microscopical examination of the butt of it was concerned, is that right? A Yes.

Q Now, this mark which you saw while in charge of the case and which you looked for because you are in charge of the homicide cases,

and I presume you looked at it knowing the importance of it in this case, did you observe anything about that mark that it was very light and small? A I cannot say that I did now.

Q Did you take in mind—withdraw that. When you knew through your experience that that bullet might be put into a foreign substance, was there anything about that part that you remember that made you worry because you might be afraid it would become obliterated? A No.

Q Did you say to Major Goddard when you got the bullet from him—you did not get it yourself? A No.

Q Did you communicate with Major Goddard in any way and say, "Major, there was a mark on this to identify this, and it is gone, I cannot see it; is there anything you left on that we can bring to take and put it in the condition such as it was when I gave it to you?" A I did not. May I make an explanation?

Q Certainly. A I read Major Goddard's report and then I remarked to Detective Callahan—

Q No. Did you communicate with the Major? A I did not, but I made some reference to the wax.

Q I have no objection to that. A That Major Goddard had left some of his wax in the base of the bullet.

Q But you did not show it to Detective Callahan? A Well, he was right there when I was speaking of the wax.

Q Did you then show the bullet to Detective Callahan? A Yes.

Q So he did see it after it came back from Major Goddard? A I presume he saw it. He was apparently looking at it.

Q And while he was apparently looking at it, you were calling his attention to the covering of wax? A Yes.

Q So that you believed that he must have seen it? A I believe he did.

Q Now, in spite of that, you left that covering of wax on there? A I did. That was an exhibit in a homicide case and I would not tamper with it.

Q Well, somebody had tampered with it in putting wax on it.

Mr. Fisch: I object.

The Court: Sustained.

Q Did you consider the removal of wax any more tampering than putting wax on it?

Mr. Fisch: I object.

The Court: The witness says he did not do anything to it.

Q Now, lieutenant, you looked at it this noontime after Dr. Martland left the stand? A Yes, I cannot say that I made a keen observation of it. I looked at it.

Q And you were very much interested in it? A Yes, but Mr. Fisch, when I had it under the magnifying glass—Mr. Fisch was talking to me.

Q He is more interesting than the bullet, is that right? A I think so.

Q Now, this question had come up during the morning and you must have looked at that pretty closely? A No, I cannot say that I did, Mr. McGeehan.

Q Well, you were not sufficiently interested in it to look at it particularly closely? A Well, I

looked at it under the magnifying glass and Mr. Fisch was talking to me at the same time and I had to answer Mr. Fisch.

Q Well, was he talking about the bullet? A I do not remember what he was talking to me about.

Q What? A I do not remember what he was talking to me about.

Q This mark that you saw on it, even with that casual glance you gave it at noontime, appeared the same as it did before it went to the expert in New York? A I made a casual glance, but I did not see any mark, because I did not look close enough.

Q Did you ever see such a small mark on a bullet identifying it? A Well, that all depends on the size of the bullet.

ERNEST W. MIEROU, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Dr. Mierou, where do you live? A Springfield and Sanford avenue, Irvington.

Q Are you connected with the Irvington General Hospital? A Yes.

Q In what capacity? A Attending surgeon.

Q And as an attending surgeon, did you have occasion to examine one Maurice Grossman? A I did.

Q And I show you Exhibit S. 7 for identification and ask you if that is a photograph of the man who you examined? A Yes.

Q And when did you conduct your examination, make your examination? A April 22, at eight o'clock in the evening.

Q And what did you find on examination of him? A I found this man had a bullet wound through his right forearm and two bullet wounds under the lower portion of his chest on the right side.

Q What else? A The wound of exit. There were two wounds on his forearm, one of entrance and one of exit.

Q And were there any other marks on his body or any place? A That I do not recall.

Q Well, would it refresh your recollection if you referred to the history of the case? A It might.

Q That is, the hospital record? A Yes.

Q And is this the record? A That is part of the record.

Q What about the rest of it? A That is all part of the record.

Mr. McGeehan: Did you keep those, doctor?

The Witness: No.

Mr. McGeehan: Well, I will waive the testimony at this time. It ought to be marked for identification.

Mr. Fisch: I do not expect to offer the record in evidence.

The Court: Go ahead, doctor.

Q You may refresh your recollection by referring to the record. What other marks, if any, were on this man's body or any part of him? A Laceration on his forehead.

Q Bleeding, was it? A Yes, sir, an open laceration.

Q An open laceration, what else? A Nothing that I can see here.

Q Did you observe anything with reference to his forearm, his right forearm? A He had a bullet wound in his right forearm.

Q And outside of the bullet wound did you observe any discoloration? A Yes, sir; there was discoloration.

Q Where? A Around the area of the bullet wound.

Q How about the area from the wrist to the bullet wound, did you observe any discoloration there? A Well, that was where the bullet wound was, the wound went in here and came out there and the area around it was discolored.

Q Does that area take in the distance from the wrist to the bullet wound, the area of discoloration? A No, the bullet wound was up considerably above the wrist.

Q I understand that, but I want to know if the area between the bullet wound and the wrist —can you tell me whether or not you observed any discoloration there? A I don't recall it.

Q That is, there might have been and you do not recall it? A Yes.

Mr. McGeehan: I object. If he doesn't recall it, he can't say.

The Court: Sustained, but he has already answered it.

Q Was the patient conscious or unconscious? A Conscious.

Q And did you treat him? A I did.

Q What did you do for him? A I had him transfused—first he was X-rayed, and then he was transfused and taken to the operating room and his abdomen was opened to find the extent of the injuries internally. We found that the bullet had gone through his liver, the abdomen was

filled with free blood and clots, which we mopped out. There was no injury to the other viscera within his abdomen, that is his intestines, and we drained him and plugged up the holes and sewed him up.

Q Did you extract any bullets? A No, sir, we could not find them.

Q You could not find the bullets? A No, sir.

Q Then did you continue to treat him? A I did.

Q What, if anything, did you do with reference to any of the bullet wounds? A The case was dressed every day, the area cleansed, sterile dressings put on and he had been given the preliminary treatment of anti-toxin to prevent lockjaw.

Q What did these sterile dressings consist of? A Sterile gauze pads and bandages.

Q Did you insert any iodoform gauze in any of the wounds? A Yes, sir, that was done at the original time of the operation.

Q And then did you continue to treat him at any time after that? A I did.

Q What did your treatment consist of, doctor? A Supportive treatment, stimulation, rest and medication, all things that were necessary.

Q And for how long a time did you treat him in that fashion? A Until the 25th of April.

Q And what happened? A The man died.

Q Do you know what he died of? A No, I do not.

Cross examination by Mr. McGeehan.

Q This discoloration around the area of the bullet wound, in your opinion, was from the bullet wound, was it not? A Yes, sir.

Cross examination by Mr. Becker waived.

IRENE V. McEVOY, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Miss McEvoy, where do you live? A 221 Williamson avenue, Hillside.

Q And you live there with your mother, do you? A Yes, sir.

Q And you knew Mr. Grossman, didn't you? A Yes, sir.

Q And how long did you know him? A Well, some ten years or more, off and on.

Q And he boarded in your mother's house, did he? A Yes.

Q And did you know where his store was? A Yes, sir.

Q On Sanford avenue? A Yes, sir.

Q And did you clerk in the store there, help him out as a clerk on occasions? A Yes, sir.

Q And were you in the store on the 22nd of April of this year? A Yes, sir.

Q And did you observe the position of the various counters and movable objects in that store on that day? A Yes, I did.

Q Will you be good enough to step down from the witness stand, just a moment, because this map, Exhibit S. 2, is a little bit hard to see from the stand? A I am not familiar with maps.

Q Well, Exhibit S. 2, it has been testified, is representative of the store, this is the front, these are the front windows and the radiators, just behind the windows, and the various articles are marked on that. Will you just, please, carefully examine the map and the show case here, it has been testified, separates the front of the store from the prescription department, and there is a swinging door leading to the back,

and there is the counter in the centre of the prescription department and this is marked "chair" and this is marked "stool" and "sink" over in the corner. Will you be good enough to examine this map carefully with reference to the articles marked on it, and, after examining it carefully, will you please tell us whether this map truly represents the position of those articles as they were in the store on the 22nd of April, 1929? A Positively.

Q Now, when did you get to the store on the 22nd of April? A Why, I arrived there about a quarter six.

Q In the afternoon? A Evening, yes, afternoon.

Q And when you got there at a quarter to six, where did you go? A To the prescription room.

Q That is in the back? A In the back.

Q And did you see Mr. Grossman? A Yes, sir.

Q Where was he? A Also in the prescription room.

Q What were you doing in the back? A Well, I was reading—you mean at the time—

Q After you got back there did you have some conversation with Mr. Grossman? I don't want to know what it was. A In regard to the day's business, yes.

Q Now, then, after that, and around seven o'clock or thereabouts, were you still in the store? A Yes, sir.

Q In what part of the store? A The prescription room, in the rear.

Q And were you standing up or sitting down? A Sitting down.

Q Were you sitting on the stool which is marked on this map or on the chair? A On the chair.

Q What were you doing while you were sitting in that chair? A Reading the paper, the News.

Q Reading the News, the Newark Evening News? A Yes, sir.

Q While you were reading the paper, where was Grossman? A Sitting on the stool, smoking a cigar.

Q Now, while you were reading the paper, and Mr. Grossman was on the stool smoking his cigar, what, if anything, happened that attracted your attention? What happened? Did he continue to sit there? A He continued until, as he thought, a customer had come in and he left the prescription room to go out front to wait on him.

Q He left the prescription room to go out front to wait on a customer? A Yes, sir.

Q And did you continue to remain in the back reading your paper? A Yes, sir.

Q Now, after he went out front to wait on the customer and you were reading the newspaper in the back, what, if anything, happened that attracted your attention? A Why, a terrible noise, scuffling of feet.

Q Where? A At the cash register, right at the swinging door there.

Q And while you heard that scuffling of feet did anything happen in the back room that you observed? A Yes.

Q What happened? A When I looked up there was a revolver in my face and I was told not to move, speak or budge.

Q You say there was a revolver in your face. Was anybody holding that revolver? A Why, yes.

Q Who? A A man.

Q Do you see that man here? A Yes, sir.

Q Will you step down, please, and put your hand on his shoulder? A (The witness leaves the witness stand and indicates the defendant Calabrese.)

Q Well, now, while that man, whom you have just pointed out, was holding this gun and pointing it in your face and telling you not to move, did you say anything to him? A Yes.

Q What did you say to him? A I asked him if he was going to use that revolver on me and he told me if I kept quiet he would not, so I assured him I would be quiet and not move, so he did not.

Q Did not use it on you? A Not on me, no.

Q And did you continue to sit in the chair? A No, I stood up.

Q With the gun in your face? A Yes, sir.

Q And then while you were in your position, and with this defendant standing there holding the gun in your face, what, if anything, did you see or hear? A I could not see anything, but I could hear plenty.

Q What did you hear? A Why, a sound, no speaking, but scuffling of feet, great scuffling of feet around the cash register.

Q Around the cash register? A Scuffling of feet.

Q While this man was holding that gun in your face, can you point out on this map, and particularly with reference to the swinging door, where he was standing? A Here is the swinging door (indicating). I was sitting in the chair —the stool really should be here (indicating). What I mean is that the stool was here, I was sitting in a chair here and the man was standing right there.

Q The man was standing right there in front of the chair? A Yes, sir.

Q Now, then, while you heard this scuffling of feet and this gun was pointed in your face, what happened? A Why, he left the prescription room.

Q Who? A The man that was holding the gun to me, he went out to help the other three that were beating Mr. Grossman.

Q When he left the prescription room and went out into the store, what, if anything, did you do? A I went out with him.

Q You went right out with him and when you came out with him where did you stand? A Why, he and I both stood at the register with the other three and I put my hand on Mr. Grossman's head.

Q When you were standing there at the cash register was that in the store part, past the swinging door? A Right outside of the swinging door, right across from it like that (indicating).

Q And by the way, was that door closed? A It is a swinging door. Of course, it closes after each party goes through.

Q Was it held open by anything? A Yes, it was held open by he and I. We were both in the doorway together.

Q It was held open by you and the defendant Calabrese, the man you pointed out? You don't know his name? A We both went out the door together.

Q And when you went out that door what did you see? A I don't know where to begin.

Q Did you see Mr. Grossman? A Yes, sir.

Q Where was he? A He had one arm on the cash register because he would not open it—

The Court: Strike that out.

Q Where was he standing? A At the cash register.

Q Which way did that cash register open? A Which way did it open?

Q Yes, did it open towards the front of the store or towards this side or towards the back? A Towards the back.

Q And where was he standing with reference to where the cash register opened? A He was standing right in front of the cash register, right in the little aisle in back of the counter.

Q You say "in the little aisle in back of the counter," in back of which counter? A Do you want me to show you? Right here, Mr. Grossman was standing right there (indicating).

Q That is, he was standing in back of the counter that the cash register rested on, and where the cash drawer opened, is that right? A Yes.

Q And as he was standing there was he standing upright or what was he doing? A The best he could.

Q What was he doing? A He was pretty well crushed down by that time, he was not standing upright but still he was on his feet.

Q Where were his hands? A One on the cash register and one on a man—one of the men.

Q Now, which one was on the cash register? A The right.

Q Right hand? That was holding on the cash register, on the top of it, is that right? A That is right.

Q What was he doing with the other hand? A Trying to beat them off.

Q Trying to beat who off? A Three men.

Q Now, do you see any of those men that you say you saw in that store at that time, do you see any of them here? A Yes.

Q Will you point them out?

The Court: You can stand up there and do it.

A Why, that party with the gray suit.

Q Sitting where? A The second man from the aisle.

The Court: Between the two officers?

The Witness: Between the two officers.

The Court: Indicating the defendant Cort.

Q Is this the man you mean? A Correct.

Q Indicating the defendant Cort. Now, these three men that you saw—you saw what they were doing? A The three were beating Mr. Grossman on the head.

Q With what? A Handles of revolvers. The revolvers turned around.

Q The revolver turned around, and they were beating him with the butt of it? A The butt of it.

Q And was Grossman bleeding or not? A Yes.

Q Profusely or not? A Yes, very much so.

Q And what was Grossman doing while they were beating him? A Standing there holding onto the cash register.

Q And what did you do, if anything? A Why, I saw a terrific blow coming down on Mr. Grossman's head, from that gentleman there.

The Court: Which one?

The Witness: With the gray suit.

The Court: Indicating Cort.

The Witness: And I put up my hand to ward it off.

Q Which hand? A Right, and he gave it to me.

Q What? A The blow which was meant for Mr. Grossman.

Q With what? A The handle of a revolver.

Q And where did you receive that blow? A My hand was on Mr. Grossman when I received it.

Q Your hand was on Mr. Grossman's head? A Yes.

Q And you received the blow on your hand? A Yes.

Q And what happened to your hand, if anything, as a result of that? A Well, it broke my finger and lacerations.

Q And did you bleed? A Yes.

Q And then what happened? A And then he shot Mr. Grossman right there.

Q Which one? A That man right there.

The Court: Indicating the defendant Calabrese.

The Witness: He shot Mr. Grossman in the arm when I held my hand on Mr. Grossman's head.

Q Then what happened? A Then the four of them ran out of the store and Mr. Grossman ran out after them.

Q How did Mr. Grossman hold on? A They had overcoats on and he held on to the end of the overcoat and he was dragging along the floor.

Q And they were going where? A To get away, running to get out.

Q Toward the front of the store? A Toward the front of the store.

Q And then what happened? A Why, they picked Mr. Grossman up and threw him on the radiator. The radiator to the left as you go out.

Q And that would be the radiator to the right as you go in? A To the right as you go in, to the left as you go out.

Q Is this the radiator you refer to? A Going out.

Q As they were coming out of the store with Grossman holding on to the tail of the overcoats? A Yes.

Q You say they picked him up when they got to the front of the store? A Yes.

Q And threw him on the radiator? A Yes, by the cigar case.

Q That is the radiator between the cigar case and the window, is that right? A Yes.

Q Then what happened? A Well, they did not succeed in shaking him off, he still held on.

Q Then what happened? A Well, they ran out into the street and he still held on and he shot him again.

Q Who shot him again? A That man (indicating).

Q The fellow with the black and red necktie? A Yes.

Q With the black suit? A Yes.

Q Indicating the defendant Calabrese? A Well, whatever his name is, yes.

The Court: The man whom you went down and identified?

The Witness: Yes, sir.

Q Now, you say Grossman held on as they went out of the door? A Yes.

Q What did you do with him? A I went with him, right out to the gutter.

Q Did these men each have guns? A The whole four had guns. There were two more.

Q You do not see them here? A No, I cannot say as I do.

Q Now, as they went out that front door and you went out, too, where did they go? A That I don't know.

Q Just as they went out of the front door, you went out with them? A Yes.

Q I am referring you now to Exhibit S-1, if you will look at this map a minute. It has been testified this represents the corner of Lenox street and Sanford avenue. This gray is the sidewalk and this little white opening here is the entrance to the Grossman store the same as this here? A Yes.

Q And this is a tree here and here is another tree? A Yes.

Q And here is a telegraph pole? A On Sanford avenue.

Q This tree is in front of the store, and this tree is in front of the National Grocery Store? A Yes.

Q Do you understand the map now? A Yes.

Q As they were going out of that door was Grossman holding on? A Yes.

Q Where did they go? A Right here. He run this way on Sanford avenue, not toward Lenox street; out on Sanford avenue is a tree.

The Court: You say he ran. Who ran?

The Witness: Mr. Grossman was holding on to the men.

Q And as Grossman was holding onto the men they came out on the sidewalk, out of the store, and went toward the gutter? A In the direction of the gutter, but not in the direction of Lenox street.

Q No, in the direction opposite Lenox street? A Yes.

Q And as they got out toward the gutter, the curb beside the second tree on Sanford avenue, what happened, was anybody on the ground? A Well, Mr. Grossman, of course, was being dragged; he was being held on to their coats, and when they saw they could not shake him off, he shot him again.

The Court: Who shot him again?

The Witness: Calabrese.

Q And then what happened after Calabrese shot again? A Mr. Grossman let go then, that was the last.

Q What became of them? A I don't know.

Q You do not know where they went? A No.

Q What if anything did you do then, and what did Grossman do or say? A Mr. Grossman stayed right where he was and I went across the street to see if I could get a doctor, but he was out, and when I got back there was a lot of help.

Q Then what happened? A Well, they took Mr. Grossman to the hospital in the patrol wagon and I, also, to have my hand dressed.

Q And you had your hand dressed there? A Yes.

Q Now, I show you Exhibit S-7 for identification and ask you whether or not you can identify that photograph. A Mr. Grossman.

Mr. McGeehan: I object to that. I do not think it is necessary.

The Court: I do not see the necessity of it.

Q Did you see Grossman in the hospital? A Yes.

Q Of course, you know that he died? A Yes, I know he died.

Q What is that? A Yes, I know he died.

Q What happened with regard to the store? A Why, the store is closed from that day to this.

Q The store was closed from the time he died? A. From the time he died. He died the 26th of April. It has been closed since that time.

Mr. McGeehan: I object. It is closed now.

Mr. Fisch: Well, she did not know what date it was and I had to cover it in that way.

Cross examination by Mr. McGeehan.

Q Miss MacEvoy, have you been in the court room since we began to draw this jury? A Today is the first I have been upstairs here.

Q I mean in the room here? A Today is the first.

Q So have you been here all day since this morning? A Yes.

Q And were you in the court room yesterday afternoon when the case began? A No.

Q Where were you sitting in the court room? A This morning?

Q Yes. A In the rear this morning, and this afternoon I was in the front.

Q Of course, you knew that the two men on trial were these two men who are sitting with the officers in this line, didn't you? A I ought to know.

Q I beg your pardon? A Yes.

Q This store, I wonder if you could point out the cash register on the picture? A I will try.

Q Do you think you could find it? A Well, you cannot see it very well. It is there (indicating).

Q Indicating a point at about the end of the counter.

Mr. Fisch: Suppose you have her mark it with an X.

Q Well, can you see any part of the cash register there? A Yes. There is the back of it. That is the back of it.

Q Would you mind just taking this pencil and marking what you just pointed to as the back of it? Suppose you put an arrow above the cash register, pointing a point down toward it? That is it. Now, you have made a mark like the head of an arrow right above, and a little to the left of a dark background, which is part of the cash register, is that right? A Yes.

Q Now, that was standing, then, at a position at the end of the soda fountain, wasn't it? A Right next to the candy case.

Q There being an aisle in front of the counter on which it rested? A Yes.

Q And the keys were pointing toward the swinging door there that goes into the back part, is that right? A Yes.

Q Now, back of the swinging door, there appears to be something marked, a show case

along at a point almost in line with the swinging door here? A Yes.

Q And that show case is a high show case that appears in the back here, isn't it? A Yes.

Q And the wall is behind that? A Yes.

Q Now, in back of that which is marked counter, is that sort of a prescription counter where they make up prescriptions? A Yes.

Q Now, behind that there were no more partitions, it is open? A At the center of the store there is sort of a—

Q Counter? A Counter.

Q Now, is the place where you were sitting either where it is marked stool or where it is marked chair, is that right? A Yes.

Q Is that right? A The chair is in the right place.

Q And the stool was somewhere else? A More toward the door.

Q You were not sitting on the stool? A No.

Q It was the chair you were on? A Yes.

Q Now, you were reading the paper at that time? A Yes.

Q And I believe you said you did some work in the store, helped in the running of the store, is that right? A Yes.

Q You heard the scuffling of the feet before you saw a revolver pointed at you, is that right? A Yes.

Q When you looked up were you frightened? A Why, no, I cannot say that I was.

Q Weren't you frightened? A Not for a minute. I did not realize for a minute, but then and there soon become frightened.

Q Well, now, then, when you heard the scuffling and saw a strange man pointing a revolver at you you were pretty nervous, weren't you?

A I was when I realized what took place, certainly.

Q I did not quite hear that? A Yes.

Q And were you afraid? A I could not call it afraid, no.

Q And you asked him if he were going to use it on you, meaning the gun? A Yes.

Q And he told you not if you kept quiet? A He said he would not if I kept quiet.

Q Now, all this time the scuffling was going on? A Yes.

Q Your eyes were pretty well upon that revolver? A Yes, I think they were.

Q Then you were wondering what the scuffling was? A No. I realized what the scuffling was then.

Q You realized it naturally had a connection with what you were confronting? A Yes.

Q Now, when the scuffling occurred—I will withdraw that. Did you hear the scuffling first and then look up and see the gun pointed at you, or was the gun pointed at you before the scuffling was heard by you? A No, the scuffling first.

Q And then you looked up and saw the gun? A Yes.

Q Then did the scuffling become louder and more pronounced? A It became so loud he decided to go out and help them.

Mr. McGeehan: I move to strike that out.

The Court: Strike it out.

Q It became louder as a fact? A Yes.

Q And he went out, this man who had the gun, is that right? A Yes.

Q And you were concerned and went out, too? A I beg your pardon?

Q And you were sufficiently concerned with what was going on that you ran out, too? A Yes.

Q I understood you to say in answer to the prosecutor's question that you stood in the doorway where the swinging door is with the man, or rather alongside of the man who had confronted you in the rear part of the store? A Yes.

Q He stood there so as to hold the door open? A No, I won't say that.

Q Did I understand you to say, when Mr. Fisch asked you whether that door was open or closed, you said it was a swinging door but "We held it open"? A It is a very small door, and, of course, when five stand in a doorway it is naturally held open, the door cannot close.

Q I know that, that is what I understood you to say. A Yes, sir; that is correct.

Q The door naturally had to swing for you to go through it, but I understood you to say that it was held open by you and a man who had the revolver in the back? A Yes.

Q Now, did both of you remain in that doorway long, was it a long period? A Well, after he shot Mr. Grossman he did not stay very long.

Q Did you remain very long? A No, I went with them, they went out.

Q The time you were in the doorway there, was that the position from which you say you saw the shots fired? Is that the position you were in when you say you saw a shot fired? A The first shot, yes.

Q Now, at that time, where was Mr. Grossman standing? Was he standing? You said

that he had his hand on the cash register? A Yes.

Q But was he in there towards the front of the store from the cash register, or towards the rear of the store or towards the side? A Towards the side.

Q With his right arm on the cash register? A Yes, sir.

Q Fighting with his other hand, is that right? A That is correct.

Q Now, where were the other men at that time? A Standing right there beating Mr. Grossman on the head.

Q Yes, but were they all around him? A Yes, sir; all around him.

Q Were they all in front of him or in back? A All around him, one in front, one on the side and one here. The man with the gray suit was the nearest to the prescription door.

Q That is the man that you have picked out? A The man with the gray suit was the one nearest to the prescription door.

Q He was nearest to the door where you were then standing, is that right? A That is correct.

Q Now, there was a lot of commotion there, wasn't there? A Yes, sir, there was.

Q Was Mr. Grossman's head bleeding when you first came to that door? A I said that, yes.

Q You were then very much frightened, weren't you? A Well, I think anybody would be.

Q Well, undoubtedly, but we must ask you about yourself? A Yes, sir.

Q And you wanted to help him, didn't you? A I certainly did.

Q He was a friend of your family for many years, was he not? A Correct.

Q And lived in your mother's house? A Yes, sir.

Q Boarded with her? A Yes, sir.

Q And you assisted him in the store? A Yes, sir.

Q And when you saw him bleeding and this scuffling going on, was he punching at them? A The best he could, yes.

Q Well, was he punching? A Yes, sir, with one hand.

Q And was the cash register opened or closed? A No, it was not open.

Q Was it open at all? A No, it never was open.

Q And when you heard the shot fired, did you see it fired or hear it? A No, I saw it.

Q There were many people crowded in this space? A Six, counting Mr. Grossman and I. There were four men.

Q Six people? A Yes, sir.

Q All or some of them in rapid action and fighting, is that right? A There was four in fighting action, yes, sir.

Q You say one of the men had a revolver turned around and was striking? A One? Three.

Q Well, three, then, all right. At any rate, one that you particularly noticed and tried to ward off the blow? A Yes, the man with the gray suit, I took that one. I don't know the name.

The Court: Cort.

Q This space there is only a few feet, isn't it, that is, it is no more than two feet behind the counter, is there? A Mr. Grossman stood here—

Q That is not the question at this moment? A What are you asking me?

Q What is the distance between the counter and the show case in back? A That I can't say, I never measured it.

Q It is only a couple of feet behind there anyway, isn't it? A Yes, sir.

Q It is not more behind it than the width of this rail, just about. Is that right? A That is correct.

Q And the space between the end of the cash register or the counter it is on and the wall and showcase along there is also about that wide, isn't it? A Yes, just about.

Q Is that right? A Yes, sir.

Q And the distance in front of it is just about that width? A Just about.

Q So that with the action that was going on everything was pretty crowded there, was it not? A Very much, yes, sir.

Q Now, who did you look at when you came out? A I looked at Mr. Grossman first.

Q You were trying to protect him? A Why, yes.

Q And you were horrified to see his head bleeding? A Yes, sir, very much.

Q You did not concentrate very much attention on the appearance of the man, did you, then under those circumstances? A They all had overcoats on, heavy overcoats and three had caps, but he had a blue slouch hat on.

The Court: Who do you mean?

The Witness: Calabrese.

Q Now, the question is you did not concentrate your attention very much on the appearance or features of any of the men, did you? A Well, Mr. Calabrese I did, because I had noth-

ing else to do but look at him while he held the revolver in my face. Mr. Calabrese I did, yes.

Q Now, you say you were not—when you say you heard a scuffle of feet around the cash register you figured it was around the cash register, didn't you? A I did not figure that until I got out there, I did not know what it was.

Q Now, what was Grossman fighting with, his fists, or did he have anything? A No, nothing, absolutely nothing. Just his fists. There was no revolvers or anything in the store, nothing.

Q He was a big man, wasn't he? A He was short but stocky, and I should judge about 180 pounds, I think.

Q He was hitting with his left hand at that time? A Yes.

Q Now, that fight continued right out to the sidewalk and across the sidewalk, didn't it? A No, they were not fighting while they were dragging Mr. Grossman. Of course, he held on.

Q They were dragging him by his holding on to some one or more of them? A I presume he was looking for help, thinking somebody would come in the store to his assistance.

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

Q The question is not what he was looking for or thinking of. When you say he was dragged, he was dragged by the men trying to get out—I withdraw that—by the men moving towards the door and he holding on to them. Is that right? A That is correct.

Q And he was hitting them at that time, wasn't he, as they were going towards the door?

A No, at that time, no. They had their back towards the door at that time.

Q That is, he was the last to go out? A He was the last to go out, yes, sir.

Q Do you know what he had hold of or who he had hold of at that time? A I can't remember just which one he had hold of, I know he had hold of an overcoat, but just which one he had hold of I don't know.

Q And was he sliding along with his feet? A Yes, sir.

Q Trying to hold them back? A Yes, sir.

Q And when the radiator that has been spoken of was reached—I wish you would describe, Miss McEvoy, there has been some little doubt as to just where the radiator was—were there two there in the store? A This is the radiator (indicating).

Mr. Fisch: Indicating the radiator to the south of the entrance on Exhibit S. 2.

The Witness: This is the radiator that they threw Mr. Grossman up on to try to shake him off.

The Court: The radiator on the right as you enter the store.

Q Now, that radiator is a couple of feet over from the doorway, isn't it? A Well, not very far from the doorway. I should judge a foot or two, not far, it is close to the door.

Q It is a regular steam heating or hot water heating radiator? A Yes, one of them low ones.

Q And it is right in the aisle as you get in front of the cigar case in the store? A Yes, sir.

Q You say they threw him on that? A Yes, sir.

Q Did they break his grip on that? A Only for a minute, but he soon got another hold on them.

Q He came right back and got another hold? A Yes, sir.

Q That is as they were getting out of the door? A As they were getting out of the door.

Q Now, this shot which you say you saw fired, do you know whether it struck him or not? A Oh, yes, positively.

Q Do you know whether it struck him or not, not whether you know it now? A Yes.

Q And what could you see as to whether it struck him or not? A What could I see?

Q Yes, at that time when the shot was fired? A Why, I had my hand on Mr. Grossman's head, when he shot him right there in front of me.

Q You had your hand on what? A Had my hand on Mr. Grossman's head when Mr. Calabrese shot him.

Q I thought you said you were standing in the door looking from there.

The Court: What shot are you referring to, Mr. McGeehan? The first shot or the second shot?

Q The first shot? A I told you that.

Q Do you know whether that struck him or not? A Yes, sir, positively.

Q You said his head was bleeding, is that right? A Yes, sir.

Q It was bleeding when you first came to the door? A Yes, sir.

Q You said, I think, that you stood in the doorway there and that it was there, from there

that you saw the shot that you speak of, is that right? A Are you speaking of the first shot?

Q Yes, is that right? A Yes, sir.

Q Do you know whether that shot struck him or not?

Mr. Fisch: I submit that the question has been answered three times.

The Court: Yes, the witness has positively said she did.

Q How do you know that it did strike him? A How do I know?

Q Yes, how do you know? A Because I stood there and saw it with my own eyes. Goodness, how would I know?

Q You saw the shot actually strike him? A Yes, sir.

Q Or did you see the direction that the gun was pointing? A No, sir.

Q You just saw the shot actually go in? A Yes.

Q Where did it strike him at that time? A That I really cannot say, for I did not follow the bullet.

Q You just said that you saw this, and that is how you know whether it struck him, because you saw it go in? A Struck Mr. Grossman's body, but just what part I cannot say.

Q Do you know whether it struck his arm or not? A That I cannot say.

Q You don't know whether it struck his arm or body? Do you? A He got it in the body.

Q You said just now you could not say whether it struck his arm, didn't you?

Mr. Fisch: Let us see what shot she is talking about now.

The Court: We are talking about the first shot. Is there any doubt about that?

(Last question read.)

Q It was aimed for the arm, wasn't it? A It his arm.

Q It was aimed for the arm wasn't it? A It was aimed for the arm that was beating the men, one was on the register and the other, it was aimed for this arm.

Q You mean to say that it was aimed for the arm that was beating the men? A Positively.

Q Why, didn't you testify, Miss McEvoy, that the man was at the doorway when he was firing, is that right? A Yes, sir.

Q All right, now, let us get this straight. A We will get it straight.

Q You said he was at the doorway when he fired? A Yes.

Q And you said that Mr. Grossman was standing in this passageway at the end of the counter? A Yes, sir, that is what I said.

Q Facing the cash register? A No facing the men.

Q Didn't you say he had his right hand on the cash register? A That is what I said.

Q That he was beating them with his left arm? A Yes, sir.

Q And did you say that you saw the shot fired at that left arm? A Yes, sir.

Q That was the farthest arm away from the door, wasn't it? A That was the nearest arm from the door.

Q Grossman was at the end of that counter, wasn't he? A You mean the prescription door?

Q No, the end of the counter. Mr. Grossman was at the end of the counter, wasn't he? A Yes, sir.

Q He had his right hand on the cash register? A Yes, sir.

Q He was in the aisle in between the back showcase and the counter, not in front of it, but in the aisle that is at the end of that counter which I am pointing to. A The aisle just in back of the counter, in back of the register.

Q He was in the aisle in back of the register? A Why, certainly, he was in back of the register.

Q Suppose you come and point here just which aisle he was in at that time. You understand this map well, don't you? A Mr. Grossman was in this aisle right here (indicating).

Q You did not say previously that he was at the end? A I did not say that.

Q Now, Miss McEvoy, you are sure at this time Mr. Grossman was standing behind the cash register at the point that I am pointing to with this pointer now? A I cannot see from here.

Q Right there, is that right? A That is right.

Mr. McGeehan: Indicating a point in the aisle between the back of the counter upon which the cash register is marked and the showcase behind it at a point in about the centre of the square marked "cash register."

Mr. Fisch: And to the east of the cash register.

Mr. McGeehan: Yes, it would be east, it would have to be in that aisle between those two.

Q Now, which way was he facing then? A Why, he was facing the aisle as you go into the prescription room, facing the side of the store.

Q Then, he was facing towards the right hand side of this map as we look at it, which is south, is that right? A Yes, sir.

Q With one hand on that cash register, his right, and he was fighting with his left, is that right? A Yes, sir.

Q You say that is when you saw a shot fired? A That is when I saw the shot fired.

Q And that the man who fired that shot was in the doorway there? A The prescription door.

Q The doorway which runs between the prescription room and the other which is indicated upon the map as a swinging door. Is that right? A Yes, sir.

Q Now, are you sure of that, Miss McEvoy? A Am I sure of it?

Q Yes. A Positive.

Q And you are sure also that you saw that gun aimed right at his left arm then? A Yes, sir.

Q And that you saw it hit him? A Yes, sir.

Q You know it hit him because you saw the bullet actually going into him? A Yes, sir.

Q But you don't know whether it went into his arm or body? A Well, it was aimed for the arm, but whether it went in, I don't know.

Q But you did not see it go in, did you? A Mr. Grossman got the bullet.

Q You believe that, don't you? A I know it.

Q That is what I asked you before. How do you know it? Is it that you have since learned that he was struck? A No, sir, I know it.

The Court: What happened at that time to make you believe that you saw it?

The Witness: Because it was aimed at Mr. Grossman and he got every bit of it.

Q You say that because you saw the gun aimed at him? Is that right? A I saw the trigger pulled and he got the whole thing. I don't know that I can say anything else.

Q You don't know whether it hit him, at any rate, if it hit him you don't know where it hit him? A It was aimed for his arm and his arm got it.

Q It was aimed for that left arm up in the air? A Yes, sir.

Q Of course, you have since learned that he was shot in the arm, haven't you? A I have heard since?

Q I mean, you know, evidently, since that he was shot in the arm? A Well, I was right there; no, I haven't heard it, for I saw it.

Q Now, we have come to the shot that you say occurred outside that you saw, we have come to the point, I think, Miss MacEvoy, where after you saw them throw him on the radiator and they were trying to get out of the door he got hold of them again? A Yes, sir.

Q Do you know which one he grabbed then? A No, I do not.

Q Do you know whether any blows were struck at the front door there? A No, sir.

Q The men were just running and trying to get away, is that right? A Yes.

Q And they had shaken him off, pushed him off? A They tried to but did not succeed.

Q Did he go over to the door? A Yes, he came right back.

Q And the men were trying to get away? A Yes, sir.

Q And then he got one of them or more? A One of them.

Q And hung on to him again? A Yes, sir.

Q And as I understood you to say—I will ask you in a minute just how many of them—the direction they went was towards this tree (X) which is just a little bit to the south of the entrance to the drug store? A Yes, sir.

Q And not actually towards Lenox street? A No, sir.

Q Now, as they crossed that sidewalk Grossman was hitting them, wasn't he? A No.

Q Wasn't he hitting the man he had hold of? A No, he just had hold of his coat.

Q Did you observe just where he had hold of him? A The end of the coat, the end of the overcoat.

Q And did these two men come to grips in a scuffle there, do you know? A No, Calabrese is the name?

Q Yes. A Mr. Calabrese came back and released the hold with another bullet.

Q From where, where had Calabrese gone to? A They were running across the street in all directions.

Q I don't think you said that before, did you? A I don't think we had got to that part yet.

Q Did you see some of the men running across the street then? A They were all scattered on the sidewalk and Mr. Grossman held on to the one, and of course, he came back to help his friend—

Mr. McGeehan: I move that that be stricken out as a conclusion or a guess.

Mr. Fisch: I object to its being stricken out, it is not a guess or anything else.

The Court: When you say he came back to release his friend, don't draw conclusions, just tell us what you saw happening.

The Witness: They had all gone and Mr. Grossman held this one and the man came back.

The Court: Who came back?

The Witness: Mr. Calabrese came back and shot Mr. Grossman and he immediately let go of the man and they all went off.

Q Tell us about the running, did you see some of the men run across the street? A Why, they all ran, yes.

Q No, did you see them? A Why, I did, yes, we all ran out.

Q I know, you all went out to the sidewalk, but here is the question and I want to make it as plain as possible, did you see any of the men running across the street? A They scattered in the street and what direction they went in I don't know, they all scattered but the one that Mr. Grossman was holding.

Q Did you see any man run across the street? A Yes, sir.

Q How many of them did you see run across the street? A Three.

Q And one was with Mr. Grossman? A One was with Mr. Grossman.

Q What was the position between him and Mr. Grossman? A He was dragging Mr. Grossman, he was running and he was dragging Mr. Grossman.

Q Well, I know, but he didn't get apast this man that he was holding, you say; he did not get apast the curb line with Mr. Grossman? A They had just reached the curb.

Q Those two? A Mr. Grossman and the man he was holding. Which one it was I don't know. They had just reached the curb.

Q Do you know if it was Calabrese or Cort? A No, it was Calabrese, because he come back and shot Mr. Grossman.

Q Do you know whether it was Cort? A I do not know which one was holding him.

Q You do not remember which one that was at all? A I could not very well judge a man from the back.

Q And that man had his back to the store? A They all had their backs to the store as they were running out.

Q Now, as the others ran across the street, how far did you see them run, did they get to the other side of the street? A I was not interested in that. I was interested in Mr. Grossman.

Mr. McGeehan: I ask that that be stricken out.

A No.

Q You do not know how far they got? A No.

Q Where was the last point you saw those three men running across the street? A The last point was right at the tree where Mr. Calabrese shot Mr. Grossman.

Q Which way were they running, which direction? A I could not say.

Q Well, you did say they ran across the street? A Into the street; where, I could not say.

Q Well, now, when they ran into the street, were they running into the street in a direction that was west or toward the other side of Sanford avenue? A I told you I do not know what direction they were running. All I know

they were running in the street and that is the last I was interested in them.

Q Now, this is a question and it will have to be answered. You did say you saw them running across the street? A Into the street.

Q You did say you saw them running into the street, is that right? A Yes.

Q Now, when you saw them running into the street, was it in a direction when you last saw them toward the other side of Sanford avenue? A When I saw—

Q One minute. A direction toward Lenox street or diagonally or away from Lenox street, in other words, which direction were they headed for when you saw them running into the street? A That I cannot answer. All I can say Mr. Grossman and Mr. Calabrese were toward Varsity road.

Q Varsity road is the next street south on Sanford avenue? A Yes.

Q Will you repeat? A I say this tree is headed more toward Varsity road and that is where Mr. Grossman—

Q You mean to say you saw Grossman and Calabrese going that way? A Yes. That would be in that direction.

Q Well, was Calabrese the man Grossman had ahold of? A No, I could not say who Mr. Grossman had ahold of.

Q Do you know whether he had Calabrese or not? A No, he did not have Calabrese. Calabrese came back and shot Mr. Grossman.

Q Well, when you just said toward this other street, was the direction Calabrese and Grossman went? A Yes.

Q What did you mean by that? A Well, naturally the man Mr. Grossman was holding

was going to go into that direction and Mr. Grossman would not go in that direction.

Q Can you tell us which way the three other men you saw running into the street were running? A I lost track of two, the one Mr. Grossman had ahold of was facing Varsity road, that is the direction he was headed.

Q Did you see which way the other men were running? A No.

Q You did not see them running into the street? A They left the store and ran into the street.

Q And by the street you mean on the sidewalk? A I mean out into the middle of the street.

Q Now, the middle of Sanford avenue toward the other side of the street? A Out into Sanford avenue. What direction they went I could not say.

Q Did they disappear for a time? A They certainly did.

Q They did? A Very much so.

Q All of them? A Well, two, until Mr. Grossman released the one that Calabrese helped.

Q At any rate, you did not see anybody go toward Lenox street and Sanford avenue? A No, I couldn't see.

Q Now, then, they got to the curb. I am going to speak now of the two men you say got to a point near the tree and any question I ask do not hesitate to say you do not understand. I want to be perfectly clear and do not want to confuse you. When the two got out by that tree, which was Grossman and one of the others— A Yes.

Q You say he had ahold of the coat? A Yes.

Q Was that coat the part that he had ahold of it the end of the coat? Was there some

distance between them, or were they very close to each other? A Very close.

Q So that Grossman was behind the other man and very close to him and holding on to some part of his coat, is that right? A Yes.

Q He had him from behind? A Yes.

Q And the other man was pulling or trying to get away? A Yes.

Q At that moment, do you know just where the other men were? A No.

Q Your eyes were centered on Mr. Grossman? A Yes.

Q Do you know whether the other three were close to him at that time? A Were close to him? No. He was alone with the one man and Mr. Calabrese came back and released the man.

Q Where did the man come from that you saw Calabrese release? A From the middle of the street.

Q And then you say there was a shot fired? A I say there was a shot fired in the gutter.

Q Do you know who fired that? A Yes, Mr. Calabrese.

Q Do you know where the other two men were at that moment? A No, I could not say.

Q Do you know whether they were right alongside of Calabrese or not? A No. That I could not say.

Q You heard a shot? A I saw a shot. I did not hear it.

Q How far away was that shot fired from where Grossman was at that time? A How far away?

Q Yes. A About like that (indicating).

Q Indicating about three inches? A The revolver was put right to Mr. Grossman's coat.

Mr. McGeehan: Three inches, Mr. Prosecutor?

The Witness: I would not say three, it was closer than that.

Q Now, will you indicate with your fingers again about how far? A Well, as close as he could get the revolver to Mr. Grossman's side.

Q You are sure about that also? A I am positive.

Q You do not know at that point how close the other men were to those two? A I do not.

Q Was Grossman's head bleeding at that time? A Yes, very much so.

Q That was after, of course, you heard the shot in the store as you say? A Uh?

Q You were very nervous, were you not? A Yes, I think I was.

Q You are nervous somewhat, aren't you by disposition? A Well, I think anybody would be nervous when they hear shots.

Q Yes. And you are also nervous at other times? A No.

Q You were not very well able to pick out which of several men were doing the specific things at that time, were you?

Mr. Fisch: I object. What time?

Mr. McGeehan: At the time the shot was fired we are speaking of.

A What was that again?

Mr. McGeehan: I will withdraw the question.

Q In that excitement of having heard a shot fired, or seen it fired, as you say, in the store

and with Mr. Grossman, whom you knew so well, bleeding, you were excited and nervous, weren't you? A I was excited.

Q Seeing a friend or acquaintance being injured? A Yes.

Q Your instincts and desires were to help him? A Yes.

Q So much so that you put your hands up? A Yes.

Q And you were centering your attention on Mr. Grossman? A I was centering my attention at that moment to put my hand on that man was the gray suit in warding off the blow.

The Court: Cort?

Q You say he is the man who struck your hand? A Yes.

Q You had come out of the doorway to do that? A Yes, Mr. Calabrese and I had come through the door.

Q You did that before any shot was fired? A That happened at the same time; he shot Mr. Grossman at the same time Mr. Cort was going to strike the blow on the head, so I took the blow on the hand and Mr. Grossman took the shot.

Q They both happened at the same time? A Yes.

Q Now, if that is so, you certainly had some attention fixed on the revolver that was going to hit Mr. Grossman on the head and putting your hand up to ward it off.

Mr. Fisch: I object.

Q I say you had some attention on it.

The Court: I will admit it.

A I had my attention on the whole thing. I thought Mr. Calabrese was going to shoot Mr. Grossman and I took the blow and he took the shot.

Q And you say they all had guns out at that time? A Yes.

Q And when you saw that blow that was going to be hit with a butt of a revolver on Mr. Grossman's head, you were frightened? A No, I am not—

Q What? A Yes, I was.

Q Yes, you feared for the safety of Mr. Grossman. A I think I would.

Q The answer is yes? A Yes, certainly.

Q And so much so that at that time you tried to ward that blow off? A Yes.

Q And you say it was while that was going on that the shot was fired? A Yes.

Q Now, four men, five persons besides yourself all with guns out, you could not be very sure who fired that shot.

Mr. Fisch: I object.

The Witness: I am positive who fired it.

Q Now, Miss McAvoy, since that day until today have you ever seen the men who you say you saw there? A Why, I saw Mr. Calabrese, I believe, the next day after that, I believe the 23rd.

Q The next day? A I think I saw him.

Q That is the day after the shooting took place you say you saw the defendant Calabrese the next day? A I was taken down to identify

the men in the line-up. I believe the next day. I am confused on the dates.

Q Well, now, sometime shortly after that you say you were— A Yes.

Q Down where? A Police headquarters.

Q Newark Police Headquarters? A Yes.

Q And when you went there you went before a line of men, did you? A Yes.

Q Before that and right after you—withdraw that. You had been questioned by the police officers before that and right after the occurrence? A Yes.

Q And did you say then that you could not give a good description of any of the men? A I said I would give a good description of Calabrese.

Q Did you mention his name, Calabrese? A No.

Q Well, what did you say then? A The man who had the gun in the back room.

Q You could give a good description of the man who had the gun in the back room? A That is what I said.

Q Did you say anything else at that time? A No.

Q You did not speak of him then as the man who had shot Mr. Grossman but as the man who had the gun in the back room?

Mr. Fisch: I object to that on the ground it is not cross examination.

The Court: Sustained.

Q When you spoke to the officers—withdraw that. When did the officers speak to you first?

Mr. Fisch: I object on the ground it is not cross examination.

The Court: I will admit it.

Q I just want to fix the time. When was it that the officers first spoke to you, when you said something to them about who you thought you could identify? When was that? A I beg your pardon?

Q When did the officers first talk about what happened after this occurred? A I guess it must have been eight o'clock, it happened after seven and at eight I was in the hands of the police.

Q Well, that night you thought you could remember just one of the men, didn't you?

Mr. Fisch: I object. That is not what she said.

Mr. McGeehan: I do not say she said it. This is a new question.

The Court: Sustained.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q That night at eight o'clock you only remembered the face or appearance of one man that you had seen there that day, is that right?

Mr. Fisch: I object. There is nothing in the testimony to show that.

The Court: Sustained.

Mr. McGeehan: May I argue that?

The Court: Yes, that is the reason I sustained it, because I do not think it is based on the testimony.

Mr. McGeehan: I know it is not.

The Court: Well, you put the question in such way that you assume it has been testified before. Now, if you want to have that question by reframing your question, I will allow it.

(Question read.)

The Court: It assumes she testified that.

Mr. McGeehan: I will change it.

Q That night at eight o'clock did you only remember the face of one man you had seen that afternoon? A No.

Q Didn't you testify that you—do you remember my asking you whether you told the police that night that you could not identify any of them, did not remember what they looked like, and you answered you told them, "I thought I could remember the man who had the gun in the back room."

Mr. Fisch: I object. I do not see how there is any connection between those two questions.

The Court: I will permit it. Go ahead.

A I did not say I thought.

Q Well, then, did you say that night when you were asked whether you could remember any of them, that you could remember the man who had the gun in the back room? A I said I could remember at least three.

Q Didn't you say before that you testified you thought you could remember the man who had the gun in the back room? A I did not say that. I said I could identify them if I saw them.

Q Didn't you say before in answer to my question that you told the police that you could identify the one who had the gun in the back room. Now, didn't you say that on the stand here? A Yes.

Q And that is what you told the police? A Yes.

Q And that man that you remember and spoke of you remember as a man who had the gun in the back room, didn't you? A Yes.

Q You did not remember him then as a man who had fired shots, did you; you did not remember him as the man who had shot Mr. Grossman, did you? A Why, certainly I did.

Q Then why did you describe him as the man who had the gun in the back room instead of the man who did the shooting?

Mr. Fisch: I object to that as being—

The Witness: I will answer that.

The Court: Sustain the objection.

Q Now, I understand that you went before a line-up you said, Miss McAvoy. Can you fix the time about when that was? That was not the next day after this occurred, was it? A Well, that night. That very night I went down and looked over pictures. Is that what you are referring to?

Q No, it isn't, but we will let that stand. You did look at some pictures that day? A That very night.

Q But did you go before a line-up that night or the next day? A Yes, the next day.

Q A line-up of men? A Yes.

Q At police headquarters? A Yes.

Q And are you sure that was the very day after this occurrence?

Mr. Fisch: I object to that, because the witness has already testified that she may be confused about the date.

Mr. McGeehan: I am willing to give her all the chance in the world.

The Witness: Well, if it was not Tuesday morning, it was Wednesday morning.

Q What day of the week was the shooting? A Monday.

Q If it was not Tuesday, it was surely by Wednesday, is that right? A Yes.

Q Now, were you ever before any other line-up after that? A Yes.

Q How long after were you before the line-up again? A The next day.

Q Then were you ever before any line-up of men later than that? A No.

Q Never? A No.

Q So that at any rate, the two line-ups that you went before at police headquarters were both during the same week during which the shooting occurred? A Yes.

Q Is that right? A Yes.

Q Now, are you sure of that, Miss McAvoy? A Yes.

Q Positive? A Yes.

Q At that time when you went before either of those line-ups you did not pick any—you did not pick this man out of any line-up?

The Court: Indicating Calabrese.

Mr. McGeehan: Indicating Calabrese.

A Why, yes.

Q Which line-up was that you picked him out? A The first.

Q The very day after the occurrence? A Either the day after or the next day. As I say, I am confused about the dates.

Q The next day? A Yes.

Q And that you are positive of? A Quite.

Q Did you ever pick Mr. Cort out of any line-ups? A The second line. Mr. Cort was in the second line.

Q And you picked him out then? A I was not positive of him then, but I am positive of him now, more than positive of him.

Q Did you see him in the line-up? A The second line-up.

Q You are sure he was in it? A I am quite positive he was.

Q Now, you know that you are under oath and this is a serious proceeding? A Yes, I do.

Q And you have said that he, Cort, was in that second line-up, but you were not sure of him and you are sure of him now? A Well, as I recollect, he was the tallest of the lot in the street.

Q Well, you stood before that second line-up and stood with the idea in mind of seeing if you could identify anybody? A Yes.

Q There was no excitement at that time? A No.

Q Is your memory good enough to know the faces of the two line-ups that Cort was in? A The second line-up he was.

Q You are quite sure of that? A Yes.

Q But you were not sure then he was a man you had seen? A Yes. I was sure of it.

Q But you did not pick him out? A Yes. Just as much as I did Mr. Calabrese.

Q Yes, but the words you used were that you were not quite sure in both line-ups. A The first I was positive of.

Q Didn't you say before you were not sure of Mr. Cort then but you are now? A No, I didn't say that.

Q You did not say that? A No, I didn't.

Q I mean didn't you just say that in court here a few minutes ago? A The second time.

Q Didn't you just say that in court here a few seconds ago? A The second time?

Q No, I am now asking you a question, and try to consider what I am asking you. Didn't you just say on the stand here as a witness, to this jury, that when you were before that second line-up Cort was there, but you were not sure of him then but you are sure of him now? A No, I was just as much sure of him then as I am now.

Q And you did not say what I just asked you a few minutes ago in this court room? A You are getting me confused.

Q I don't want to, Miss, I am not trying to, and if you are confused, say so. I am asking you a plain English question. Didn't you a few moments ago, while sitting there being questioned by me, didn't you say that Mr. Cort was in the second line-up, that you were not sure of him then but you are sure of him now? A No, I did not say that I said this, that Mr. Cort was in the second line-up, the second or third day I went down there and that I identified him as soon as possible that I could.

Q Well, you did not identify him positively then, did you? A Well, yes, I did identify him positively.

Q Were you positively sure he was the man you had seen up there? A Yes, I was.

Q And if you said before that you were not sure of Mr. Cort then, that was not so, was it? A If I said I was not sure of him then?

Q Yes. A I was quite positive.

Q But if you swore on this stand a moment ago that you were not sure of him, then that is not so, is it? A That is not so, no, sir.

Q Now, will you tell us someone who was present when you say you ever picked Cort out of any line-up or were before any line-up in which he even was? A Well, I don't know any of the men who were there.

Q Now, this was at Newark Police Headquarters, wasn't it? A Yes, sir.

Q Who brought you down?

The Court: Detectives, were they?

The Witness: Yes, sir.

Q The Newark police officers, weren't they? A Yes, sir.

Q Now, don't you know their names? A No, I do not.

Q Now, you were down to headquarters several times, weren't you? A I believe I went down with Mr. Kenny.

Q Mr. Kenny? A I believe it was Mr. Kenny who went down there.

The Court: Is that the gentleman there?

The Witness: The stout man.

Q Is that Officer Kenny, Lieutenant Kenny? A Well, that I went down to court with?

Q Yes. A Yes, sir.

Q Now, did Mr. Kenny take you down both times or was he there both times when you were

before the line-ups? A Well, Mr. Kenny was down there.

Q Was he in the room with you at the time that you were before each of the two line-ups? A Yes, he was.

Q Now, then, I understand you to be sure that some time or other, no matter when it was, since this shooting, you were before a line-up in which you saw the defendant Cort? A Well, I drew from pictures—

Q Now, Miss. A I drew from pictures, then when I went down to the line-up I identified him as soon as possible, as I could—

The Court: Wait a minute, Miss McEvoy. Please listen to the question.

Q This is very important. A I realize it.

Q Do you say now positively that at some time, a week or later, but after the shooting had taken place, at one of the two line-ups, which you say you were before, or in some line-up, that you saw Mr. Cort in a line-up, standing there in a line-up? A Well, I did not know them by name.

Q No, not by name, but a man whom you remembered as being one of the men and whom you now point out? A Resembled, yes, sir.

Q What is this? A The resemblance.

Q I want you to get this very clearly, Miss. A I will try to.

Q You do say that some time or other between the shooting and now you have been at headquarters in the City of Newark standing before a line-up of men in which the man that you now point out as the defendant Cort was, and that you stood before him and that you there picked him out as one of the men whom you had seen

at the shooting, is that right? A I picked out two in one-line-up and then in the second line-up I picked out only—

The Court: Did you ever pick this man Cort out of the line-up?

The Witness: Well, I picked out a man who resembled him very, very much, as far as I could recall it, yes, sir.

The Court: Do you see this man Cort sitting there now, do you?

The Witness: Yes.

The Court: Looking at him now would you say whether or not you ever picked him out of the line-up?

The Witness: In the second line-up I picked him out, yes.

Q You are not sure now, are you? A I said yes.

Q Are you sure you picked him out? A Yes, sir.

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

Mr. Fisch: I submit she has answered it a half dozen times.

Mr. McGeehan: I won't ask it again, then, Mr. Prosecutor.

Q Miss McEvoy, now, that line-up at which you say you picked out this defendant Cort—are you paying attention to the question? Suppose you look at me. A I am.

Q That line-up at which you say you picked him out at Newark headquarters, Mr. Kenny was present at that time, wasn't he? A There was quite a roomful.

Q All right, I want to determine who was there. You say you did that. Now, Mr. Kenny was there? A Yes.

Q The man who brought you down or summoned you down, is that right? A Yes, sir.

Q And were any of the captains there, Sebold or Captain Brex or Chief Brex? A I can't tell you whether they were there or not, I don't know them.

Q Would you recognize any of them who were there? A The chiefs? No, I wouldn't know them.

Q Have you a good memory for faces? A Fairly well.

Q Don't you know some other officers? A All the detectives were there, I guess.

Q Do you remember any of them in the court room? A Mr. Kenny is about the only one.

Q At any rate, you are sure Mr. Kenny was there at the line-up at which you picked Mr. Cort out? A I am quite sure I picked out two men, I know.

Q Now, then, with respect to the defendant Calabrese, did you ever pick him out of a line-up and point him out as a man that you had seen at the place where this shooting took place?

Mr. Fisch: I object to that as having been answered.

The Court: I think we have been over that several times.

Mr. McGeehan: I have been devoting the questioning to the line-up where Cort is alleged to have been.

The Court: My recollection is that two or three times we have been over the question of picking Calabrese out of the line-up.

Q At the time you say you picked Calabrese out of the line-up, did you pick anyone else at that time, out of the same line-up? A No, not that day.

Q You did not? A No, sir.

Q Are you sure that you picked him out? A Yes, I am positive.

Q Do you remember what you did when you picked him out, did you put your hand on him or point to him? A I did not touch him, I just pointed to him.

Q Did you say anything then about not being sure, you could not be positive? A I was quite positive, quite positive.

Q Were you entirely sure? A Entirely.

Q Did you say something, "I can't be sure, I am not positive"? A No, sir.

Q You didn't say anything of that sort? A No, sir.

Q Before you went down to these line-ups you had seen some pictures, had you? A Yes, sir.

Q Had you seen a picture in a newspaper? A No, no newspaper. I stopped the papers. I did not have the papers coming in after this happened, no, I saw nothing from the papers at all.

Q Now, at the time you went to the line-up that you speak of you read the newspapers, didn't you? A No, sir.

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

Q You do read newspapers some times? A I always do, but not at this time I did not, no.

Q Not at that time? A No.

Q You did not see any pictures then in the newspapers of any men? A No, sir.

Q You did not know, then, that certain men had been arrested? A Yes, I heard from different parties—

Q I haven't finished the question—you did not know then that certain men had been arrested on a charge or suspicion in this case? A Yes.

Q Didn't you read the newspaper account of their arrest? A No, sir.

Q Weren't you interested in seeing who was arrested? A No, sir.

Q Or pictures of them? A No, I didn't read the papers at all.

Q Didn't you want to see whether you could remember any of them? A No, I didn't read the papers at all.

The Court: Miss McEvoy, that is not the question asked. You are being asked if you are interested.

The Witness: Oh, interested, yes, sir.

Q Didn't you look at any papers or anything? A No.

Q You have not heard the question, how can you deny this until I have asked you? Didn't you look at any pictures to see if the men who were arrested could be remembered by you as being in it? A I did not, that I will say, I did not, no, no, I did not.

Q Didn't the newspapers come to your house at that time? A No, sir.

Q Had you gotten it before this? A Yes, sir.

Q Who was your newsdealer? A I buy it, we have no newsdealer, I bring it in at night with me.

Q You bring it in at night? A Yes, used to bring it to the store with me.

Q Didn't you have papers delivered to your house at that time? A No, I buy it every night and take it to the store and read it.

Q But you say you did not see any pictures of men in the newspapers? A No, I was not interested in any pictures.

Q Do you remember whether Captain Brex or Captain Sebold was present at the line-up that you were at? A I don't know, because I didn't know the gentlemen at that time. They could be there and I would not know them.

Q You would not remember? A No, I never met them.

Q Now, weren't you questioned by either Chief Brex or Captain Sebold after you were before one of the line-ups? A No, I have never met them, this is the first time I have laid eyes on them.

Q At the time of the occurrence, or the portion of it in by the cash register, Miss McEvoy, you have given the position of Mr. Grossman, you have told where the man that you said was Calabrese was, and where you were. What was the position of the man that you say was Cort at that place and which way was he facing? A Facing Mr. Grossman, standing right at the door, right at the prescription door, facing Mr. Grossman.

Q He was facing him? A Cort and two other men and a man with a large fat face, a very large fat face. I don't see him here, another man.

Q Where were you when the shot outside was fired? A Right there at the curb.

Q At the curb? A Yes, right there.

Q I think you have said that Grossman and the man that he had hold of from behind was

on the curb or at the curb but near the tree? A Right at the curb.

Q And they were facing towards the store? A Facing towards the Varsity road, in that direction.

Q Oh, at an angle? A Yes, sir.

Q Not straight down towards the corner, were they? A They were on the road, either running out in the street.

Q At an angle towards the street? A Yes, sir.

Q More to the left as you came out the door? A Exactly to the left.

Q Now, this man that you say was Calabrese that you say ran back there, did he come from the direction of Lenox street or from the direction of Varsity road?

Mr. Fisch: I object to that. She has answered that. She said she did not know what direction he came from, but she saw him come back.

The Court: Sustained.

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

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

WALTER D. VAN RIPER,
Judge.

Q Whereabouts was the man that you say fired the shot on the sidewalk when the shot was fired? A Where was he?

Q Yes. In the street or on the sidewalk? A On the curb off of the sidewalk, right in the street at the curb.

Q That is in the street, in the gutter as it is sometimes called? A Yes, sir.

Q Below the curb stone, is that right? A Yes, sir.

Q And Mr. Grossman was on the sidewalk? A No, also in the gutter.

Q They were all in the street, and part off the curb? A Off the curb.

Q And at that time do you know from which direction the man that you say fired the shot approached those two men? A Why, he came from the direction, as I say, of Varsity road.

Q So, you do know from which direction he came. A They were in the middle of the street, which was facing that way, not Lenox street, in the middle of the street.

Q They came from the middle of the street, but more from the direction of Varsity road? A From the center of the street, not Lenox street, but Varsity.

Q More toward Varsity? A That is what I said.

Q Now, which direction from Grossman, Grossman was facing toward the center of the street inclined a little toward Varsity, is that right? A Yes, sir.

Q From which direction, then, did the shot come that you say was fired at Grossman out in the street? A In what direction?

Q Yes, from which direction was the man facing him when he was fired at? A Mr. Grossman was going in that direction and this man ran back.

Q In the opposite direction? A No, he must have been in the middle of the street and came back and shot Mr. Grossman right in the side, right there at the tree. I can't make that any plainer.

Q You have said which way Mr. Grossman was facing and you have said which way the man came who you say fired the shot, and that far I understand you perfectly, but at the time the shot was fired, we have Mr. Grossman in the street. A In the gutter.

Q Off the curb, and right near the curb. A Exactly on the curb, off it, but touching it.

Q So Mr. Grossman has his back towards the store, slightly to the left and his feet practically up against the curb? A That's right.

Q And the man who he has ahold of is in front of him, is that right? A Yes, sir.

Q And he is holding him somewhere by his overcoat, behind? A Yes.

Q Then a man comes from over in that direction, from around the center of the street, or more toward Varsity road? A In the center of the street he came from.

Q Did you see him in the center of the street? A They were in the street.

Q I know that, but did you see the man out in the center of the street? A He came from the center of the street.

Q Now, where did he get to when he fired the shot? A He got to Mr. Grossman's side.

Q So he came from the left side of Mr. Grossman?

Mr. Fisch: I object to that, that is not what she said.

The Court: Sustained.

Q Did he come from the left side of Mr. Grossman? A He shot Mr. Grossman on the right-hand side coming from Varsity road, which would be on the right, if that is what you are asking me.

Q The left side of Mr. Grossman was toward Varsity road, wasn't it?

Mr. Fisch: I object to that if the Court please, we have been all over that. Mr. McGeehan has been over this three or four times, and he is trying to entrap this witness.

(Question read.)

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

Q You don't feel you are being trapped into saying that?

Mr. Fisch: I object to that.

Q Assuming this, Miss McEvoy, is the curb —naturally it would be low, of course, as Mr. Grossman was there and this man was in front of him and he was not facing straight away from the drug store door, was he? A Who?

Q Mr. Grossman. A Slightly toward—

Q Varsity road he was facing, is that right? A Yes, sir.

Q Now, to get that as a beginning point. His left side was toward the left side of the road, wasn't it? A He was facing Varsity road completely.

Q All right, turn to the road, they were facing Varsity road, is that right? A Yes.

Q Now, which side of him did the man come that you say fired the shot, on the left side or right side of Mr. Grossman? A From Varsity road.

Q No. A I don't get you then.

Q Which side did he approach Mr. Grossman from his left side or his right side? A His left side.

Q Did he fire the shots when he was toward the left side of Mr. Grossman? A Yes, sir.

Re-direct examination by Mr. Fisch.

Q Just let us refer to this map and be calm and cool about this thing—

Mr. McGeehan: Like the Prosecutor.

Mr. Fisch: I object to that if the Court please.

The Court: I think it is a fact.

Q As I understand your testimony, this man came out of the store and came to the curb by this tree? A Yes, sir.

Q Somewhat toward the direction of Varsity road, is that right? A Right.

Q And Grossman had ahold of one of the men? A Yes.

Q And you say that Grossman was facing toward Varsity road? A Yes, sir.

Q And he was holding on to one of these men? A Yes, sir.

Q And was at the curb? A Yes, sir.

Q And while he was in that position you say Calabrese came from the middle of the street, from Sanford avenue?

Mr. McGeehan: I object to that as leading. This is direct examination.

The Court: Don't answer until the Prosecutor gets through.

Q Did you see Calabrese come from the middle of the road—

Mr. McGeehan: Objected to as leading.

The Court: I will have to hear the question.

Q Did you see Calabrese come from the middle of the road toward the curb?

Mr. McGeehan: I object to that as leading on direct examination by the Prosecutor.

The Court: Where did you see Calabrese come from?

The Witness: From the middle of the street, they had run—

Q Now, then, did Calabrese—

Mr. McGeehan: Now, your Honor, if one leading question follows after another, the witness can then be easily lead despite the sustaining of the objection.

Q Now, then, here is the store, and here is Grossman and the man he is holding on, and Grossman is facing toward Varsity road? A Yes, sir.

Q And you say you saw Calabrese come from the middle of the street, is that right? A Yes.

Q Is that right? A Yes.

Q And so you saw him go from the middle of the street. Was there anybody—withdraw that. When you say you saw him go from the middle of the street, where was Grossman and the man he had ahold of with reference to the store and Calabrese? A In the gutter at a tree, facing toward Varsity road, in the gutter.

Q So that it was Grossman and the man he had ahold of, were they between the wall of the building and Calabrese? A No.

Mr. McGeehan: I object to it as leading.

The Court: I will permit that.

Q At the gutter? A Yes.

Q And you say you saw him come from the middle of the street? A Yes.

Q And did he come toward Grossman? A Yes, and gave him the fatal shot.

Mr. McGeehan: I ask that that be stricken out.

The Court: Strike it out.

Q And when he came toward Grossman as Grossman was over at the curb, holding on to this man's coat, and Grossman was facing toward Varsity road, you say he came there and fired the shot? A Yes.

Q And as Grossman was in the street facing Varsity road, which side of Grossman was at the curb facing Varsity road? A His left side.

Q Are you sure about that? A Yes, he was.

Q Let's see. Varsity road is over here, south of Lenox street? A Yes.

Q Is that right? A South of it. You see, we were only up there four months.

Q Varsity road is further away from Springfield avenue than Lenox street is? A Varsity road is to the right of this store.

Q Is Varsity road farther away from Lenox street— A Yes.

Q —than—I will withdraw that. As you were walking toward the drug store the first street you come to is Lenox street, is that right? A Yes.

Q Then you come to the grocery store? A Yes.

Q And then you come to the drug store? A Yes.

Q And then you come to the delicatessen store? A Yes.

Q And if you keep on walking, what is the next street? A Underwood, and next is Varsity.

Q So Varsity road is over this way (indicating)? A Yes. It would be over toward Varsity road.

Q Are you sure about that? A Yes.

The Court: Well, can't we have it settled where Varsity road is?

Mr. McGeehan: Is the store between Lenox street and Varsity road?

The Witness: It is between Lenox street and Underwood, on that side, but Varsity road is opposite.

Q Varsity road does not cross Sanford avenue? A No.

Q And it runs west from Sanford avenue, does it? A Yes. They were going across the street, they were going out of the street. They were facing toward Varsity road.

The Court: Well, gentlemen, can't we have it definitely fixed on the map where Varsity road is? That ought not be a question of argument.

Mr. McGeehan: Yes, sir, I will agree.

The Court: I understand Varsity road is on this side of Lenox street.

Mr. McGeehan: It is a continuation on the westerly side.

The Witness: One side is Underwood street.

The Court: One side of the street is Underwood and the other side is Varsity road.

Mr. Fisch: Lieutenant Linarducci is familiar with that neighborhood. We can withdraw that witness. Well, can we agree on this, that Underwood is south of Lenox street running east from Sanford avenue and that Varsity road is also south of Lenox running west from Sanford avenue.

Mr. McGeehan: And is a continuation of Underwood street.

Mr. Fisch: And is a continuation of Underwood street.

Mr. McGeehan: Agreed.

Q So that Varsity road and Underwood street are the same street? A Yes.

Q So that as Grossman was holding on to this man and facing toward Varsity road, Varsity road being over here— A Yes, across from the store.

Q Then Calabrese came from the street? A Yes, from the street.

Q Now, we are sure we have the directions right. A Quite sure.

Q Here is the drug store? A Yes.

Q They came out of the drug store and is this the place where Grossman was holding on to this man? A Yes.

Q And as he was pointed in what direction? A Toward Varsity road, across the street.

Mr. McGeehan: She said across the street. I do not think she should be led.

The Witness: They were all running into the street.

Mr. McGeehan: Is that marked?

Mr. Fisch: Yes, I marked it.

Mr. McGeehan: I object to that and ask that it be removed.

The Witness: They were running over in the direction of Varsity road.

The Court: Diagonally from the store, is that it?

The Witness: Yes, sir.

Q Were they running in this direction I am indicating now? A Yes.

Q Diagonally? A Yes.

Q And Mr. Grossman— A He was at the curb.

Q In a diagonal direction facing Varsity road? A Yes.

Mr. McGeehan: I object to that pencil directing her. She has not testified.

The Court: I think she did.

Q Now, assuming— A You have Lenox marked—

The Court: Just listen to the question.

The Witness: Yes, I will.

Q Now, while Grossman was at the place you have indicated and which I am now holding the point of this pencil, did you see where Calabrese came from?

Mr. McGeehan: I object and I think it is important, to the Prosecutor leading that witness who is his own witness, or holding of a pencil that she has not testified to yet.

The Court: The witness has testified that Grossman was standing on the curb headed toward Varsity road in the direction where the pencil is pointed.

Mr. McGeehan: I do not think she has yet.

The Court: Upon that I guess my memory will have to rule, but I will rule she has and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Now, Miss McEvoy, just listen to this question.

(Question read.)

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Where did he come from? A The center of the street.

The Court: Now, point out to us on the map where did he come from.

The Witness: Would you call this the street?

Q That is Sanford avenue up there. A Well, they got across Sanford avenue.

Q Where did Calabrese come from? A Sanford avenue, the center of the street there.

Q And where did Grossman get to, where the point of the pencil is or the butt of the pencil?

Mr. McGeehan: I object to that. The witness ought to say where on the map.

The Court: I will permit it.

A Where the point is, facing Varsity road.

Q That would bring his right side nearest to the gutter? A I would call that the left side. Maybe I am dumb. I don't know.

Q Would it bring his right side nearest to the opposite side of Sanford avenue? A It would bring his—

The Court: Look at it this way. Was Mr. Grossman facing this way (indicating)?

The Witness: Yes, sir.

The Court: Now, where was his right side?

The Witness: This would be his right side.

The Court: I mean which side of the pencil?

The Witness: Facing this way (indicating.) His head would be this way.

The Court: He was standing up?

The Witness: No, he was lying down.

The Court: He was lying down?

The Witness: They were dragging him.

The Court: So was his face down?

The Witness: Dragging him on his side, as I saw it, his right side.

The Court: Was part of his body out in the street in Sanford avenue, into the gutter?

The Witness: His body was off the sidewalk completely.

The Court: So which side of his body was nearest to the curb?

The Witness: Well, his feet were touching the curb. His whole body was in the street.

The Court: What side was nearest to the curb?

The Witness: I would call it the left.

The Court: I think we have been a little bit unfair to the witness in thinking she was wrong. If he was lying down in the gutter, his left side would be near the curb.

Q And then you saw the shot fired? A Yes.

Q Do you know into which side that shot was fired?

Mr. McGeehan: I object. The witness has already testified it was the left side and this is not proper re-direct.

The Court: I will permit it.

Q Do you know into which side that shot was fired? A I would call it the left.

Q Are you sure it was the left?

Mr. McGeehan: I object to that after the witness has definitely testified.

The Court: I will permit it. It is perfectly proper to have it straightened out.

Robert M. Hammond, for the State, direct.

Q You still think the shot was fired into his left side? A I do.

Adjourned until tomorrow, Friday, November 1, 1929, at 10 o'clock A. M.

FIFTH DAY.

Friday, November 1, 1929.

Continued pursuant to adjournment.

Present: Counsel as before stated.

The Court: Mr. Stenographer, let the record show that each exception that has been granted so far in the trial applies to both defendants, and in the future, all exceptions to the testimony will apply to both defendants unless otherwise specifically stated.

ROBERT M. HAMMOND, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Hammond, where do you live? A 127 Underwood street.

Q And is that near Sanford avenue and Lenox street? A Yes, sir.

Q And were you in the vicinity of Sanford avenue near Lenox street on the evening of April 22 last? A I was.

Q At about what time? A About 7:30.

Q Were you walking or driving in an automobile? A I was driving in an automobile.

New Jersey State Library

Q In which direction? A I was driving north on Sanford avenue.

Q And was there anybody with you? A Yes, sir, there was another fellow.

Q What is his name? A Charles Spann.

Q Now, do you know where the Grossman drug store is? A I do.

Q And did you drive in the vicinity of that drug store? A I did.

Q And what, if anything, did you observe? A A I approached the Grossman drug store I saw three persons that seemed to be struggling on the sidewalk.

Q Whereabouts on the sidewalk? A It was in front of the delicatessen.

Q What is that? A In front of the delicatessen.

Q Where with reference to the curb stone? A Right near the curb.

Q You saw these men and they seemed to be wrestling, you say? A Yes, sir.

Q Then what next did you see or hear? A It was just after I passed, my attention was diverted to something else at the moment, and I did not take special notice, but just after I passed I heard two shots fired with a brief interval between them.

Q Then, what did you do? A I pulled up to the curb on the other side of Lenox street and stopped.

Q Then what did you see, did you get out of your car? A I got out as quickly as I could and I started to run back.

Q And then you pulled up to the curb on Sanford avenue? A That's right.

Q And where, with reference to the National Grocery store which is on the corner here? A

On the other side, that would be right about here (indicating).

Q So that you pulled up to the curb on Sanford avenue north of Lenox street. Is that right? A Yes, sir.

Q Then you got out of your car? A And started to run back.

Q Show us with the pointer the direction that you took in running back? A Right along here (indicating). I came right to where Grossman was laying.

Q You came to the point where Grossman was lying? A Yes, sir.

Q And as you were running back did you see anything? A I saw two men run around the corner.

Q What corner? A The corner of Lenox street and Sanford avenue.

Q Show us, please, the course that you saw these two men take. A Right down here.

Q That is you saw them going north on Sanford avenue and then turn east on Lenox street? A That's right.

Q Did you observe anything about how these men were dressed? A I did not, I did not pay any attention to the men at all. My attention was directed on Grossman lying in the gutter.

Q Then, after seeing those two men running north on Sanford avenue and then turning east on Lenox street, what did you do? A I went over to Grossman as quickly as I could. There was an automobile parked in front of him and I could not see him, he was lying right in back of the automobile.

Q What part of the street or sidewalk was he lying in? A He was in the gutter right near the curb.

Q In the gutter near the curb, and did you observe his condition? A Yes, sir, he seemed to be in agony.

Q Was he bleeding? A Yes, sir, he was bleeding.

Q Did you hear him say anything?

Mr. McGeehan: I object to that.

The Court: Did you hear who say anything?

Mr. Fisch: Grossman, I think it is a part of the *res gestae.*

The Court: Just at the time of the shooting this was?

Mr. McGeehan: It is following the shooting.

Mr. Fisch: Immediately following the shooting. If your Honor please, if there is any question about it, I will withdraw the question.

The Court: I think you better hold it now. Probably a little later in the testimony, somebody will be there to make it admissible.

Q You say you saw him bleeding? A Yes, sir.

Q And what else, if anything, was he doing? A He wasn't doing anything except lying in the gutter, he could not do much else.

Q Then, what did you do, if anything? A Why, there was considerable confusion as a crowd collected. There were attempts at hailing automobiles and so forth, and finally myself and the other fellow, we picked him up and somebody said there was a doctor lived across the street, so we carried him over across the street and into the doctor's house and we laid him on

the floor, but the doctor was not home, and we carried him out again, and we brought him to the sidewalk, and at that moment a patrol wagon drove up and they took him away.

Q Did you see where he was bleeding from? A Well, I did not take particular notice. I noticed he was bleeding from the head and there were spots of blood on his clothes.

Cross examination by Mr. McGeehan.

Q Mr. Hammond, I understand you saw three persons struggling there at the time? A That's right.

Q And you were, when you first saw them, about where on the street were you then passing them, or had you not come up to the point? A I don't really think yet.

Q Then, I understand you to say your attention was diverted or perhaps you looked ahead of your car, is that right? A That's right.

Q So that you did not see the shots fired, but heard them? A It was after I passed that the shots were fired.

Q So that you cannot tell us about how far you were away from where the men who were struggling were when you first saw them? A When I first saw them, I can point to it. The men were about here, and I was about here (indicating).

Mr. McGeehan: Indicating a point about two inches from the right-hand side of the map, Mr. Fisch.

Mr. Fisch: That is the map, Exhibit S. 1.

Mr. McGeehan: What is the scale of that map?

Mr. Fisch: I think it is one-quarter inch to the foot. Yes, one-quarter inch on the map equals a foot on the ground.

Q Now, can you estimate the distance about how far that was from where they were struggling? A I could hardly say that.

Q I mean just approximately. A Oh, I would say 35 yards.

Q About 35 yards? A Yes, sir.

Q That is approximately 100 feet? A Yes, sir, about that.

Q Was it greater, for instance, than the distance from you to the rear wall of the court room here? A Yes, sir, it was greater.

Q You say about 100 feet? A About that, yes, sir.

Q Now, about how far did you get past the point where you saw them struggling when you heard the shots? A Well, I had almost reached that corner there.

Q The first corner or the far corner? A No, the first corner.

Q And that was a distance of how far, would you say, 30 feet, 35, 40 feet? A Yes, about that.

Q Now, how fast were you going at that time, approximately? A I don't know, I wasn't going very fast, about 20 miles an hour, I should say.

Q And when you first saw those men struggling they were all in a group, is that right? A That's right.

Q Do you know whether or not—you know there were more than two men, don't you? A I saw three.

Q Do you know whether there were more than three, did you get a good enough view to

say whether there might have been four? A No, I saw only three men.

Q Then, when you heard the shot you saw three men and when you came back you saw two men running towards Lenox street. Is that right? A Yes, sir, that is going around the corner.

Q Now, those shots, you are sure there were two shots fired? A As I remember it now, there were two shots, with a very brief interval between them.

Q Your mind is a little uncertain on that point, is it, as to whether there were two shots or more than or less than two? A It is a little uncertain, but I believe there were two shots.

Q It is your mental recollection of what you heard there? A That's right.

Q But of that you are not altogether sure, are you? A Not positive, no.

Q Now, did I understand you correctly that there was a car parked somewhere on Sanford avenue there? A Right in front of where Grossman was laying.

Q Towards Lenox street from him or towards the other street? A Towards Lenox street.

Q How close to where Grossman was lying was that car, about? A About 5 feet, 6 feet in front of him.

Q Now, when you saw them struggling, your recollection is that they were on the sidewalk by the curb. Is that right? A That's right.

Q Not in the street? A No.

Q But he lay in the street when you came back? A That's right.

Q Of course, you could not distinguish the positions beyond the fact that there were three men there struggling? A No.

Q When you say struggling, do you mean hitting each other? A Well, I can't very well say that, the three of them seemed to be bunched together and they seemed to be having a—

Q Tussel of some kind? A A tussel, that's it.

CHARLES SPANN, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Spann, where do you live? A 277 Chancellor avenue.

Q And you are a friend of Mr. Hammond who was just on the stand? A I am.

Q Were you in his company on the evening of April 22, about 7:30 o'clock? A I was.

Q And in his automobile, were you? A Yes, sir.

Q What kind of an automobile is it? A A Ford roadster.

Q Who was driving? A Mr. Hammond.

Q And where were you seated? A I was seated in front alongside of him.

Q You were seated alongside of him? A Yes, sir.

Q And did you travel over Sanford avenue? A I did.

Q In what direction? A North towards Lenox street, it was.

Q And as you were approaching the direction of Lenox street, did you observe anything? A I saw men struggling in the street, at first it seemed that it was some children playing, as they generally do up there and I did not pay any attention to it at first, I did not pay any

attention to it at first until we got a little past, and I heard shots, and I turned around, and although there was a car right in front and I could not see anything, I told Mr. Hammond to stop, and of course he could not stop right at the spot, and he pulled north of Lenox street and stopped and as we got out I saw two fellows run around the corner.

Q Around what corner? A Around Lenox street east, I think it is, from Sanford avenue.

Q Running on Sanford avenue in what direction? A Towards Lenox avenue around the corner.

Q That is from the direction of the drug store? A Yes, sir.

Q You say you heard shots? A Yes, sir.

Q How many shots did you hear? A I heard two shots.

Q Did you see where this struggle was taking place? A About two feet off the curb, I imagine, in front of the delicatessen.

Q And the delicatessen is just to the south of the drug store, is it, in the same building? A That is right.

Q And after you saw those two men running around the corner, what did you do? Where did you go? A We ran directly to Mr. Grossman, he was lying in the gutter.

Q He was lying in the gutter? A Yes, sir.

Q Did you observe his condition? A He was bleeding from the face and he seemed to be struggling on the ground, squirming on the ground.

Q Squirming? A Yes, sir. Of course, we were there the first ones, I believe, and we wanted to get a car to rush him to the hospital, and our Ford was down the street too far to run down and get it, and we tried to get some-

one to stop and pick him up, and nobody would stop and somebody said there was a doctor across the street, and we picked him up and carried him across the street and got half way across and two other fellows helped us carry him, because he was too heavy, and we got him upstairs and the lady in the house told us the doctor was not in—

Mr. McGeehan: I don't like to interrupt, but I don't think this is relevant, Mr. Fisch.

Q After you got him up to the doctor's house and after you carried him there, what did you do? Did you leave him there? A No, we did not leave him there because the doctor was not in and we brought him downstairs.

Q When you got downstairs what did you do? A Just as we got him downstairs a patrol wagon came and they took him along.

Cross examination by Mr. McGeehan.

Q How many men—was it dark at this time? A Yes. It was just getting dark.

Q This was in April, and your recollection is that the men were off the curb and down in the street when you saw them? A They were two feet from the curb on the sidewalk.

Q Oh, they were on the sidewalk and not on the street at that time? A No.

Q And was the distance you were away from them just about the same as your friend on the stand, one hundred feet away? A Yes.

Q At that time I do not think you said you paid much attention to it until you heard the shots afterwards? A That is right.

Q Did you notice altogether how many men there were in that group? A Well, I just saw three of them struggling. That was including Mr. Grossman.

Q Well, of course, you did not know until later it was Mr. Grossman? A No.

Q Well, did you notice three of them? A Yes.

Q Do you think there might have been four? A I could not say. I am not clear on that.

Q That is because you did not pay a lot of attention to it because you did not think anything about it? A That is right.

Q Now, where was your car about when you heard the shots? A Just coming up to the corner of Lenox street.

Q And you stopped on the opposite corner? A Stopped on the opposite corner.

Q Now, are you sure you heard two shots? Is it clear in your mind? A I could not say it was clear, no.

Q That is what you think, but there is a little doubt about that? A Yes.

Q With respect to the men that you saw, I think you said you saw the men running toward Lenox street? A Yes.

Q How many men were running toward Lenox street at that time? A Two at that time.

Q Are you sure of that number? A Yes, I am sure.

Q Were they close together? A I would say about two or three feet apart.

Q That is close together? A Yes.

Q And do you know whether any men preceded them running along there; did you see any others running along Lenox street at that time? A No.

Juror No. 1: You did not notice this automobile as you came up that was parked at the curb?

The Witness: No, I did not notice it.

ALBERT M. APGAR, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Are you connected with the Newark Police Department? A Yes.

Q Attached to the Detective Bureau at Police Headquarters? A Yes.

Q Did you have occasion to go to the Grossman drug store on the night of April 22nd last? A Yes.

Q What time did you get there? A About 7:30 or 7:40.

Q Did anybody accompany you? A Detective Rogers.

Q I suppose you went there in response to an alarm? A I did.

Q And after you got into the place did you make some inquiries? A I did.

Q I show you a piece of iron or steel and ask you whether or not you found that in the drug store? A Detective Rogers picked it up from the floor.

Q In your presence? A Yes.

Q Whereabouts? A I should judge about a foot and a half or two feet from the entrance of the door.

Q I show you Exhibit S. 2. Do you understand this map? A Yes.

Thomas Scanlon, for the State, direct.

Q Will you point out about where that was found? A About over here (indicating).

Mr. Fisch: Indicating a point about a foot and a half east of the entrance door. I offer it in evidence.

Mr. McGeehan: I object. It is not in any way connected with this matter.

The Court: Well, let it be marked and I will allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

(Marked Exhibit S. 12.)

Cross examination by Mr. McGeehan.

Q When you got there, who let you in? A There was a uniformed officer and a large crowd of people, and the door was open when we arrived.

Q Who was in the store, a uniformed officer and anybody else? A That I could not recall.

THOMAS SCANLON, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Are you connected with the Newark Police Department? A I am.

Q And attached to the detective bureau at headquarters? A I am.

Q And are you attached to any particular squad at headquarters? A The automobile squad.

Q Now, did you have occasion to—withdraw that. I show you Exhibit S. 5, a photograph of a Chrysler automobile, and ask you whether you have ever seen that automobile? A I did.

Q When was the time you saw it? A In front of 237 Bank street, Newark.

Q When? A April 25th.

Q Was there anybody in it at the time you saw it? A Nobody at all.

Q And do you know what the condition of it was at that time? A I know the left front light was out when we got there about 9:30, on the night of the 25th. I did not notice anything else.

Q What did you do about it? A We had it removed to Boettner's garage.

Q Then did you check up on the automobile after it was removed to Boettner's garage to find out to whom it belonged? A We did.

Q What did you find?

Mr. McGeehan: I object.

The Court: I think a general statement what the witness found might be very material.

Q Well, did you make an investigation? A Yes.

Q What did your investigation consist of? A It was owned by Morris Shapiro, of 15 Milford avenue.

Mr. McGeehan: I move that be stricken out.

The Court: Strike it out.

Q What did you do? A Well, we made an investigation on the license plates. We called

up Trenton and found out the license plates belonged to Morris Shapiro.

Mr. McGeehan: I object and ask that that be stricken out.

The Court: Well, you called up Trenton and you found out whose name the car was in?

The Witness: We did.

Q Was anybody with you? A Detective Dennebaum.

Cross examination waived.

ROBERT P. DENNEBAUM, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Dennebaum, I show you Exhibit S. 5, a photograph of an automobile, which bears License 3-E-4477, and ask you whether you ever saw that automobile? A Yes.

Q Where? A 237 Bank street, on April 25th.

Q And was anybody with you? A Yes, Detective Scanlon.

Q Was there anybody at the car? A No.

Q How did you come to go there?

Mr. McGeehan: I object to that. I do not think that is relevant at all.

The Court: Sustained.

Q What did you do with the car, if anything? A Well, the car was removed to the police garage.

Q Do you know how it was removed? A Yes, by a wrecker from Boettner's garage.

Q Then did you make an investigation with regard to whose car it was? A I did.

Q From Trenton? A That is right.

Mr. Fisch: I would like to offer in evidence certification of the Motor Vehicle Inspector of the State of New Jersey with respect to automobile bearing registration No. 3-E-4477.

Mr. McGeehan: The testimony of the witness was it was his car.

The Court: I think it is surplusage, but I will admit it.

(Marked Exhibit S. 13.)

Cross examination waived.

ROBERT A. TEMPLETON, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mr. Templeton, what is your business or occupation? A I am in charge of the bureau of records at Police Headquarters, Newark.

Q And as such are you also engaged in the finger-printing and deciphering of finger prints? A I am.

Q How long have you been engaged in deciphering finger prints and the art of finger print identification? A A period of more than eleven years.

Q And are all of the finger print identifications in the City of Newark under your supervision? A They are.

Q How many of them have you examined in the last 11 years? A Well, I have examined in the neighborhood of approximately 10 to 15 thousand finger prints and I have made perhaps three to four thousand finger print identifications.

Q Now, these are comparisons you made? A They are.

Q And identifications? A They are.

Q I show you Exhibit S. 5, and ask you—which is a photograph of an automobile, and ask you whether you saw that automobile? A I did.

Q When did you first see it? A At Boettner's garage on New Jersey Railroad avenue, Newark.

Q When? A On May 1, 1929.

Q And what did you do with reference to the automobile? A I made an examination of the rear right window of the car where a prior examination had been made by another person connected with my office and a finger print was developed thereon.

Q Now, in making an examination, how did you make that examination, did you put anything on the car? A White finger print powder.

Q Now, you say you made this examination of the rear window? A Right rear window.

Q Now, then, you say you made this examination of the rear window? A The right rear window.

Q Inside or outside? A Inside.

Q Would that be next to a person who was sitting in the rear seat on the right-hand side? A It would.

Q And you developed a finger print there? A I did not develop a print, no.

Q Well, you took the print. Did you take the impression? A I did not.

Q What did you do with reference to it? A I removed the glass.

Q You removed the glass on which the print was? A That is, I did not remove it. I had the glass removed by one of the mechanics in the garage.

Q And what did you do with the glass? A Brought the glass to Police Headquarters and turned it over to photographer Day and instructed him to make a photographic plate of this print on the glass.

Q Did he do that under your supervision? A He did.

Q Then what did you do? A He returned the plate and the photograph of the print that he printed from the negative of this plate to me and I compared this print with a number of different finger prints that we had on file at the office.

Q These finger prints are classified in various classifications? A They are.

Q How many classifications are there? A Numerous.

Q Did you proceed by your comparison by the classification as it is shown in the print? A The comparison is made not on the basis of classification but on a comparison of the characteristics of the ridges of the print.

Q Now, just tell us how you do that, because I don't know. A The print is carefully compared, the ridges, the configurations and the ridges of the print, to determine whether they agree with the other print that is under comparison.

Q Then, what did you do in this case? A After comparing this latent print, which was taken from the glass of the automobile, with a number of different impressions on file, photographs, I finally came across one that it corresponded with, and these impressions were on a finger print form that had been sent to the Bureau of Records from the Essex County Probation office and they were the finger prints of—

Mr. McGeehan: I object to any testimony as to whose prints they were.

Q Did you determine, or were you able to determine from your examination whose finger prints they were? A I was.

Q And after you came to the conclusion as to whose finger print it was, did you subsequently see a man and take an impression of his finger prints? A Some days after that.

Q How long after? A I won't be sure as to the exact number, I think it was five or six.

Q I did not get that. A I think it was five or six, but if I could refer to my notes I could tell you exactly the day.

Q And did you report the result of your investigation and your comparison to anyone? A I did.

Q To whom? A To Captain Philip Sebold.

Q Captain Sebold at Police Headquarters? A Yes, sir.

Q And then, this five or six days afterwards, did you take the prints of a man, of some man in connection with this matter? A I did.

Q And did you compare the prints that you took of that man with the prints that you had received from the probation office? A I did.

Q And also with the print that you had found on the glass of this automobile? A I did.

Q And what did you discover?

Mr. McGeehan: I object to that. I think the proper method of proceeding is to put in evidence the photograph which he testified was taken from the car and the photograph of the finger prints that he seeks to establish as being identifical and let him testify to his opinion as to whether they are.

The Court: I won't say that that is an improper method, Mr. McGeehan, but I don't think it is the only method. It seems to me that this is admissible.

Mr. McGeehan: The Courts have stated that you don't have to bring the glass or the door to court, but photographs may be put in evidence—

The Court: But the photographs are merely an elaboration of his opinion.

(Objection withdrawn.)

(Last question read.)

A I discovered that they were identically the same.

Q And whose finger print was it? A The finger print of one William Raymondo.

Q Would you know Raymondo if you saw him again? A I would.

Q I suppose you have made an extensive study of this science of finger printing? A I have.

Q And what does science tell today with regard to the likelihood of the finger prints of two different individuals being exactly alike, what are the chances?

Mr. McGeehan: In the interest solely of saving time, I might say that I have withdrawn any objection to the question and manner of introducing the print, and the witness has testified they are Raymondo's finger prints, and there will be no contrary evidence introduced as to the certainty and correctness of Mr. Templeton's comparison, so, under those circumstances, I don't think it is necessary to go into the degree of accuracy.

Mr. Fisch: This is the only question I intend to ask him with regard to accuracy.

The Court: I don't think it is proper to ask what science says, but what is this witness' opinion.

(Question withdrawn.)

Q What is your opinion, Mr. Templeton, with regard to the likelihood of finger prints of two different persons being exactly alike? A There have never been discovered two finger prints that were identically the same.

Q Do you see in the court room the man whose prints you took? A I do.

Q Where is he? A Sitting directly behind you.

Q The man whom I am now indicating? A Yes, sir.

Mr. Fisch (addressing the man indicted): And your name is?

(The man indicated answers, "William Raymondo.")

Q Now, have you the photographs of the prints that you made that you have been testify-

ing to? A I turned them over to the prosecutor's office.

Q And are these the prints? A They are.

Q Now, will you be good enough to pick out just the prints, identify them, and tell us what they are? A As you have them here?

Q Yes. A This is the original finger print negative that was taken by a man connected with my office, Mr. Kissling, and turned over to me after being developed by the photographer Day.

Q By your direction and under your supervision? A Yes, sir. And this is the finger print made from that negative.

Q And was this print made under your direction and under your supervision? A It was. This is a positive film made from that negative film by photographer Day.

Q Was that made under your supervision and by your direction? A It was. This is a print made from the positive film by photographer Day.

Q Was that done under your supervision and by your direction? A It was. This is a print made from a plate of the right thumb and left thumb impressions of William Raymondo.

Mr. Fisch: I would like now, if the Court please, to offer in evidence the original negative and the latent impression on the automobile, the print from that negative, the original negative and the positive film of the latent impression and the print from that positive film, as one exhibit.

Mr. McGeehan: These all refer to the prints he testified to before?

Mr. Fisch: Yes.

Mr. McGeehan: There is no objection.

(The same were received in evidence and marked Exhibit S. 14.)

Q Now, Mr. Templeton, I interrupted you. A These are enlargements—

Q No, wait a minute. You were telling me about other prints. A These are photographs of the original ink impressions of William Raymondo.

Q Taken by you and under your supervision? A The photograph was made by Officer Day under my supervision.

Q And have you the impressions that were made of Raymondo's finger prints? A The original, you mean?

Q Yes. A From which that photograph was made?

Mr. McGeehan: It seems to me, your Honor, we having consented to the testimony of the witness, that he compared them and they are the same, that these photographs, although in existence, do not need to be used.

Mr. Fisch: I will try to confine this to as short a compass as possible. I don't want to take up too much time.

Q After having that print made from the negative plate of Raymondo's thumb impression, what did you do? A I made the comparison with that and the photograph of the impression found on the glass of the car and found they were identically the same.

Q Did you then have photographs made of these two impressions that show an enlargement

of the thumb of the original impression and the impression found on the right rear window of the car? A I did.

Q And have you that original here? A I have.

Q Is this the original? A It is.

Q And did you have copies printed up from it? A I did.

Q And have you marked them out, made outriggers, I believe you call them, to show the points of similarity? A I have.

Mr. Fisch: I offer the original and a copy of the print as one exhibit.

(The same was received in evidence and marked Exhibit S. 15.)

Mr. Fisch: If the Court please, I have a number of these prints for the benefit of the jury and the Court and counsel.

The Court: All right, you may distribute them.

Q Now, you have marked, have you not, the respective parts of the photograph, Exhibit S. 15, what they represent; the one on the right represents the finger print enlargement of the right rear window of the sedan? A Yes.

Q And the one on the left the photo representation of William Raymondo? A Yes.

Q Will you explain to the Court and jury the result of your examination and what they represent? A There are 16 points of similarity in these two impressions. That means there are sixteen identical features about the impression that are the same and show that these two impressions were made by the same hand, that they are of the same finger. Number one, if

you will notice, is an upward line and abrupt ending of an upper line and you will find if you count between feature or characteristic No. 1, and characteristic No. 2, there are three separate lines between these two points on each of the two impressions illustrated.

Q I notice that the photograph enlargement on the left of the print is so much clearer and more distinct than the one on the right. Will you explain that to us? A That is due to several things. In the first place, the impression on the left was made by an operator under the most favorable conditions with finger print ink, the ink being rolled on the fingers and then being rolled over a white piece of cardboard, and the contrast between the black and white is very good, and produces a good photograph, whereas the one on the right was made under different conditions. The white powder was placed on the glass with a camel's hair brush and this glass was quite dirty and the white powder placed on the glass produces a gray color. The background was not quite as good as the white paper made to produce the other photograph. Therefore, the gray powder and the gray color of the glass did not contrast so good and an allowance must be made that a black finger print ink was made on the left whereas the right was made with a finger print powder, and the ink adheres better to the ridges than the powder does. Characteristic No. 2 is the ending of a line and if we follow that characteristic upward we find that in both impressions there is a fork or a bifurcation of two lines marked on the two impressions as characteristic No. 4. Of course, as I said before, the impression on the left is much clearer than the one on the right, but if you

scrutinize the one on the right you can see the lines agree. Characteristic No. 3 is a downward flow and directly to the right of that characteristic is characteristic No. 14, which is a downward stop line. Characteristic No. 4, as I said before, is a fork, a downward fork or bifurcation as it is called, which is a bifurcation of two lines which takes the shape of a fork and between characteristic No. 4 and characteristic No. 3, there are one, two, three, four, five, distinct separate lines. Characteristic No. 5 is a stop line coming up and between characteristic No. 5 and characteristic No. 6, which is a downward fork, there are two separate lines.

Q When you refer to these characteristics, you are referring to both prints? A Both prints are exactly the same. Characteristics No. 7 and 8 are what we term a very fine characteristic. It is an unusual and unique one. It is a fork to the right and a fork to the left. It is not quite as clear in the print on the right as the one on the left, but if you examine it carefully, you will find these differences there. No. 9, characteristic is a stop line and there is one line separating that characteristic, and No. 10, which is a fork upward and to the right. Now, I might explain that this print—this impression, in this impression there appears a scar and that is shown as you will notice by a sort of puckering of the ridges of the impression. That is due to a cut and the skin and ridges healed and after the ridges healed and showed their original contour, there is a mark where the cut was inflicted, and you will notice that scar is present in both of the two enlargements. Characteristic No. 11 and No. 12 are at the point where this scar appeared and show the difference, or, rather, the similarity

in the puckering ridges of the scar. Characteristic No. 13 is a downward fork and characteristic 14 is what appears to be on one on the right—it appears to be a fork upward, and the one on the left a stop line downward. It does not appear to join in the one on the left. This is due to the fact that the powder in the impression on the one on the right has filled in the opening in the one that shows on the left, but it is quite evidently the same. Characteristic 14 is a fork downward and that is separated from characteristic No. 16, which is also a downward fork at two intervening lines. The fact that these sixteen characteristics appear in identically the same location and have identically the same shape or contour, goes to prove that these two impressions are the same.

Q Is that your opinion? A That is my opinion.

Q And in your opinion, to sum it up, the finger print impressions found on the glass of the right rear inside window of the Chrysler sedan, the photograph of which I showed you, was the finger print impression of William Raymondo, is that right? A It is.

Cross examination waived.

JOHN WHITE, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Where do you live? A 35 Rutgers street.

Q And do you remember the 25th of April, last? A I do.

Q Were you in the vicinity of 241 Bank street? A Yes.

Q What is your business? A My business is janitor.

Q And were you a janitor of the place 241 Bank street? A Yes.

Q Is that how you happened to be there? A That is how I happened to be there.

Q And between ten and eleven o'clock that morning did you notice anything? A I was standing out on the steps and I noticed a car coming across out of Howard street into Bank, across the car tracks, and they pushed it right down in front of 241.

Q Who pushed it? A Two young fellows.

Q And pushed it right in front of the place you are the janitor of? A Yes.

Q And pushed it along the street? A Yes, one on one side and one on the other.

Q What else did they do? A They got in the car and tried to start it up and I walked over to it with my own smart self and I told them the rear wheel was gone, and went back on the stoop.

Q And then what did these two men do? A They gets out of the car and goes back to the rear and looks around and they come back to the car and raised up the hood and tried to do something and they could not do anything, and then they walks back and gets in the car and tries to start the car and they could not make it go and they both get out and walk away.

Q And left the car there? A Yes.

Q What kind of a car was it? A Well, it was a greenish car, I think.

Q Open or closed? A Closed.

Q I show you Exhibit S. 5 and ask you whether you can tell me if that is a photograph

of the car you saw. A Well, I told you I didn't pay so much notice to the car, but this is made on the same order it looks to me.

Q It looks on the same order? A Yes.

Mr. McGeehan: Made on the same order.

The Witness: Well, you know what I mean.

Q Well, what do you mean? A Made on the same order.

Q Was it open or closed? A Closed.

Q I want to know if the car you saw looked like the car shown in this Exhibit S. 5? A Well, it looked something like it. I cannot say for sure.

Q Do you know what became of that car afterwards? A No, I do not.

Cross examination by Mr. McGeehan.

Q What were you doing, Mr. White, in front of your place that day? A I finished cleaning up and I was standing resting on my broom like I used to do, looking around.

Q Do you usually rest? A I usually rest, and that is where I seen the trouble with the car. If it was not for that I would be down in the yard.

Q Were you alone or did you have somebody with you? A I was alone.

Q Didn't you say you went across the street with somebody else? A No, sir.

Q Oh, with your smart self you went there? A I did not go across the street. I stayed there when the car came down in front of the building.

Q So you advised these men about the car? A I told them the rear was gone.

Q And as soon as you said the rear was bad, they opened up the hood in front? A Afterwards, yes.

Q Couldn't they start the motor? A They could not start it, because they left it there.

Q You do not know much about cars, do you? A I do not know anything about cars, only cleaning them sometimes.

Q So your advice about the rear was only a guess? A Well, the reason I told them it made an awful noise (witness makes loud noise), like that.

Mr. Fisch: I hope to get that in the record.

Mr. McGeehan: Just tear up some paper and that will be enough.

Q When you heard that noise, is that when they were fixing it? A That is when they tried to get it off again.

Mr. Fisch: I object to that.

The Court: Sustained.

Q Well, did you see them try to start it with their starter? A Sure, when they tried to start it, I told them the rear was gone, and I heard this noise in the back.

Q You were paying a lot of attention to the car? A I was not paying no attention to it. I see so many of them with the cars on the blink. I help sometimes to push the cars down the hill.

Q Is there a hill right there? A There is a grade going down.

Q You do not know what date this was? A No, I do not, I did not take any record of it.

Q Sometime in the spring or summer, was it? A Well, I did not make any record of it, because I was not concerned with it. That is why I did not pay any attention.

Q Did you ever see it after that time when you saw the men with the car in front of your place? A Not that I know of.

Q That was the last you saw it? A That was the last time.

Q Did you go right in the house after that? A I went right in the house after that.

Q Can you tell us whether this was summer or winter time? A Well, I know it was a cold, rainy day.

Q It was a cold, rainy day? A Yes.

Q All you know it was—it was within the last year this happened? A I believe it was this year.

Q Don't you want to tie yourself down exactly? A Don't ask me so many questions, I want to tell the truth and nothing else but the truth, please.

Q I am trying to make them very broad. Sometime or other, then, somebody stopped in front of your house with a closed car and had some trouble with it. Is that right? A Yes, sir.

Q You don't know just when that was? A I don't know what date it was.

Q You don't know what make of car it was? A No, sir, I do not.

Q You do not know whether the car stayed there more than twenty minutes or not, do you? A Well, from what I could learn, it stayed there from that time—

Q No, not from what anyone told you or you read in the newspapers anywhere, but you don't know yourself how long it stayed there, do you? A No, sir, I do not.

Re-direct examination by Mr. Fisch.

Q Of course, you don't bother very much about a calendar, do you, about what day this happened on? A No, sir.

Q Now, a short time after it happened did you tell the police about it, did you tell the police what you saw? A Well, when they came up there in two days—

Mr. McGeehan: I don't want to interrupt your re-direct, but may I ask one more question, Mr. Fisch?

Mr. Fisch: Surely.

Mr. McGeehan: And the car, you say, you think was green?

The Witness: I think it was green.

Q Shortly after this thing occurred, did you tell the police what you saw? A What do you mean?

Q Well, did you tell the police? A I seen the car.

Q You told the police about that? A Yes, sir.

Q Did you make a statement? A Well, I made a statement.

Q And you signed it, didn't you? A I signed it.

Q And this is the statement you made, isn't it? A I suppose it is. That is my name there.

Q That is your name, that is your signature? A That is my signature.

Q And you made that statement on the 11th day of May, did you? A I was down to Captain Sebold's office.

Q Yes, down to Captain Sebold's office, and did you make this statement on the 11th of May? A Well, I guess I did.

Q Do you think if you refer to this statement you would be able to tell us about what date it was and what kind of a car it was—this is a long time ago now. A Yes, it has been a long time.

Q And you are a busy man and you can't remember little things like that? A I am not so busy a man, but I have a lot of work, I don't remember all this.

Q I want to know whether you think that if you refer back, if you read this statement that you made to Captain Sebold on the 11th of May, that it would make you remember better what date this was and what the color of this automobile was? A Well, I will tell you, I can't remember, and that settles it. I can't remember it right now.

Q You can't remember it right now? But did you remember when you told it down to police headquarters? A I remembered.

Q You remembered it then when you went down to police headquarters and told it down to police headquarters? A Sure.

Q And that is when it was put down in writing? A Yes, sir.

Q And then you signed it? A Yes, sir.

Q And what you signed down there, that was true? A Yes, sir.

Q Now, do you think by reading that, looking at it and reading it, do you think that you would be able now to remember what happened then as to what date it was and as to what the color of the car was? A (There was no answer.)

Q Was this statement read to you? A It was read to me.

Q Did you read it yourself? A I did not read it myself.

Q You can't read, can you? A I do read, but I haven't got no glasses with me.

Q But it was read to you? A Yes, sir.

Q And before it was read to you you signed because what was in there was right. Is that right? A Yes, sir.

Q Now, do you think if the statement was read to you now you would be able to remember better what date it was and what the color of this automobile was? A Yes, I think so.

Mr. Fisch: I submit, if the Court please, I would like to read to him just a portion of the statement which refers to those two items.

Mr. McGeehan: I have heard of statements being shown to refresh recollection, and it would be perfectly proper to read it to the witness, but I don't think it would be proper to read it in front of the jury.

Mr. Fisch: I will read it to him so that the jury cannot hear it.

The Court: Go ahead do that. Maybe that will expedite it.

(Mr. Fisch reads statement to the witness.)

Mr. McGeehan: I do object to it. I can hear it, Mr. Fisch.

The Court: I do not see any objection, Mr. McGeehan, in him asking the witness if he did not say to Captain Sebold, or to whomever he gave the statement, so and so.

Mr. McGeehan: But he cannot read it over to him, the Prosecutor cannot read a writing which is not admissible in evidence, nor can he read it now unless there is surprise claimed, and then his testimony can merely be neutralized. This is a serious objection.

Mr. Fisch: If the Court please, I have no intention of reading this into the record and I will read it to Mr. White so the jury will not hear it.

(Mr. Fisch reads statement to the witness.)

Q Now, Mr. White, I have read a portion of this statement to you. Does that help you to remember any better with regard to the date and the color? A That is correct.

Q What is correct? A This statement.

Q Now, I have read it to you, can you tell us now what the color of that automobile was? A It was a blue sedan.

Q And do you remember now anything better about the date? A (There was no answer.)

Mr. McGeehan: I assume Mr. Fisch has read it to him to refresh his recollection, and I assume we are entitled to his present recollection.

The Court: Do you remember the date now, Mr. White?

Mr. McGeehan: If he is going to read the statement without its being to refresh his

recollection, we may as well have him read it—

The Court: Mr. White, do you remember the date?

The Witness: No, sir, I can't remember the date. You know, Mr. Judge, this is the first time I ever sat in the chair.

Mr. McGeehan: Not so comfortable?

The Witness: No, sir, it makes me, you know, a little nervous, but then, I want to tell the truth, I don't want to tell any lies.

The Court: That is all we want. You don't have to be nervous, Mr. White. Nobody is going to hurt you here.

Q Do you think you could refresh your memory if you read the statement with the aid of a magnifying glass, even though you haven't got your glasses here? A I think I could.

Q Well, suppose you try.

(The witness reads the statement with the aid of a magnifying glass.)

Q Have you read enough of it now to be able to refresh your recollection as to the date? A The 15th day of April.

Mr. McGeehan: What is that the witness said?

The Court: The 15th day of April.

Mr. Fisch: He is asking it in interrogatory form.

Q Now, can you read that, Mr. White? If you can't read it say so and if you can read it

say so. Be frank enough to say so. A I can read some of it and some of it I cannot.

Q Can you tell, after reading that, what date it was? Now, if you can't say so and if you can say so. A The 15th day of April.

Q The 15th day of April? A Yes, sir.

Q Are you sure about that?

Mr. McGeehan: Now, he has answered, Mr. Fisch.

Mr. Fisch: I don't have to be bound by his answer.

Q Are you sure about that?

Mr. Fisch: I am perfectly satisfied to have Mr. McGeehan see it.

Mr. McGeehan: I don't think it is necessary. I don't think the man knows what today's date is, no matter what the statement shows. I don't think he is familiar with dates.

The Court: Why do you say the 15th day of April?

The Witness: That came to my memory, I see that on the statement.

Q You say the 15th of April on the statement? You are sure you see it on the statement, the 15th of April?

Mr. McGeehan: I object to that as immaterial, what he sees on the statement. I think we have had a lot of this.

The Court: I suppose it is important to fix this date.

Mr. McGeehan: I object to it.

The Court: Overruled.

The defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

The defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Do you see on the statement the 15th of April?

Mr. McGeehan: I object to it. I think it is incompetent for the State to prove by a witness the contents of a statement or to say what is in the statement—

The Court: It is only permitted for the purpose of allowing him to refresh his recollection.

Mr. McGeehan: I object to it. That is not asked for the purpose of allowing him to refresh his recollection. The question is "Do you see a certain thing on the statement?" It is improper in law.

The Court: You may look at the statement again, Mr. White, as far as the dates are concerned, and see if you can get any other recollection as to what date this happened.

Q Well, look at this date and look at the number of the house which you were the janitor of—

The Foreman: Your Honor, could the jury retire and the statement be read to the witness?

The Court: We are going to take a recess in a few moments. Have you found anything in there, Mr. White, which helps you to recall what the date is?

The Witness: No, sir.

The Court: Is there any further questioning of this witness on any other subject?

Mr. Fisch: No other subject, except with reference to this date.

Q Now, Mr. White, while we had this recess, did I read this statement to you that I was questioning you about? A Yes.

Q In the presence of Mr. Becker, one of the counsel in the case? A Yes.

Q And after reading that statement are you able now to remember what that date was? A Yes.

Q What was the date? A 25th of April.

Q What day of the week? A Thursday.

Q Can you tell us now why, after you looked at the statement under the glass, you said it was the 15th of April? A I thought it was one, that is the reason I said the 15th.

Q You thought the two was a one? A I thought the two was a one. It had a little bit of period there, you know.

Q Then you say that was the date, Thursday, the 25th of April? A Yes.

Cross examination by Mr. McGeehan.

Q In other words, Mr. White, you would say anything that that statement says? A Well,

that statement was right. I can remember it was right, because I was right there.

Q Now—

Mr. Fisch: Now, if Mr. McGeehan uses the statement—

Mr. McGeehan: No, I have a right to refer to something the witness used without offering it in evidence.

The Court: Go ahead.

Q Is this the paper which was shown and which was read to you to refresh your recollection? A (Not answered.)

Mr. McGeehan: You will agree that it is?

Mr. Fisch: Yes. I will agree.

Q Now, you say it was the 25th of April because you signed something that says it was the 25th, don't you; is that right? A Because I signed something.

Q Because it says so on this paper, that is why you say now it was the 25th of April, isn't it? A Well, I could not remember at the time.

Q No, you cannot remember now, even after seeing the statement what date it was, can you? A Yes, I can remember; it brought it back to my recollection, my memory.

Q All right. A while ago when you thought it said the 15th of April, then you said it refreshed your recollection and you remembered that it was the 15th of April, didn't you? A Well, I am sure it was a one instead of a two.

Q I know, but a little while ago you thought this was a one and a five, you said, "Yes, I remember now it was the 15th"; you said that

before, didn't you—I will withdraw that question. Mr. White, what I want to get is this, you are saying it was the 25th of April, because this statement says that, aren't you?

Mr. Fisch: I object to that. That question has been answered. The witness says he remembered.

The Court: What was the question?

(Question read.)

A Yes.

Q Now, Mr. White, when you signed your name to this statement, you could not read it yourself? A I think it was Mr. Baldwin; wasn't it right, Mr. Baldwin?

Q You did not read it yourself? A No, he read it to me.

Q Somebody read it to you? A Yes.

Q And before they wrote it down they asked you questions, didn't they? A Yes.

Q Now, at that time do you know whether they asked you whether it was the 25th of April before they wrote anything down? A Yes.

Q Uh? A Yes.

Q Did he ask you that? A Yes.

Q Did they ask you that? A Sure.

Q Then the first time the 25th of April was mentioned, was when the detectives mentioned it; not when you mentioned it, is that right? A Not when I mentioned it, because I was not thinking I was going to be in this at all. That is why I did not take no notice of the date or anything at the time.

Q After you saw this, you did not carry any date in mind just what date you saw that automobile? A No.

Q Then you were brought to headquarters? A I was down there.

Q And then when you got down there they asked you if you remembered an automobile in front of your apartment house? A Well, I was asked before.

Q Up at your house? A Yes.

Q Now, when you got down to headquarters you did not carry just what date it was in your head, did you, or what day of the month? A No, I did not carry no day. I know the month, but I did not carry no date.

Q So that the reason you signed this statement was because you were asked, "This was the 25th, wasn't it?" What did you say, "I guess so," when they asked you was this the 25th of April? What did you say, I guess so? A No, they said the 25th, and I looked on the calendar and I seen the 25th of April.

Q Oh, they showed it to you on the calendar.

Mr. Fisch: I object. That is not what he said.

The Court: Sustained.

Q Where did you get the calendar that you looked at? A Captain Sebold's office.

Q And was that there? A Yes.

Q Now, you had to figure out the date, didn't you? A I did not figure out the date, no, sir.

Q Well, who did?

Mr. Fisch: I object to that.

Q Well, did anyone? If you did not figure out the date, do you know how the 25th of April got on that paper? Did someone else figure out

the date? Tell us that, will you? Did someone else figure out the date? A Well, when the statement was wrote, they had to put some date on it.

Q Well, one date is as good as another to you?

Mr. Fisch: I object to that.

The Court: Sustained.

Cross examination by Mr. Becker.

Q Mr. White, during the recess of the Court, Mr. Fisch read a statement to you in my presence, didn't he? A Yes.

Q Is this the statement?

The Court: Well, everybody admits it is.

Q How many times did Mr. Fisch tell you Thursday? A Thursday?

Q Yes. How many times did he say Thursday to you when he read this statement? A He told me once.

Q Only once? A Only once.

Q Are you sure that Mr. Fisch only said Thursday once? A I read Thursday on there myself.

Q What?

The Court: I read Thursday on there myself.

Q Isn't it a matter of fact that you did not see this statement, that Mr. Fisch was reading it to you? A Yes, sir.

Q Why did you just say that you had read it? A Didn't he give me a glass so I could see, too?

Q Right here at this point, did you read this statement when Mr. Fisch was speaking to you? A I read it right here.

Q You said on the stand that you read this statement in my presence.

Mr. Fisch: I object to that. That is not what he said.

The Court: No, it was read to him in your presence.

Q Well, in my presence, what did Mr. Fisch do or what did he say to you here at this point? Do you understand the question? It only happened a few minutes ago. Can't you remember that? A I don't know what you mean.

Q Did Mr. Fisch give you this statement in your hand and did you read it? A I read some part of it.

Q What part did you read? A Then Mr. Fisch, he read to me.

Q What part did you read? A I read about the date and time I went over to the curb where the car was.

Mr. Fisch: If the Court please, I submit that if counsel is going to examine from the statement I have a right to offer that statement in evidence. The only purpose counsel would have in examining the paper is to determine whether or not it is such a memorandum which the witness may use to refresh his recollection.

The Court: I have not heard counsel ask any questions from the statement yet.

Mr. Fisch: He is examining it and holding it in his hand.

The Court: But I have not heard him ask any questions based on it.

Q Mr. White, you just made a statement on the stand a moment ago that you read out of this statement that you ran to the curb? A No, sir, I did not say I ran to the curb.

Q What did you say? A I said I walked over to the curb.

Q Is there any such wording in the statement, that you walked over to the curb, what do you say to that? A Well, I said walked, that is the way I pronounce it, "walk."

Q Where did you read it, on top of the statement or at the bottom? A Down near the bottom.

Q How many times— You did not answer that question—did you read the statement here or did Mr. Fisch read it to you? A They read it to me there.

Q When you came off the witness stand you came over here and did Mr. Fisch hand you the statement or did you read it or did Mr. Fisch read it to you? A He read it to me.

Q So, you didn't read it? A No, sir.

Q Now, how many times did he tell you Thursday?

Mr. Fisch: I object to that.

The Court: Haven't we been over that?

Q How many times did Mr. Fisch tell you 25, the 25th day? A He told me twice.

Q You are sure of that? A I told him I thought that was a "1" instead of a "2."

Q How many "2's" did Mr. Fisch show you on this statement? A There is 241 Bank there.

Q How many 2's did he show you on that statement? A He only showed me that 2.

Q You don't know that there are more than two 2's? A Well, that is the only 2, and one 2 was made plainer than the other.

Q And that 2 that you say you had mistaken as a 1—is it any different than the other 2 on the statement? A Yes, sir, that 241.

Mr. Fisch: If the Court please, I offer the statement in evidence which Mr. Becker has been inquiring and examining concerning while he had the statement in his hand and examined the witness with reference to it and asked particularly whether it was in the statement and one part of the statement there was the question of whether this man walked or ran over to the curb.

The Court: I don't think I will admit it.

Re-direct examination by Mr. Fisch.

Q Can you tell us how long after you saw that automobile and saw this man that you have been telling us about, how long after that time was it that you went down to police headquarters and made this statement? A To my remembrance it was about two weeks after.

ALICE HILL, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Mrs. Hill, where do you live? A At 241 Bank street.

Q And were you living in that place last April? A Yes, sir.

Alice Hill, for the State; direct.

Q Did you see anything out in the street in front of your house that attracted your attention? A Yes, sir.

Q When was that? A On the 25th of April, Thursday.

Q What time of the day? A At ten o'clock at night or about ten o'clock.

Q And what was it that you saw? A I perceived an automobile down there.

Q What is that? A An automobile.

Q What kind of an automobile? A Well, I did not take a very good look at it, because I was not very much interested, but I overheard a conversation—

Mr. McGeehan: Never mind the conversation.

The Court: She is not telling us about it, go ahead.

The Witness: Well, I went to the window and looked out and one of the children went with me and I said "Instead of the neighbors talking about a thing like that, there is a man across the street that ought to know about it" and my son said—

The Court: Never mind that.

Q What kind of an automobile was it, an open or closed one? A An open car.

Q Sure about that? A Wait a minute, now, no, it was not.

Q Well, what kind was it? A I cannot tell you the make of it, I did not look at it.

Q Well, I am not asking you about the make of it.

The Court: Was it open or closed?

The Witness: It was a closed car.

Q I show you photograph, Exhibit S. 5 and ask you if you can tell me whether or not the automobile that you saw looked anything like that automobile? A Yes, sir.

Q It looked like that one? A Yes, sir.

Q Then, what did you do about it? A Why, I went to the window and saw the policeman across the street and I said "Instead of the neighbors—"

The Court: Never mind what you said.

Q You saw a policeman and did you tell him about it? A Yes—I did not tell him personally, my son told him first.

Q Then what happened to the automobile, do you know? A It left there and I haven't seen it taken away.

Cross examination waived by both defendants.

WILLIAM RAYMONDO, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Raymondo, how old are you? A 23.

Q What is your business? A Sir?

Q What is your business? A I work in the Westinghouse.

Q Do you know Joseph Calabrese? A Yes.

Q How long have you known him? A Since 1922.

Q Friendly with him, were you? A Yes, sir.

William Raymondo, for the State; direct.

Q Do you know the defendant Cort? A Yes, I knew him slightly.

Q How long have you known him? A Since 1927.

Q Do you know a man by the name of Simioni? A Yes.

Q How long do you know Simioni? A 1925.

Q Do you know a man by the name of Cardinale? A Yes.

Q How long have you known him? A Since 1927.

Q And do you know a man by the name of Dominick Lamilino? A Yes.

Q And do you know him by any other name? A That is all I know him by.

Q Did you ever hear him called Wally? A Yes.

Q How long did you know him? A I met him in the Reformatory.

Q That is the New Jersey Reformatory at Rahway? A Yes.

Q And do you know a man by the name of Victor Bruno? A Yes.

Q How long have you known him? A I met him at the Reformatory, too.

Q When was that? A 1928.

Q 1928? A Yes.

Q And you met these men, you say, in the Reformatory, and you were in the Reformatory at that time? A Yes.

Q Now, were you friendly with Calabrese? A Yes.

Q Did you go around with him? A Yes.

Q Now, did you see him in April of this year? A Yes.

Q And where did you see him in April of this year? A I do not remember. I know I seen him on the streets.

Q What is that? A I saw him on the streets.

Q And did you ever see him in Cardinale's house, Billy Jinks, he is known as? A Well, he brought me there.

Q Who did? A Calabrese.

Q Calabrese brought you to Cardinale's house, and Cardinale is known as Billy Jinks? A Yes.

Q Where is that house? A Jones street.

Q Anybody else with you? A He and me and Simioni.

Q Who else? A That is where we met Dominick, Wally and Bruno.

Q And did you see Cort there? A Yes.

Q And is that where you were introduced to Cort? A Yes.

Q By Calabrese? A Yes.

Mr. McGeehan: It is a very leading proposition.

Mr. Fisch: It is preliminary.

Q When you were introduced to Cort, did you remember whether you ever saw him before? A. Yes, I saw him at the Reformatory.

Q Now, did you have a conversation at that time with Cort and Calabrese? Did you have a talk with him that night? A No.

Q Well, did you leave the house—did you leave Jinks' house with anybody? A Calabrese.

Q You left with Calabrese? A Yes.

Q And who else? A Just me and him left.

Q Where did you go to? A I went home with him.

Q Well, do you know where Norfolk and Orange streets are? A Yes.

William Raymondo, for the State; direct.

Q Did you go to Norfolk and Orange streets that night?

Mr. McGeehan. I object to that as leading. I do not think the Prosecutor should do that. He can ask where they went, and he has answered.

Mr. Fisch: Withdraw the question.

Q When you left the house you say with Calabrese, how did you leave, did you walk from there or ride or what? A We walked up.

Q Where did you go to? A I went home.

Q Did you meet Simioni? A No.

Q When did you meet him?

Mr. McGeehan: He said no.

Q When did you meet him? A I met him April 22nd.

Q Uh? A I met him April 22nd.

Q Well, now, getting down to the 22nd of April of this year, did you see Cort that day? A In the morning.

Q And who else? A Calabrese.

Q And who else? A Simioni.

Q And where did you see them? A On the corner of Jay street and Sussex avenue.

Q Jay street and Sussex avenue? A Yes.

Q Were you in an automobile or not? A I was in an automobile.

Q What kind of an automobile was it? A I think it was a Chrysler.

Q Open or closed? A Closed.

Q And who was driving it? A Cort.

Q And where did you sit? A I was in the back.

Q And who sat next to Cort? A Calabrese.

Q And you say you sat in the back? A Yes.

Q Who sat next to you in the back? A Simioni.

Q So there were the four of you in this sedan? A Sedan.

Q Which you say you think was a Chrysler, and Cort was at the wheel, it that right? A Yes.

Q Now, then, where did you go to? A We went up toward Sussex avenue straight up Orange—toward Orange.

Q Did you have a talk there with Calabrese, you and Cort and Simioni? A He said he was going some place.

Q Who said that? A Calabrese.

Q Did you ask him where he was going to? A Yes.

Q What did he say? A He said he was going up toward Orange.

Q Did he say what for? A I do not remember him saying anything.

Q Well, where did you go? Where did you go, Raymondo? A I do not want to say anything. Send me away.

The Court: Sit down. You are going to answer the questions you are asked to answer. The question is where did you go. You heard that question, didn't you?

The Witness. Yes.

The Court: Why don't you want to answer it? Don't you want to? Is that the reason you are not answering it, or can't you answer it?

The Witness: I do not remember it.

Q What is that?

Mr. McGeehan: I think counsel heard what he said.

The Court: Do you mean that, that you do not remember, or do you mean you do not want to answer?

The Witness: Supposed to do a stick-up in Orange.

The Court: Supposed to do a stick-up in Orange?

The Witness: Yes.

The Court: All right. Go ahead.

Q Did anybody have any guns with them? A One gun.

Q Uh? A There was one gun.

Q Whose gun was it? A It was mine.

Q And who had it? A Calabrese had it on him.

Q How did he get it? A He got it from me.

Q I show you a gun and ask you if that is the gun that Calabrese had that belonged to you and which he got from you. A It looks like mine.

Q You say it looks like your gun? A I can tell by taking it apart.

Q Suppose you take it apart. A It looks like my gun.

Q By taking it apart it looks like your gun, and how can you tell that? A It looks like a shiny gun.

Q Does it have a number on it? A I did not examine it.

Q You say it looks like your gun? A Yes.

(Gun marked Exhibit S. 16 for identification.)

Q Now, when you gave him the gun—when you gave Calabrese your gun, was it loaded or not? A Yes, it was loaded.

Q What was it loaded with? A Five steels and one lead.

Q Five steel jacketed bullets and one lead? A Yes.

Q And then you went up to Orange, did you, in that fashion? A Yes.

Q And after you got up to Orange, what did you do? A Supposed to hold up a butcher store there.

Q And what did you do—

Mr. McGeehan: What was that?

The Court: Supposed to hold up a butcher store there.

Mr. McGeehan: I ask that that be stricken out as referring to—

The Court: It is not responsive. Strike it out.

Mr. Fisch: I consent it be stricken out.

Q And what did you do when you got up there?

Mr. McGeehan: I object to that broad question, because it might call for an answer similar to the last one, which would call for a mistrial.

The Court: You probably know, Mr. Prosecutor, what answer this is going to bring forth, and I do not.

Mr. Fisch: I will withdraw the question.

Q After you got to Orange, did you talk to Calabrese and Cort and Simioni? A Yes, he said—

Mr. McGeehan: Never mind what he said

Q After you got up there in Orange did you talk to Calabrese and to Cort and to Simioni? A Yes, sir, I said—

Mr. McGeehan: Never mind what you said, please.

Q And then did you leave Orange? A Yes, sir.

Q And after you left Orange where did you go? A Went towards Irvington.

Q Who was driving the car? A Arty Cort.

Q And what conversation did you have between you, between the four of you with reference to going towards Irvington, what was said? A He said he was going to take any job on the way.

Q What is that? A He said he was going to pick up any jobs on the way to hold up.

Q Who said that? A I don't remember who said it, it was in the front.

Q Then where did you drive to? A We went up straight Sanford avenue.

Q That was towards Irvington? A Yes, sir.

Q From Orange? A Yes, sir.

Q Now, as you were going over Sanford avenue towards Irvington from Orange, did you have some talk between you with regard to holding up some place? A Yes, sir.

Q Now, what was the talk? A He says "Let us take any place which came along."

Q Who said that? A I don't know who said it. I was sitting in the back, it came from the front.

Q It was said on the front seat, and the people in the front seat were Cort— A (Interrupting.) And Calabrese.

Q Now, I show you a picture, Exhibit S. 5, and ask you whether or not that is the car that you were in? A Yes, sir.

Q Now, then, what did you do? A We came near a drug store near the corner—

Q Near the corner? A Yes.

Q Near what corner? A I don't know the side street, coming down, I don't know the name of that street.

Q I show you a photograph, Exhibit S. 10, and ask you whether or not the drug store which you refer to is shown in that photograph? A The middle one.

Q The middle store on that photograph? A Yes, sir.

Q And when you came to that drug store, what did you do? A It was locked.

Q You came to the drug store and you were in an automobile, weren't you? A Yes, sir.

Q What did you do with the automobile? A We came around the corner and stopped near the corner.

Q You drove around the corner? A Yes, sir.

Q Stopped near the corner? A Yes, sir.

Q Did anybody get out of the automobile? A Calabrese got out.

Q Calabrese? A Yes.

Q Anybody else? A Just him alone.

Q And what did he do? A He looked at the drug store and said the place was closed.

Q What was that? A The drug store was closed.

Q He came back to the automobile and said that, did he? A Yes, sir.

Q Now, when he got out of the automobile at that time, did he have this gun, Exhibit S. 16 for identification?

Mr. McGeehan: I object to that as leading.

The Court: Yes, I think it is a little too leading, Mr. Prosecutor. You can ask him where it was.

Q Where was the gun, Exhibit S. 16 for identification, when Calabrese got out of the car in the morning to go over to the drug store?

Mr. McGeehan: Counsel knows that is not in evidence. He knows it has been marked for identification and the witness has merely said it looks like his gun. That question assumes that it was the gun.

Mr. Fisch: I will connect it up, your Honor.

The Court: Where was the gun?

Q Where was the gun? A Calabrese had the gun on him all morning.

Q And then he came back to the automobile, did he, after it was stopped around the corner? A Yes, sir.

Q And the drug store had not opened yet? A Yes, sir.

Q Then what did you do? A We left it there then.

Q Where did you drive to? A I went up toward that way (indicating) Sanford.

Q And what was said about driving up toward Sanford avenue, what was the conversation between you? A He said, "Let us go back."

Q Who said, "let us go back." A I don't know, they turned back anyway.

Q Who said that? A I don't remember.

Q Somebody in the front or the back? A In the front.

Q And who was in the front when you drove away from there? A Calabrese and Cort.

Q And then you drove around on Sanford avenue? A Yes, sir.

Q Then did you come back again? A Yes, we came back, there was another car there before us.

Q There was another car there? A In front of that drug store.

Q On Sanford avenue or where? A On Sanford avenue.

Q There was a car there in front of the drug store? A Yes, sir.

Q And where did you go? Where did you go with your automobile? A We came around the sidewalk, where we were around, the same place.

Q Did you stop the car? A Yes, sir.

Q And did anybody get out? A Nobody got out.

Q Nobody got out of the car? A No, sir.

Q Did you have a conversation there in the car? A Yes, I told them I did not want to do the stick up.

Q Who did you say that to? A I told the whole bunch of them.

Q What else did you say, did anybody else say anything? A They would get somebody else to do it.

Q What, if anything, did Simioni say? A He did not say anything, he did not want to do it either.

Q And who was it that said, "We will get somebody else to do it."? A Calabrese.

Q Calabrese said, "We will get somebody else to do it"? A Yes, sir.

Q And what, if anything, did Cort say? A He did not say anything.

Q How long did you remain? A Just a minute, then we drove away.

Q Then when you drove away, where did you drive to? A Toward Orange street.

Q And then what did you do? A I got off there, they let me off at Orange street and Clifton avenue.

Q Did you get out of the automobile alone? A Yes, sir.

Q And where did the automobile go? A I don't know where they went, I went up home.

Q They drove off, did they? A Yes, sir.

Q Now, then, before you got out of the car and the automobile drove off with Cort and Calabrese on the front seat and Simioni in the back seat. Did Calabrese give you the gun back again? A No, sir.

Q He still had it? A Yes, sir.

Q Now, then, where did you go to? A I went home then.

Q When did you next see Calabrese and Cort? A That same night.

Q Where? A At Billy Jinks' house in Stone street.

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

Q And who was with him? A Wally, Bruno, Calabrese and Cort.

Q The four of them? A Yes, sir.

Q Did they all come in together? A Yes, sir.

Q And when they came in did you notice anything about any of them? A They were all excited.

Q Did you notice anything about their clothing, any of them? A Well, Wally had blood on his clothes.

Q On what part of his clothes? A His shirt.

The Court: Who?

Mr. Fisch: Wally, he said, that is Lamilino.

Q And who else was there in Jinks' house besides you and Bruno and Wally, that is Lamilino, and Cort and Calabrese? A Billy Jinks.

Q Now, when they came in, what, if anything, did they say, and by whom was it said? A By Bruno.

Q What did Bruno say? A He said they had just come back from doing the stick-up and they had an argument up there and there was a fight going on, he says, and he went in and bought some chewing gum and when the man turned to give him change of a dime Joe and Wally walked in and Joe ran to the back room, and there was a woman there, and he says "Keep quiet, I won't harm you," and then there was a shuffle out there and somebody was fighting and Wally said "Help me" and Bruno said he fired a shot and Joe fired a shot.

Q And Joe was there at the time when he said that? A Yes, sir.

Q And Cort was there? A Yes, sir.

Q And what, if anything, did Joe say, that is Calabrese? A He didn't say nothing to me.

Q And then what was done with regard to Wally's clothing? A Somebody gave him some water to wash the spots off his shirt.

Q Somebody did give him some water? A Yes, sir.

Q Do you remember whether or not he changed his shirt? A Nobody changed clothes.

Q Now, then, did you all stay there? A We left.

Q Who left? A Me and Calabrese.

Q You and Calabrese left together? A Yes, sir.

Q Now, in that conversation, in that talk there, you say Bruno was doing the talking? A Yes, sir.

Q Now, was anything said with regard to who was having a tussle up there at the holdup? A Wally was.

Q That Wally was having a tussle with whom? A With the man in the drug store.

Q And what, if anything, did Wally say to Calabrese or to Bruno or to anybody there? A He said "Help me."

Q That is what Bruno told you. Is that right? A Yes, sir.

Q Now, what I want to know is what Wally said down there in Jinks' house that night. What did Wally say before he left?

Mr. McGeehan: I object to that unless it is shown it is in the presence of the defendants.

Q What, if anything, did Wally say before he left, to Bruno and Calabrese? A He said "Thanks, you saved my life."

Q What is that? A He said "Thanks, you saved my life."

Q And then you say you left with Calabrese? A Yes, sir.

Q Who left first? Wally and Bruno—did they leave before you? A They left after us.

Q So you were the first ones to leave, you and Calabrese? A Yes, sir.

Q Where did you go? A Joe went home and I went home.

Q And after you left Jinks' house there, did you talk to Calabrese about it? A No, sir; he didn't say nothing to me then.

Q You didn't say anything to him? A No, sir.

Q Now, did Calabrese ever give you that gun back? A He gave it to me on a Saturday.

Q On a Saturday, you say? A Yes, sir.

Q What Saturday? A I don't remember the date.

Q Not the date, but was it the Saturday following this time when you saw him down in Jinks' house? A The same week.

Q Saturday of the same week? A Yes.

Q He gave the gun back to you? A Yes, sir.

Q And where were you when he gave you the gun back? A He handed it to me in the street.

Q Now, did he offer to give you the gun before that time?

Mr. McGeehan: Objected to as leading.

The Court: Overruled.

A No, sir.

Q Had you had any conversation with Calabrese about the gun that you had loaned to him before that Saturday when he actually gave it

back to you? A Yes, sir, there was only five bullets left in the gun.

Q Had you had any conversation with him about it? A Only about the gun, that is the only thing he told me about, the gun.

Q What was the conversation he had with you about the gun? A He said he fired one shot out of the gun.

Q He said he fired one shot out of the gun? A Yes, sir.

Q He told you that? A Yes, sir.

Q What else, if anything, was said about the gun or about giving it back to you or about his keeping it? A I don't remember him saying anything like that.

Q What is that? A I don't remember him saying anything.

Q Was there any conversation between you about his holding on to the gun, that he might need it? A No, sir.

Mr. McGeehan: Isn't that leading, your Honor, there is such a thing as irreparable damage being done after the Court has sustained a leading question, but the damage is done—

The Court: Strike that out of the record.

Q After he had given you the gun back on Saturday, what if anything, did you do with the gun? A I kept it.

Q Until when? A Until Sunday.

Q What is that? A Until Sunday, I had the gun until Sunday.

Q That is the next day? A Yes, sir.

Q Then, what did you do with it? A I gave it to Simioni to hold for me.

Q And was that on Sunday that you gave it to Simioni? A Yes.

Q Did you ever get it back? A No, sir.

Q Now, when was the next time you saw the gun? A Right in here.

Q When? A Right here.

Q Now, what, if anything, was said in the talk in Jinks' house by Bruno with regard to Bruno's gun? A His gun was busted.

Q Did you see his gun? A Yes, a black one.

Q Did you see whether it was broken or not? A Yes.

Q What part of it was broken? A Where the trigger is.

Q And was anything said by him in the presence of Cort and Calabrese how his gun got broken? A Sure, he hit the man over the head.

Q Was anything said in that conversation as to what became of that part of the gun that was broken off? A He said it fell on the floor and he didn't want to pick it up.

Q Now, where did you get the gun that you had loaned to—that you had given to Calabrese and that he afterwards returned to you and which you afterwards turned over to Simioni to hold for you? A I bought it from Billy Jinks.

Q You bought it from Billy Jinks? A Yes.

Q That is Cardinale? A Yes.

RECESS FOR ONE HOUR.

After Recess.

WILLIAM RAYMONDO, resumes the stand.

Cross examination by Mr. McGeehan.

Q I understood you to say, Raymondo, that the gun which was shown to you looked like the gun that you owned, is that right? A Yes.

Q But you are not absolutely sure that is the same gun, are you? A No.

Q The gun that you saw and which you testified you loaned to Calabrese, that was a gun with six chambers for bullets? A Yes.

Q Commonly known as a six-shooter? A Yes.

Q And it was a revolver? A Yes.

Q And when it was returned to you, just one chamber was empty, that is right, isn't it? A Yes.

Q When you, as you testified, spoke with Bruno in the presence of the defendant, he said he fired a shot, did he not? A Yes.

Q And you saw blood on the clothes of Lamilino, that is what you said? A Yes.

Q What part of the clothes was that blood on? I think you said his shirt, didn't you? A A shirt, and some on his coat.

Q What kind of a coat did he have on, I mean an overcoat or what? A Top coat.

Q Now, when the blood was on the shirt, I think you indicated with your hand the front of your shirt? A A spot right here (indicating).

Mr. McGeehan: Indicating a spot on the front of the shirt beneath the collar. You agree to that?

Mr. Fisch: Yes.

Q Was there very much blood there? A No.

Q How much was there? Just describe what you saw? A A few spots.

Q Was Lamilino wounded, as you could see? A No, sir.

Q And did they say where that blood had come from? A He said from a stickup.

Q Did he say who was bleeding when he got that on him? A No, sir, he did not tell me who was bleeding.

Q Then you do not know whether or not Lamilino was bleeding or not? A No, sir.

Q When Lamilino said, as you testified, "Thanks, you saved my life," he was talking to Bruno, wasn't he? A He was talking to all of us.

Q He was not saying that to you, was he? A No, sir.

Q He was talking to Bruno at that time? A Well, Bruno was standing up when he said it.

Q Well, was he looking at Bruno when he said it? A I do not know who he was looking at.

Q Now, when you got—I will withdraw that. You say Calabrese spoke to you about what had occurred? A Bruno.

Q Well, did Calabrese also say anything to you? A No.

Q He did not say a thing at all? A No.

Q Didn't you testify on your direct examination that Calabrese said he had fired one shot out of the gun? A Yes.

Q Well, did he say that? A Well, Bruno said that he fired a shot and Joe fired a shot.

Q Now, when you gave the gun to Simioni, you met him on the street, is that right? A Yes.

Samuel Simioni, for the State; direct.

Q Do you know how many bullets were in it when you gave it to Simioni or not? A No.

Q You do remember that there were five bullets in the gun when you got it back from Calabrese? A Yes.

Q You do not remember whether they were steel or lead or what? A I do not know what bullet was missing.

Q Now, you said something about knowing that Bruno's—to use your language—gun was busted, is that right? A Yes.

Q And the part that was broken was the guard around the trigger, is that right? A Yes.

Q And by that I mean—may I use this gun as an illustration, Mr. Fisch? By that you mean this part around here (indicating)? A Yes.

Q The part that is known as a trigger guard? A Yes.

Q Bruno told you that that had gotten broken when he was hitting the man over the head and that it fell on the floor, did he? A Yes.

Q Did he say it fell where he had struck the man? A He did not tell me. He just told me it fell on the floor.

SAMUEL SIMIONI, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Simioni, do you know the defendant, Joseph Calabrese? A Yes.

Q Do you know Raymond Raymondo? A Yes.

Q How long have you known Calabrese? A I know him in Rahway. That is all.

Q When? A 1927.

Q And how long have you known Raymondo? A The same length of time.

Q Where did you meet him? A The same place.

Q That was the Reformatory? A Yes.

Q You were confined there, too, were you? A Yes.

Q Now, in April of this year, where were you living? A Bergen street.

Q Now, do you know the defendant Arthur Cort? A Yes, I know him for a long time, but I have not seen him in the last fifteen years since we were kids.

Q Did you see him in April of this year? A Yes, once or twice, that is all.

Q Where? A I seen him the morning of April 22nd.

Q Where did you see him that morning? A When I stepped in the car at Sussex avenue and Jay street.

Q What kind of a car was it? A Chrysler they told me. That is all.

Q Well, do you know? A Well, I could not say positive.

Q Well, was it an open or closed car? A It was a sedan.

Q And I show you a photograph, Exhibit S. 5, and ask you if you can remember whether or not that looks like the car you stepped into that morning? A I do not know. It was raining. I only know it was a sedan. I only seen it once.

Q I want to know whether this was the car you stepped in. A I could not say, because the back was toward me when I stepped in.

Q I will show you another photograph, Exhibit S. 6, and ask you disregarding now these

white spots—I ask you whether or not that looks like the car you got into? A No, I could not say for sure, but I know it was a sedan.

Q And who was at the wheel? A Arthur Cort.

Q And was there anybody sitting next to him? A Calabrese.

Q That is Joseph Calabrese? A Yes.

Q And where did you get in? A I got in the back.

Q And was anybody in the back? A Raymondo.

Q What part of the back was Raymondo in? A He was in the left-hand side.

Q And what part of the back were you in? A I was on the right-hand side, because it was near the curb when I got in.

Q Now, you say you got into that car where? A On Jay street and Sussex avenue.

Q Now, after you got into the car where did you go? A Up in Orange.

Q Did you see any guns in the car? A I brought it over myself that morning.

Q Brought over the gun? A Yes, sir.

Q Whose gun was it? A It was Raymondo's gun.

Q And what, if anything, did you do with the gun? A I didn't do nothing with it, he told me to bring it over, because he said he wanted to sell it. We were supposed to go for a job that morning, and I brought the gun over, and when I stepped in the car I said "Do you want the gun?" and Joe said "Give it to me," and he said "Go ahead, give it to him."

Q Joe offered the gun to Raymondo? A Yes, sir.

Q And then Joe—do you mean Calabrese? A Yes, he said give it to him, so Raymondo shook

his head and said "All right," so I reached back and gave it to him.

Q Gave it to whom? A Joe Calabrese.

Q I show you Exhibit S. 16 for identification and ask you whether or not that is the gun which you had and brought along that morning and gave to Calabrese? A I cannot say when it is open, because I never looked in the gun, all I know is the two last numbers, 19, that's all I know.

Q And by looking at the gun and seeing these two last numbers 1 and 9, 19, can you tell us whether or not that is the gun that you had that morning and gave to Calabrese? A I cannot say it was the gun, it was a gun similar to that, and all I know is the last two numbers on it.

Q Well, now, were the last two numbers on the gun that you gave to Calabrese that morning, were they 1 and 9? A Yes, sir.

Q Now, from whom had you gotten that gun? A From Raymondo.

Q Now, then, after you had been up to Orange in this automobile, where did you go from there? A They took it over to Sanford avenue.

Q You say "they," whom do you mean by "they"? A The driver of the car who was driving, Cort, I don't know where we were going.

Q Now, after that, when you were going over Sanford avenue, were you all seated in the same positions that you described? A Yes, sir.

Q Cort at the wheel and Calabrese in front in the seat next to him and you and Raymondo in the back seat, is that right? A Positively.

Q Then you went over Sanford avenue in what direction? A I don't know what direction, I don't know the neighborhood.

Q Well, you were coming from Orange, weren't you? A Yes, sir.

Q And you went over Sanford avenue on the way from Orange? A I know we got over there, but I don't know how we got over there, though.

Q What were you going over there for? A We didn't say nothing what we were going over there for, I thought it was on the way back home—

Mr. McGeehan: Never mind what you thought.

Q What conversation did you have in the automobile as to where you were going and what you were going to do? A Didn't have no conversation at all about where we were going, just looked around and somebody said "Let's take over that place," so when we came to it, that is all the conversation—

Q Let's take over what place? A The Grossman place, the drug store.

Q Who said that? A I don't know, somebody in the front.

Q Now, when someone in the front said "Let's take over that place" when you came to the Grossman durg store, what did you all do then? A Parked the car around the corner from there.

Q Around the corner from where? A From the drug store.

Q Was that Lenox street, do you know? A I don't know the name of the street.

Q Well, now, on the corner there is a grocery store, isn't there? A I don't know, some A. & P. store.

Q I show you a photograph, Exhibit S. 8, and ask you whether or not it represents a drug

store and the street that you are talking about? A This place there, that is what they meant (indicating).

Q Indicating a drug store? A The middle one there.

Q And where was it that you went around the corner? A Right over here (indicating). Right near the door where we were parked.

Mr. Fisch: Indicating a place near the doorway of the building on Lenox street.

Q Now, then, you parked the car there, is that right? A Yes.

Q And after you had parked the car, did anybody get out of the car? A Joe Calabrese got out and went up around the corner and said the place was closed and he came right back in.

Q He said what? A He said the place was closed.

Q He came back to the car then and said that the place was closed? A Yes, sir, and he came back and sat back in the car again.

Q Now, up to the time that Calabrese got out at the corner, from the time that you had given him the gun up to that time, where was the gun? A In Joe Calabrese's possession.

Q Now, then, after Calabrese got back into the car where did he sit? A He sat in the same place where he was sitting before.

Q Still in the front seat? A Yes, sir.

Q And then what did you do? A We rode around and they stopped a block away from it on Sanford avenue, and they wanted to take it over, to do it, and we refused to do it.

Q Now, you drove around, did you? A Yes, sir.

Q Then, did you go back to Sanford avenue again? A Yes, we stopped a block away from the place.

Q And then the second time where did you park the car? A On the corner there, on Sanford avenue, they stopped there, we didn't stop very long, because we refused to do it.

Q Now, when you stopped there the second time, what conversation, if any, did you have? You say you refused to do it. I want to know just what words were used. What did you say, if anything, what did Raymondo say? What did Calabrese say and what did Cort say? A Well, Calabrese said—I mean Raymondo said he didn't want to do it, so I said I didn't want to do it.

Q Then, what, if anything, did Calabrese or Cort say? A I don't remember what they said.

Q Well, just think a minute, what did they say, what was said?

Mr. McGeehan: I object. He has said definitely he does not remember and this is a statement from his memory—

The Court: He can see if he can refresh his memory by thinking it over.

Q Just think a minute and see if you can remember, if anything, what was said? A I don't remember nothing now.

Q What? A I don't remember nothing what was said there.

Q You don't remember anything that was said there except that you and Raymondo said you didn't want to go through with it? A Yes, sir.

Q Then, after you said that, what happened? A They took Raymondo home, left him off on

Orange street between Clifton avenue and Jay street, Raymondo went home, and then they took me over to Bergen street and Orange street and I got out. So when Raymondo got out he told Joe to take the gun with him, and when I got out I told him I was through with them, I did not want to have nothing to do with them.

Q Who did you tell that to? A I told the two sitting in the car.

Q Who was sitting in the car? A Then I told them that before, before Raymondo got out.

Q Yes, then when you got out there was still Calabrese and Cort in the front seat? A Yes, sir.

Q You told them that? A Yes, sir.

Q Who had the gun up to the time that you got out of the car? A Calabrese had the gun.

Q Just to go back for a minute—when you met Cort that morning in the automobile, did you have any conversation with him with regard to the automobile itself? A No, he told me he clipped it off a street, that's all I know.

Q He told you what? A He told me he got it off the street, picked it up off the street, because I asked him, I said "Where did you get the car?" He told me he picked it off the street—

Mr. Becker: I object to that, your Honor.

The Court: Who said that?

The Witness: Cort.

Mr. Becker: I object to that question, your Honor, for the reason that it is showing a crime not presented in this indictment.

The Court: Overruled.

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

WALTER D. VAN RIPER,
Judge.

Q Now, what did—when did you see Calabrese next after that? A I did not see him until the following Monday.

Q After Raymondo had gotten out of the automobile then you were driven to some place where you got out of the automobile. Is that right? A Right on the corner.

Q When was the next time you saw Raymondo? A I am not sure, I think it was on a Sunday afternoon.

Q Now did he give you anything? A He gave me the gun and told me to hold it for him.

Mr. McGeehan: I object to the conversation.

The Court: Strike out the conversation.

Q He gave you the gun? A Yes, sir.

Q Was it the same gun that you had had before and that you had turned over to Calabrese in Raymondo's presence on the morning of April 22? A I can't tell you that.

Q Well, I show you Exhibit S. 16 for identification and ask you whether that is the gun? A I told you before I found out the number after it happened and then he gave it to me the second time.

Q Did the gun which he gave you the second time on a Sunday, did that look like the gun that he had given you before?

Mr. McGeehan: I object to that as an extremely leading question and counsel must know it is.

The Court: Does it look like the gun he gave you?

The Witness: It looked the same.

Q And what did you do with it? A I kept it for him, I held it for him.

Q What did you do with it? A I kept it for him, I held it for him.

Q Where did you keep it? A I kept it in my mother's bedroom there, where we got a drawer there, where my brother and myself and my other kid brother each kept a drawer there.

Q Do you know whether it was loaded or not? A Certainly I know it was loaded.

Q How do you know it was loaded? A Because I looked in the front of it.

Q Did you load it? A No, sir.

Q Did you put any bullets in it? A No, sir.

Q Or take any bullets out of it? A No, sir.

Q You left it just the way you got it from Raymondo? A Yes, sir.

Q Did you have any other bullets? A Well, they had four extra bullets when he gave it to me the second time, there was four extra bullets.

Q He gave you four extra bullets? A When he gave me the gun, Raymondo did.

Q And what did you do with those four extra bullets? A I kept them with the gun.

Q Now, then, you were arrested after that, weren't you? A Yes, sir.

Q How long after the time when you got the gun back from Raymondo on Sunday, when

was it that you were arrested? A Tuesday, Tuesday night.

Q Where? A On 70 Plane street.

Q Whose place is that? A I don't know whose place it was, I don't know yet whose it is.

Q Well, who was living there? A Calabrese and Cort.

Q Calabrese and Cort were living there? A Yes, sir.

Q They had a room there, is that it? A Yes, sir.

Q And at the time that you were arrested, where was the gun? A On my possession.

Q And who arrested you? A I don't know who arrested me, there was six of them.

Q And what became of the gun when you were arrested? A They took it.

Q One of the officers? A Yes, sir.

Q What about the bullets which you had received from Raymondo, where were they at the time you were arrested? A In my pocket.

Q What became of them? A They took them, too.

Q And at the time that you were arrested and this gun was on you, was the gun loaded or not? A It was loaded.

Q I show you six lead bullets and ask you whether or not those bullets look like the bullets that were in the gun at the time it was taken from you?

Mr. McGeehan: I object to that, because the testimony is definitely to the effect that this witness did not open the gun, that he did not look into it to see what kind of bullets were in it, and, therefore, this ques-

tion, premised as it is, on the proposition what kind of bullets was in is improper. I think he ought to ask what kind were in.

The Court: That is what I would suggest.

Q Do you know what kind of bullets there were? A No.

Q Do you know that it was loaded? A Yes.

Q Now, I show you four bullets and ask you whether you can tell us whether those were the bullets that you had in your pocket at the time you were arrested? A I can identify this one positively sure, and I know I had four steel-jacketed ones, so I don't know.

Q You can identify the one you picked out as a lead bullet positively sure, is that right?

Mr. McGeehan: I understood the witness to say there were four steel-jacketed.

The Court: He said, "I can identify this one positively sure, and I had four steel jackets, that I know."

Q And you say you know you had four steel bullets? Now, these four bullets that I show you— A Put them up there and compare that with that. I had four bullets all right. Five altogether. Four steel and one lead.

Q You are sure one of the bullets I show you now you had in your pocket? A Yes, because I bit it.

Q And these steel bullets, can you say they were the steel bullets you had? A How can I positively say?

The Court: Do not argue. Can you?

The Witness: I had four steel.

Q Can you say they look like the steel bullets you had in your possession when you were arrested? A I cannot definitely say. I had steel bullets the same as them.

Mr. Fisch: I ask that these four steel-jacketed bullets and the lead bullet be marked for identification.

(Marked S-15 for identification.)

Cross examination by Mr. McGeehan:

Q Now, the gun that you had in your possession at the time you were arrested and which was taken from you you say was the gun that you had received back from Raymondo on a Sunday? A Yes.

Q And it was taken from you on a Tuesday? A Yes.

Q Where had you kept that gun in addition to on your person? You mentioned some bureau. A Yes. I had it in the bottom bureau in my mother's bedroom. There is a little cabinet like where my brothers have a bureau, me and my kid brother.

Q You have other brothers? A Yes.

Q About the same age as yourself? About the same age as you? This is not important. They are all grown up? A Yes.

Q Are you sensitive about your age? A It don't make any difference.

Q Your brothers were grown up and they used that house with your mother and you at the time? A Yes.

Q How long did that gun remain in that bureau untouched by you? A From the time I put it in Sunday until Tuesday morning.

Q Tuesday morning? A Yes.

Q And you did not look to see if it was there between Sunday and Tuesday, did you? A Yes, I looked in there.

Q Well, when did you look to see? A Monday morning.

Q So from Sunday until Monday morning you did not look to see if it was still there, but you saw it in there on Monday morning? A Yes.

Q Then you did not look again until Tuesday morning, is that right? A Yes.

Q And were the separate bullets you have testified about also with the gun, or were they in your pocket all the time? A They were with the gun.

Q They were lying in the bureau? A Yes.

Q Were there other bullets there besides? A No, I had them all wrapped up in a rag.

Q Well, did you have any other bullets beside these? A No.

Q You have identified four bullets—steel jacketed bullets—and one lead bullet as those which were in your possession at the time you were arrested.

Mr. Fisch: I object to that. He did not.

Q Well, you have said that the four steel jacketed bullets look like the ones you had and you are sure of the lead one, is that right? A Yes.

Q I am referring to those now. How many bullets had you received from Raymondo? A Well, the four steels and one lead bullet.

Q You had received five from him altogether beside those that may have been in the gun? A Yes.

Q Yes. You do not know what kind of bullets were in the gun itself at the time you got it from Raymondo, do you? A No.

Q Did you break the gun at all or look at it? A No, sir.

Q Do you know whether it was fully loaded or not? A I could not say whether it was fully loaded.

Q Do you know whether it was loaded the same as it was when you turned it over to the police as when you got it from Raymondo? A Yes, it was the same way.

Q And you do not know whether that had been opened and different bullets put in during the time it was in your house? A Sure I know. Nobody opened it up.

Q Well, you think nobody opened it up, but you do not know that?

Mr. Fisch. I object to that.

The Court: Do you know that nobody opened it.

The Witness: Say the question again.

The Court: Are you sure that no one opened it?

The Witness: Positively.

Q You have been convicted of crime, have you not? A Yes.

Q How many times?

The Court: Can you answer that?

The Witness: Sure I can. Do I have to tell him?

The Court: Yes.

The Witness: Twice.

Q And you had that gun out with you from Tuesday morning until Tuesday night, did you? A Do you mean I had it out with me?

Q Well, you had it in your possession outside of your house. You know what I mean. A Yes.

Q You had it out with you all day Tuesday, did you not? A Yes.

Q What time were you arrested on Tuesday? A Between half-past eleven and twelve o'clock.

Q At night? A At night.

Q And you had the gun with you from early in the morning? A Yes.

Q And you had extra bullets with you during that time, is that right? A Yes.

Q Did anyone else borrow that gun from you during that day or not? A No, sir.

Cross examination by Mr. Becker.

Q How long were you riding in the car when you arrived at the location of Lenox street and Sanford avenue? A What do you mean? From the time I was picked up?

Q No. I am talking about the morning of April 22nd. You testified that you got into the automobile at Jay street and Sussex avenue and you rode up into Orange and came back from Orange and traveled on Sanford street until you arrived at a certain street.

Mr. Fisch: Sanford avenue, you mean?

Mr. Becker: Yes.

Q And you said you arrived at a certain street on Sanford avenue. How long were you

riding in that automobile? A I do not know how long.

Q All right. What time did you arrive at the intersection of Sussex—of Lenox street and Sanford avenue? A I do not know. I did not have no watch.

Q You do not know. Now, the car was driven up Sanford avenue and parked at the curb on Lenox street? A Well, if that is the name of the street, yes.

Q And you testified it was parked in front of a door. A Near a door.

Q How near? A Well, I cannot say how near. It was right near the door.

Q Was another car parked there at the curb? A Not that I know of.

Q It was not? A I do not remember.

Mr. Fisch: He did not say it was not.

Q You do not remember whether there was another car parked at the curb in front of the car that you stated Cort drove and you stated Calabrese was the only one that got up and walked out around the corner? A Yes.

Q And are you sure that Cort did not say anything before Raymondo and you decided to quit? A I cannot say, because I do not know what he said, if he said anything or not.

Q Do you recall Cort saying that he refused to go through with it? A I do not recall anything.

Q Would you say yes or no?

Mr. Fisch: I object to that. He has answered the question. He says he does not recall nothing.

The Court: Can you answer that question?

The Witness: No, I cannot answer it.

The Court: You do not remember it?

The Witness: I do not remember whether he said anything or not.

Q What kind of weather was it that morning? A It was raining.

Q It was raining. Hard? A Well, kind of drizzling.

Q You are sure it was not clear? A No, I am positive it was not clear.

WILLIAM CARDINALE, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Where do you live? A 132 Stone street.

Q Newark? A Yes.

Q What is your business? A I have none. Just factory work.

Q Factory worker? A Yes.

Q And what are you doing now? A I was working with my sister at a grocery store at Fourth avenue until I was sentenced to appear at court.

Q And are you also the man known as Billy Jinks, is that what they call you? A Yes.

Q And do you know William Raymondo? A Yes.

Q And did you ever sell him a gun? A Yes.

Q I show you Exhibit S. 16 for identification and ask you if you can tell us whether or not that is the gun you sold him? A Well, I have nothing to identify it. I know I sold him a gun.

William Cardinale, for the State; direct.

Q Do you know the numbers? A No.
Q Do you know what make it was? A No.
Q Can you tell us whether or not this was the gun that you sold him? A Yes, it looks like it.
Q When did you sell him the gun, do you know? A I do not remember the date.
Q Well, about when, about what month?

Mr. McGeehan: I object to that.

A Sometime in April.

The Court: He has answered it, and he said sometime in April.

Mr. McGeehan: I think my objection was timely. I move it be stricken out for the purpose of this objection.

The Court: Well, I am perfectly willing to hear you on it as though he had not answered.

Mr. McGeehan: I object and it is not connected up as the gun that was sold to any of the defendants.

The Court: Of course, if it cannot be connected up, the testimony is immaterial.

Mr. McGeehan: Well, the answer is it may be the gun.

The Court: It has already been said that Raymondo had the gun. I cannot see that it can affect you whether the gun he sold was this particular gun or not. I will permit it and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Q Do you know the defendant Calabrese? A Yes, sir.

Q How long have you known him? A I met him at the Reformatory. New Jersey Reformatory.

Q When, uh? A I think in 1928.

Q And do you know the defendant Cort? A Yes.

Q Do you know a man by the name of Raymondo? A Yes.

Q What is he known by? A I know him Dominick Lamilino.

Q Also known as Wally, is he? A Yes.

Q And do you know a man by the name of Bruno? A Yes.

Q Victor Bruno? A Yes.

Q Now, on the 22nd of April did you see Calabrese? A No, sir.

Q Did you see him that night? A No, sir.

Q Uh? A No, sir.

Q Well, now, do you remember that date? A The 22nd?

Q Yes. A No.

Q You do not remember the date, is that it? A No.

Q Well, did Calabrese ever come to your house? A Yes.

Q Did he make a telephone call?

Mr. McGeehan: This is extremely leading.

The Court: Yes, I think that is a little too leading.

Q You say Calabrese did come to your house? A Yes.

Q Did he come to your house sometime in April?

Mr. McGeehan: I object to that as being leading. I think the witness ought to testify.

The Court: I will permit that. Answer the question.

A I do not remember when he came.

Q You do not even remember what month it was? A No.

Q You are sure about that? A Yes.

Q Sure about that? A Yes, sir.

Q Now, when he came there did he come with anybody or did he come alone? A He came alone.

Q Do you know Cort? A Yes.

Q Did Cort ever come to your house? A Yes.

Q Now, when Cort came there did he come there with anybody or did he come alone? A He came with Billie Raymond, Billie Raymondo.

Q What time of the day was it? A It was at night when I just got through working.

Q Well, was it at night or late in the afternoon or when? A Well, I quit working at a quarter after four, it must have been a quarter to five when I got home.

Q How did they get there, do you know? A No, sir.

Q Did you see any automobile in the neighborhood or in front of your house? A No, sir.

Q Were you out in front of the house when they came? A No, sir.

Q Now, after Cort and Raymondo came there, who else, if anybody came there later on?

Mr. McGeehan: I object to that as assuming that somebody else did come, and even sustaining the objection does no good if this is persisted in, because it is alleging a fact just the same.

The Court: Did anyone else come there?

The Witness: When? I have a lot of fellows coming there.

The Court: That same night, that same time.

The Witness: No, sir.

Q Did Bruno come to your house? A No, sir.

Q Lamilino come to your house? A Not that night.

Q When? A Other times. I have a lot of fellows coming up there to see me in the house.

Q I am not asking you about a lot of fellows now. You know what I am asking you. When Cort left your house on this day that we are talking about, whom did he leave with? A With Billie Raymondo.

Q Who else? A That is all.

Q Did Cort say anything to you as to where he was going? A No, sir.

Q When did you see him next? A Seen him up in the headquarters.

Q Never saw him until you saw him in headquarters. Is that right? A Yes, sir.

Q Now, did you see Calabrese after that? A No, sir.

Q Did you have a conversation with Calabrese after that with regard to this hold-up? A No, sir.

Q Do you know Lieutenant Linarducci? A Yes.

Q Do you know Detective Callahan? A Yes.

Q Do you know Judge Minisi? A Yes.

Q He is your lawyer, isn't he? A Yes, sir.

Q Didn't you tell Lieutenant Linarducci, in the presence of Detective Callahan and in the presence of your counsel—

Mr. McGeehan: One moment, Mr. Prosecutor. You know that that is improper, at this time, to repeat what he is alleged to have told us. This is a State's witness and there are certain ways in which the witness can be confronted with a contradictory, prior statement, but not in that manner of question.

Mr. Fisch: I have not finished my question in the first place, and in the second place I think the question is perfectly proper.

The Court: You are not referring to a written statement, are you, Mr. Prosecutor?

Mr. Fisch: No, your Honor.

The Court: Are you claiming surprise at the testimony of this witness?

Mr. Fisch: Yes.

Mr. McGeehan: Of course, now, that has been done.

Mr. Fisch: Well, it is very evident.

The Court: I assumed it by the attitude that the Prosecutor has taken.

Mr. McGeehan: I want to state now, I object, and I think the Prosecutor should specify the statement at which he claims surprise, so that the neutralization, which is all that can be done by it, will apply to that alone.

The Court: Yes. the record ought to show, Mr. Prosecutor, that you claim surprise as to some particular statement that he made when you examined him. I don't mean a statement in general, but a statement of the witness that he did not do a certain thing or say a certain thing.

Mr. Fisch: Yes, your Honor, and the record will show that because I claim surprise on more than one answer.

The Court: I think you ought to put it all on the record now.

Mr. Fisch: We are surprised, so far as this witness' testimony is concerned, with reference to his testimony as to Calabrese and Cort having or not having come to his house together, with reference to the manner in which they arrived at his house, with reference to one Lamilino and Bruno coming to his house, and with reference to the people who left with Cort, and also with reference to his testimony in so far as it relates to his not having seen Calabrese after the afternoon at which he says Calabrese was to his house.

Mr. McGeehan: Now, your Honor, this is not a mere technical proposition and it may become very important. So far as those statements already made by the witness are concerned, which the Prosecutor claims surprise in, he is entitled to neutralize the effect of them. He has learned now, from what the witness has testified to and he cannot make a general statement to the witness, thereby making admissible in evidence something which he cannot affirmatively prove by this witness. He can only

neutralize that effect so as to wipe off the record, by the effect of other admissions, statements of this witness, that he did not talk to them or they were not at his house, and I ask that the Prosecutor be limited, in his questions, to the specific neutralization of those questions, and not to bring in new affirmative statements and make his prior written or verbal statements evidence in this case, which would harm the defendants.

The Court: I agree with your statement, Mr. McGeehan, but that in no way prohibits the Prosecutor from now asking his questions.

Mr. McGeehan: No, but it should neutralize just those things.

The Court: I will so deal with it in my charge.

The Witness: I never made any statement, I never made a statement.

The Court: You wait until you are asked a question.

Mr. McGeehan: May I question the witness on the question of his statement? It now becomes a question of fact as to whether or not this is a surprise. If the Prosecutor knew when he got on the stand that he was going to testify as he did, then he is not entitled to neutralize it.

The Court: No, I don't think there is anything that justifies this, and I assume that the Prosecutor has honestly said that he is taken by surprise—

Mr. McGeehan: Oh, it could be legal surprise, but—

The Court: The Prosecutor has stated on the record that he is surprised at the testimony of this witness in several particulars, and that certainly justified his attempting to neutralize the testimony in the manner in which he is intending to do it.

Mr. Fisch: Not only legal surprise, but actual surprise.

Q Didn't you tell Lieutenant Linarducci in the presence of Detective Callahan, in the presence of your counsel, Judge Minisi, in this building, on Friday afternoon last, that Calabrese had been to your house on the morning of April 22 between eleven and twelve o'clock and that he had called Wally in Hoboken and spoke about a stick-up? A No, sir.

Mr. McGeehan: I object to the question on the ground that it goes beyond the necessity of the neutralization. I move to have it stricken from the record because it would contain elements that might lead to prejudice and prejudicial inferences on the part of the jury. This is the very kind of a question that I anticipated. We are now going to hear the getting in of statements by this witness beyond the necessity of proving whether or not the things which he says he was surprised on—he could ask this witness, "Didn't you tell them that they were at the house and they were with so-and-so and so-and so," and it is sufficient to neutralize what he said to the effect that they were not there. No question was asked as to what the conversation consisted of, and this is just the usual move, which I anticipated, because it is the usual method of get-

ting in, contrary to the rule of law, prior statements by a witness, in evidence, beyond the mere refutation or neutralization of his prior surprise statements. The law is clear as to the purpose.

The Court: I think you ought to confine yourself to the denial which the witness previously made in this particular question as to whether or not he told Linarducci that Calabrese was there at eleven o'clock in the morning or whatever time it was.

Q Didn't you tell Lieutenant Linarducci, in the presence of Detective Callahan and in the presence of your counsel, Judge Minisi, that Calabrese came to your house on the morning of April 22 between eleven and twelve o'clock? A No, sir.

Q You did not tell him that? A No, sir.

Q And didn't you tell Linarducci at that same time, and in the presence of the same people, that Calabrese and Cort again came to your house together between four and five in the afternoon in a Chrysler sedan? A No, sir.

Q And didn't you tell Lieutenant Linarducci that an hour later Wally and Bruno came? A No, sir.

Q And didn't you tell Lieutenant Linarducci that then all four left at about half-past six? A No, sir.

Q Didn't you tell Lieutenant Linarducci at the time, and in the presence of the same people, that the next day, about nine o'clock in the morning, while you were in bed, Calabrese came and threw a Newark Ledger—

Mr. McGeehan: Now, one minute. I want to be fair and I don't object to any

questions, but the Prosecutor knows as well as I do, that he is going beyond what the Court has ruled.

Mr. Fisch: I think I am perfectly within the limitations, if your Honor please.

The Court: Has this witness been asked, before this surprise element was injected into the examination, whether or not Calabrese came there the following morning?

Mr. McGeehan: Yes, he asked a general question, "Did you ever see him after that?" so I am not objecting to any reference to any visits, but I do object to what was said.

The Court: This newspaper incident?

Mr. Fisch: And threw a Ledger in there.

The Court: You have asked him if he was there that morning and he denied it.

Mr. Fisch: Yes, your Honor, but I think I am entitled to ask that and go further than that.

The Court: If you do that, don't attempt to do something affirmatively and go beyond the neutralization of the previous testimony.

Mr. Fisch: I think it goes to the neutralization of the testimony and will show whether or not there should be neutralization just more than one incident might not be sufficient. However, I will divide the question.

Q Didn't you tell Lieutenant Linarducci, in the presence of these same gentlemen, that Calabrese came to your house the following morning, about half-past nine, while you were in bed? A No, sir.

William Cardinale, for the State; direct.

Q And that you had a conversation with him? A No, sir.

Q And that he had told you something of what had happened the day before? A No, sir.

Q Didn't Lieutenant Linarducci in your presence, make a pencil memorandum of what was said?

Mr. McGeehan: I object to that. It is unimportant.

The Court: I will permit that.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

The Witness: Yes, sir, about the gun, I admit that I saw the gun, but I never signed nothing.

Q I did not ask you about whether you signed anything, did I? A No, sir.

Q And isn't this the pencil memorandum which Lieutenant Linarducci made in your presence?

Mr. McGeehan: I object to that. I suppose the Prosecutor is now trying to neutralize the sworn testimony of the witness that he did not say those things.

The Court: He can say whether it is or not, if he knows.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

Q Isn't this the pencil memorandum which Lieutenant Linarducci made in your presence at the time that you were speaking to him last Friday with reference to this matter? A I don't know, he did not show me anything.

Q You saw him writing something, didn't you, and it was on a piece of paper similar to that? A It was on a piece of paper but I could not get close enough to see what it was.

Q Was it white paper? A Yes, sir.

Q Was it about that size? A I don't know.

Q It wasn't that size was it? (Indicating.) A I don't know.

Q Well, was it about the size of the paper I am now showing you? A It was a piece of paper, that is all I can tell you.

Q And you refused to sign any statement? A Yes, sir.

Q And while Lieutenant Linarducci was making these notes, isn't it a fact that you said to him, "What is that, a statement? I don't want to sign any statement"? A Yes, sir.

Joseph Linarducci, Jr., recalled, direct.

Q And didn't Lieutenant Linarducci then tell you that he was only making notes?

Mr. McGeehan: I object to that. I don't believe it is important one way or the other, but it takes up time.

Cross examination waived by both defendants.

JOSEPH LINARDUCCI, JR., recalled.

Direct examination by Mr. Fisch.

Q Do you know this man Cardinale who was just on the stand? A I do.

Q And did you see him last Friday in the court house here? A I did.

Q And did you have a conversation with him at that time? A I had two conversations with him.

Q Who was present? A In the morning I had a conversation alone with him and in the afternoon—

Mr. McGeehan: I object to this on the ground that I presume this is to neutralize the prior witness' testimony. I don't know whether a question has ever been decided whether or not a witness, outside of the witness whose testimony it is sought to neutralize, is allowed to be sworn on this question.

The Court: Would you mind, Mr. McGeehan, saying that again?

Mr. McGeehan: I object to this testimony which is offered for the purpose of further

neutralizing the prior witness' surprise statement, on the ground that the limit to which the State can go is to present the matter of prior statements for the purpose of neutralizing the effect of his testimony, and that the State cannot try a collateral issue by calling an additional witness on this statement.

The Court: Can't they call a witness for the purpose of showing that he made another statement?

Mr. McGeehan: I don't know whether that has been decided. I know that they can claim it on a written statement. State *v.* D' Adame was the leading case on the subject, and State *v.* Kiselik.

(Witness withdrawn.)

FRANK E. BREX, called and sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q You are connected with the Newark Police Department? A Yes, sir.

Q And bear the rank of Deputy Chief? A Yes, sir.

Q And are in charge of the Detective Bureau at Headquarters? A Yes.

Q How long have you been connected with the Newark Police Department? A Going on 26 years.

Q Now, do you know the defendant Joseph Calabrese? A I do.

Q And do you know the defendant Arthur Cort? A I do.

Q And did you have a talk with Calabrese in connection with this case at your office in police headquarters? A I did.

Q When? A About between 11 or half-past eleven on the evening of May 1 of this year.

Q Tell us under what circumstances you had that conversation. A I arrived at police headquarters about that time, about eleven or half-past eleven and I went to my office and I found Captain Sebold, Captain of Detectives, seated at my desk, and the defendant Joseph Calabrese at the desk and Lieutenant Joseph Zellers in the room. As I entered I walked over towards the desk and I heard the defendant Calabrese say—

Mr. McGeehan: No, one minute, Chief, I understood the question to be as to the circumstances and not what was said.

Q Now, what did you hear Calabrese say, as you entered?

Mr. McGeehan: I would like to ask one question of the Chief— Were his statements later reduced to writing?

Mr. Fisch: I object to that. I cannot see that that is material to this issue, whether his statements were reduced to writing or not.

Mr. McGeehan: I think if they were they are the best evidence—and where objection is made to the oral statement, the written ones should be produced.

The Court: That does not prohibit the witness from stating what was said orally, does it?

Mr. McGeehan: I think it does, if the statement was reduced to writing, and a

question is raised to that being the best evidence, a question is raised to the verbal evidence offered, the verbal evidence must be excluded and the writing produced.

The Court: Have you any authority as to that?

Mr. McGeehan: I have an indirect authority.

The Court: What is the citation?

Mr. Fisch: I am not asking the witness now, if your Honor please, with reference to any statement in writing made by the defendant. I am asking now with reference to a conversation entirely apart from any statement in writing.

The Court: I will permit it and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Q Did you have a conversation with him?

Mr. McGeehan: May I enter my objection at present. I have not made an objection. There was a question put to the Chief—I presume, if your Honor please, sustains the Prosecutor's objection.

The Court. Yes.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Mr. McGeehan: Now, I object to the question of the Prosecutor on the ground it is not the best evidence and the statement of the defendant has been reduced to writing, and, therefore, the writing is the best evidence and that objection I present now.

The Court: I will permit the question.

Mr. McGeehan: Now, your Honor sustained the objection to my question. I do think we are entitled to call for evidence on the question of whether this has been reduced to writing. Now, I would like to put the question to the Chief—has the statement of Calabrese been put in in writing.

Mr. Fisch: I object. I am not asking regarding any conversation.

The Court: Sustain the objection.

Mr. McGeehan: I know. He is asking about a conversation, because it is not the best evidence if that conversation is reduced to writing.

The Court: I sustain the objection and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Q Did you have a conversation with him? A I did.

Q What was the conversation? A I heard him say to Captain Sebold, "I then ran from the rear of the room to the store; the rear room to the store; I heard some shuffling." Then he said, "I heard somebody say stick them up." I said, "Just a minute, Joe, will you show us just how

this shooting took place?'' He said, ''Yes.'' I then asked Lieutenant Zellers to stand up and I told him that I would be Grossman and I said, ''Now, you just show us what took place just before the shooting.'' He then told me to put my arms around Lieutenant Zellers, who stood in front of him, which I did.

Mr. Fisch: Lieutenant Zellers.

Q Is this the lieutenant to whom you referred? A Yes.

Q Will you be good enough to step up here and will you be good enough to tell us what happened in Calabrese's presence and what you told him to do and what he did do? (A man steps up to the witness.) A The position was just like this.

Q Lieutenant Zellers. A He referred to Lieutenant Zellers as Wally.

Q And Deputy Chief Brex representing Grossman? A I am representing Grossman.

Q And Lieutenant Zellers is standing in front of Deputy Chief Brex and with his back toward Deputy Chief Brex? A I then proceeded to put my arms around the lieutenant in this manner.

Q How did you come to do that? A On the instruction of Calabrese. I had my arms around this way here.

Q Indicating putting both of his arms around Lieutenant Zellers' arms and covering the front of his body with his hands? A I asked him what was next. Then he proceeded to try to release my right hand from the grip of the supposed Wally, who was Lieutenant Zellers. I said, ''What happened then?'' He said, ''Gross-

man kept on holding on tight." He said, "Bruno could not do anything with him," and he stood probably three feet from me at that time.

Q Who? A The defendant Calabrese. About over here.

Mr. Fisch: Indicating about three feet from where Deputy Chief Brex was previously standing.

A (Continuing) Then I said, "What happened then." He talked up and he said, " I said to Grossman let him go or I will shoot, you damn fool, let him go." I said, "What happened then?" He said, "Then Bruno fired a shot," "And what happened then?" He said, "Then they were on the sidewalk about four or five feet in front of the store window and he said after Bruno fired the shot, he said Grossman still held right on. Bruno again attempted to get out of the way, but he said, "We could not do anything with him," and then he said, "I clipped him one." I said, "What do you mean, you shot him?" He said, "Yes." I said, "Will you show me just about where you shot him?" and he walked over, put his finger about there, a few inches below my right arm. I said, "Where do you think you shot him?" He said, "I think I shot him in the lung." Then he said he still hung on and Bruno and I, he said, "Both tried to get him away, but we were not successful," and they rolled out to the street and he said at last Grossman let go. "Bruno and I then went up and took ahold of Wally." He said Wally was almost out. I said, "What do you mean, he was almost crushed to death?" He said, "Yes, he just stood there." He said, "We had to almost lead him to the car." I said, "Joe, he put up an awful battle, Gross-

man." He said, "He certainly did. What a man he was." He said, "It was just our God-damned fool luck to meet a bird like that," and he said, "I was always under the impression—

Mr. McGeehan: I do not know as things outside of those bearing on the facts ought to be recounted.

The Court: He is testifying to a conversation.

Mr. McGeehan: I do not think he ought to state what kind of a show he saw in New York. The discussion he never thought such and such a thing is not a part of the *res gestae* in this case.

The Court: No, but it is a conversation with the defendant about the crime in which the defendant described how the thing happened.

Mr. McGeehan: I have no objection to how it happened, but the fact and discussion between the witness and defendant as to what the witness imagined is a different proposition.

The Court: I will permit it and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

A (Continuing) "I always thought the druggist would be a pretty smart man and hand over the dough without putting up a grapple." That about determined the conversation and he sat down and I left the room.

Q Now, this conversation that you had so far as you know, was that conversation reduced to writing? A I think it was.

Q All of the conversation? A The conversation I had with him, no.

Q There was a statement taken from him? A There was a statement started.

Q By whom? A By Captain Sebold.

Q And while the statement was started, you had a conversation? A I interrupted the conversation.

Q So the conversation was separate and apart from the statement? A Oh, yes, that was not written down.

Q Now, then, did you have a conversation with Cort? A The next night—the next afternoon and evening. The next conversation was around probably half-past four, and terminated about probably eight o'clock on May 2nd, in my office.

Q That was the conversation you had with Calabrese? A The first conversation was May 1st, about half-past eleven with Calabrese alone.

Q At that time was Cort under arrest? A No.

Q Then subsequently? A Cort was placed under arrest about half-past three or four o'clock the next afternoon.

Q Then did you have a conversation with Calabrese in Cort's presence? A In Calabrese and Cort's presence about seven o'clock that night.

Q Tell us about that. A Calabrese was just in my office and Cort was brought in. I asked Cort if he knew Calabrese. He said he did. I asked Calabrese if he knew Cort and he said yes. I said, "Is there any trouble between you

two fellows," and he said, "No." I said, "Joe, go ahead and tell us what he told us," I meant he could tell Cort the story. Calabrese later talked like this, and he said, "Art, I don't like to do this, but that God-damned punk upstairs has told the whole story, which is everything."

Q Where was Raymondo at that time? A Upstairs, but Raymondo's name was not mentioned.

Q Who was referred to as a punk? A Well, at no time did it appear in the conversation.

Q All right. A He said, "They have got everything, they even know what took place over in 70 Plane." "They know about the shirt, about me burning the shirt," and he said the girl saw me, too, "Jesus, Art," he said, "When she looked at me my heart went like that, it was just as though I got twenty-five punches in the jaw." He said, "They got everything." Cort looked at him and he said, "You God-damned fool," he said, "How do you know they got everything?" "Well," he said, "They will all take the stand against you." Cort said, "How do you know they will take the stand they didn't already." He said, "No, but they will." So Cort said, "Well, give me his statement, I will sign it." I said, "No, I could not permit you to do that, because from your story you were not with him all the time that he claims he did certain things with others. If you wish you can give us a statement about the part you played in it, but if you wish I will permit you to sign your statement," and he said "All right." And that practically terminated that conversation excepting I asked Cort at that period and Calabrese when they had discussed this case the first time, and Calabrese volun-

teered they had met each other in the Public Service Terminal Monday night, which was the night before the crime, and they were discussing the ways and means they could get some money and talked of some stick-ups and Cort said he would try to get a car and it was agreed if he got a car he was to call at Calabrese's house the next day. Calabrese stated that as he was going from his home on Eighth avenue, Cort got a car and he got in, and they rode up to Jay street and picked up Raymondo and went to Sussex avenue and picked up Simioni and from there they went to Orange and after looking over the place in Orange they returned to Sanford avenue.

Q All this conversation was— A In the presence of each other.

Q In the presence of Cort and Calabrese? A They were both seated at the end of my desk, that they had gone to a drug store on Sanford avenue. He called it Irvington, and they left Cort out on the corner, and Calabrese got out and returned and told them that the place was closed. They left, he said, around Lenox street, where the car had been parked, and they drove around a little while and they left Simioni and Raymondo off. After they got out of the car Calabrese said he had told Cort that the day before he had received a telephone call from Bruno and Lamilino from Hoboken that they were to come over the next evening or that evening and he was to meet them at six o'clock, and he spoke rather derogatory at that moment, about Raymondo and Simioni getting cold feet in the morning, not wanting to pull the job, and they would substitute Bruno and Lamilino for the two men that refused to go

through with the job in the morning for Cort and Calabrese. Calabrese then said they drove around a little longer and Cort took Calabrese home with the understanding that they would meet at the Lackawanna station around six o'clock awaiting the arrival of Bruno and Lamilino from Hoboken. Around six o'clock or about 5:45, he thought, Cort, he drove up to the Lackawanna station and he met Calabrese with Bruno and with Lamilino. They got into the car and they drove around about probably three-quarters of an hour or an hour and discussed during that period lonely places. They then proceeded back over Sanford avenue and they drove he said the same place they had the car parked in the morning, the four of them in the car, held a discussion just what way to attack the place. It was agreed that Bruno would go in and buy some chewing gum and that Calabrese and Lamilino would follow shortly afterwards. Calabrese said the three of them got out of the car leaving Cort in the car. Bruno went in first and Lamilino and Calabrese went in later. Calabrese said that just as soon as he entered the store he saw the druggist handing over some things to Bruno. They rushed up, Lamilino and Calabrese, and said, "Stick them up," to the druggist, pulling guns. Calabrese said he proceeded in the back of the counter. That period was—that place was right at the cash register. Calabrese said he went to the rear of the counter to take care of any body that was in the back room and he said he met a girl in there reading a paper and he put his finger to his lips like this (illustrating) and told her if she kept quiet there would be no harm. He further stated that while he was in the back room covering the girl he heard some

shuffling and he ran out in front, he said, with the girl following him, and he heard his two companions commanding Grossman to stick them up, and Grossman was hollering, "I won't, I won't." Calabrese said then he went over to Grossman and hit him in the head with the butt end of the gun and the girl at that period said, "For God's sake, give him the money." Grossman broke away and ran to the door and Wally got a little bit ahead of him and Grossman tripped and Calabrese said Grossman was struggling at the entrance to the doorway to get Wally's gun. They kind of cluttered up the entrance to the door, making it necessary for Bruno and Calabrese to climb over Grossman and Wally. After they got out in front in assisting Lamilino up they also raised up Grossman. Grossman still hung on and about that time they were getting in front of the show window and Grossman was hanging on, and Calabrese said, like in a death struggle, when he said, "Leave him go, you damn fool, or I will shoot," and immediately upon him making that remark that Bruno fired a shot in his right side. Notwithstanding that shot, Calabrese further related Grossman held on to Lamilino and the struggle continued over to the curb with him, Calabrese, then firing a shot into Grossman. He said, notwithstanding that, Grossman still hung on and he went out into the street about probably two or three feet on the street proper when Grossman sank, but dragging Lamilino with him. They then went over and extricated Lamilino and it was at that moment that he thought Lamilino was out, because he stood there dazed and they almost had to lead him a distance before he could get into the car. Then I turned them over— Cort's state-

ment. I spoke to Cort at the same time relative to the statement Calabrese had made and he said that was true, and he said that they met at the Public Service Terminal and took the car from Milford avenue and said yes to everything except what took place in the drug store, which he said he did not see, excepting while he was in his car, he heard two shots and when he heard two shots he opened the door of his car and started the motor preparatory to the others coming in and then he said he drove them back to 70 Plane street and Calabrese had told him to park the car about four or five blocks away from 70 Plane street. He took the car about two blocks away. He returned and Calabrese was waiting upstairs at the window and threw the key out to him, Cort, and Cort came in by way of the key. That when he, Cort, went upstairs, he found Wally and Bruno washing the blood off the sleeve of the coat. That he saw Calabrese loan Wally a shirt. While they were there he then said he laid down on the bed talking. When they were there Raymondo came in and they started to relate the story, Calabrese, Bruno and him, he started to relate the story to Raymondo and I said at that moment, "Is it a fact that you told Raymondo if he opened up his mouth about this you would take him for a ride," and he said, "Yes." That practically terminated the conversation.

Q This conversation in Cort's presence was after any statement was taken from Calabrese? A Yes.

Q Any written statement taken from Calabrese was taken before that? A Yes.

Q Signed? A Yes.

Q And then you had this conversation? It was really a tri-cornered conversation between Calabrese, yourself and Cort? A Yes.

Q Then after you held that conversation was a statement taken from Cort? A Yes.

Q In writing? A Yes.

Cross examination by Mr. McGeehan.

Q Chief, this last conversation that you had with Calabrese, when Cort was present, when was that with relation to the time that the first conversation was had at which time the demonstration, official demonstration was shown? A The demonstration was about, probably between 11 and half-past 11 on May 1, and this joint conversation between Calabrese, Cort and myself, was about probably eight o'clock the next night.

Q How long after he was arrested was the first conversation with him at which time there was this demonstration? A The first conversation I had with him was on May 1 between 11 and half-past 11.

Q How long after he was arrested was that? A I don't recall the exact date of that, Captain Sebold has that.

Q It was not the very day he was arrested? A No, I think he was locked up two days before. I am not quite certain about that.

Q I did not get whether or not at the time of the first conversation with you, as you testified, he had previously signed a statement or not, or whether the statement was signed later? A I don't believe—I think the statement was signed later, but I think the gun—probably a portion of it had been taken—I deducted from that that Captain Sebold was writing and talk-

ing with him as I entered the office and I heard that remark and then I interjected and I asked him for a physical demonstration.

Q I understood you to say, Chief, that when you came in he appeared to be right in the middle of a conversation. A Yes.

Q That is, you heard him saying first, "I then ran to the rear room of the store," something about that, going into the rear room of the store. A "I heard some shuffling or scuffling." He was then in the rear, he was talking then as of being in the rear and hearing some things in the store proper.

Q And heard somebody say "Stick 'em up"? A Yes, sir.

Q And then you said "Just a moment, Joe, show us what took place, or how the shooting took place."? A Yes, sir, something like that.

Q Now, at that time, I understood you to say that Captain Sebold was working on the statement, something to that effect. Now, just what was the situation with regard to that? A He had some white paper in front of him and he had been writing when I entered. Just what that contained or how much that contained, I don't know. I did not inquire in the presence of the defendant. I interjected when Calabrese was talking about being in the rear room and heard some scuffling in the front and heard some words "Stick 'em up."

Q Did Captain Sebold, who was writing something, attend this conference wherein the demonstration was given? That is, did he see that and hear that conversation? A Yes, he stopped writing and he sat back like I am in my chair and was watching the defendant, Lieutenant Zellers and myself.

Q Now, do you know whether subsequently to that Calabrese signed anything there? A Of my own knowledge, no, I did not remain there, I left.

Q Now, Chief, didn't you ask— This was the first that you spoke to Calabrese, was it not? A Yes, sir.

Q And at least it was the first discussion of what happened there on that occasion, wasn't it? A Yes, sir.

Q And, of course, you were interested when he spoke freely of what happened, you were naturally interested to know whether he made a signed statement, weren't you? A Yes, sir.

Q Either that he had made one or would not make one? A I had an opinion of what was taking place and what would take place, I had an opinion of what took place prior to my coming in there, and I had an opinion of what was going to take place when I left, but I did not remain there to see it.

Q I don't want anything that you merely guessed at, but do you know—what I am getting at is, was the statement signed before that or after that, if you know? A In my opinion it was signed afterwards. I am not positive, but I imagine so.

Q Was it signed under your direction? That is, were you there when it was signed? A No, sir.

Q Who had charge of the written statement there? A Captain Sebold took his statement.

Q No, so far as you know, then you don't know whether there was incorporated in that written statement the things that Calabrese said to you at the time he was showing by the position of the figures what had taken place? A I

learned later that some of it was, but not verbatim all that occurred in the physical demonstration.

Q That is a resume or substantially what was said? A Substantially the same, and some omissions in the written statement.

Q Now, do you remember, off-hand, what those omission are, as to what details were not included? A In substance I do, yes, when I says to him, "Joe, Grossman put up a great battle, didn't he?"

Q You mean that aside conversation? A Yes, that does not appear in the statement. I read the statement the next night.

Q Now the second discussion was then about a day later? A The next evening.

Q After Cort was arrested? A Oh, yes, after Cort was arrested.

Q Now, one thing you did not tell us, Captain, or did not make clear, and that is whether this contact that was shown between Grossman and Lamilino and the firing of the shots that you have mentioned, you did not tell us, I think, where he said it took place, whether in the store or outside? A Yes, I did. You missed it, Counsellor, it took place outside.

Q Do that according to the statement— A (Interrupting) At two spots outside.

Q So, according to the statement, there were no shots fired inside the place at all—by the statement I mean what you heard him say.

Mr. Fisch: The conversation.

Q The conversation. A In the conference?

Q Yes. A No, the shots were on the outside he said.

Q And none inside at all? A No, none at all.

Q Now, in the position that he directed you to take with the lieutenant, the lieutenant representing Lamilino and you representing Grossman, was that position stated by Calabrese to be the position or one of the positions they were in outside of the store? A That was the position just before Bruno is alleged to have shot and after he shot.

Q Just before Bruno was alleged to have shot and after who shot? A And he shot, he said Bruno shot and subsequent to Bruno, he shot.

Q And after both of the shots were fired, I understood you to say—and I would like to know if this is correct—that Grossman still held on to them and they still tussled until they got out to the street. A To the street proper, probably two or three or four feet from the curb, and the shots took place near the curb, Calabrese was near the curb and Bruno's shots about four or five feet from the window. Calabrese said he shot the second time or his shot was the second shot.

Q That is Calabrese's shot was the second shot? A The second shot.

Q Was anything said as to their positions inside of the store or the struggle that went on inside of the store? A Yes, as I related. While he was talking with the girl in the rear room he heard some scuffling and he came out and he found Grossman with one hand on the cash register and the other two fellows putting their gun up to him and telling him to stick them up, and he would not stick them up, he said, "I wont," and then he said he came up and walked

up to Grossman and hit Grossman on the head with the butt end of his revolver.

Q He did not say anything about Bruno, did not say it was Bruno that hit Grossman with the revolver? A No, and at that moment then, Grossman ran to the front, and Wally got in a little bit in front of them and Grossman tripped them and both of them fell in the doorway.

Q Then you said that he, Calabrese and Bruno, climbed over them to get out? A He said it was necessary to climb over, yes, sir.

Q To get out? A They were both occupying the doorway.

Q And that Wally had proceeded, that is, Lamilino, got ahead of Grossman on the way to the door? A Yes, sir.

Q And that Grossman was pursuing him, is that right? A And grabbed ahold of him and they went down and Grossman was trying to get Lamilino's gun, struggling with him to get the gun.

Q Did he demonstrate what position—who was on top when they went down there, Grossman or Lamilino, or don't you remember whether that was discussed? A I am not positive, but my impression is that Lamilino was on the bottom.

Q Your impression was that he was on the bottom? A Yes, sir.

Q Now, you have seen Lamilino, have you, Captain? A Oh, yes, I spoke to him.

Q How big a man is he, about? A Lamilino is perhaps about the size of Lieutenant Linarducci, not quite as stocky, but he probably weighs between 160 and 180 pounds.

Q He is a shorter man than Cort, isn't he? A A little shorter and a great deal heavier.

Q And what? A And a great deal stockier.

Q Now, Calabrese had stated what took place before Cort was arrested, hadn't he? A I don't quite grasp that.

Q Calabrese had made his statement before Cort was arrested? A Yes, sir.

Q And he told Cort to tell the truth about the matter, did he? A He did, yes.

Q Now, in the statement that Calabrese made to you, Captain, and from his demonstration and from his words, you obtained from him the understanding, the conception of his story that they were trying to get away, and Grossman was trying to prevent that.

Mr. Fisch: I object to that.

The Court: Sustained.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Counsel for the defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Part of the story of Calabrese was in words and part by demonstration, wasn't it? A Yes.

Q The words were illustrated by the demonstration with yourself and the Lieutenant, is that right? A That is right.

Q And the positions that he placed you in were referred to by the story as he told it? A He dictated that.

Q And in what he said, he said they were trying to make a get-away and Grossman hung on to Lamilino particularly.

Mr. Fisch: I object.

The Court: I think the Chief has told us verbatim what was said.

Q Now, did he say in that additional conversation that he was surprised that a fight was put up by the druggist? Didn't he? A Yes, he did.

Q And that he always felt the druggist was a pretty smart man and would hand over the dough without a struggle, is that right? A That is right.

Q Now, as to the shooting, Chief, did he say how long an interval elapsed between the shot that Grossman, or that Bruno fired and the shot that Calabrese fired?

Mr. Fisch: I object to that.

Mr. McGeehan: This is right within the heart and meat of the statement.

The Court: With reference to the shooting did he say how long—

Mr. Fisch: I withdraw the objection.

The Court: You may answer that.

The Witness: Calabrese stated that the first shot was fired into Grossman's body by Bruno when Grossman was holding ahold of Lamilino at a distance of about probably four or five feet from the show window on Sanford avenue sidewalk, and the sec-

ond shot, which he stated he shot, was at a point about perhaps 2 or 3 feet towards the curb, and after that shot it was when Lamilino and Grossman struggled, those 2 feet or 3 feet near the curb, it took that space, and then they went out in the street when Grossman sank to the ground, pulling Lamilino with him.

Q Now, did he say that Lamilino had a gun in his hand at that time? A Oh, yes.

Q And that the arms of Grossman were around Lamilino? A Beg pardon, Counsellor, just at the moment of the struggle going on?

Q At all times? A He did not mention anything about Lamilino having a gun except that when he went in there, when he came from the back room, and the last time he mentioned about any gun was when Grossman is alleged to have tried to get the gun from Lamilino at the entrance of the store. He did not mention about Lamilino having a gun after that.

Q But the place where he said Grossman was trying to get the gun from Lamilino, did he say Grossman had hold of that gun? A He simply said that Grossman was trying to get the gun.

Q Now, that was the last reference to Lamilino's gun? A In the oral statement, yes.

Q And nothing was said whether Lamilino still had the gun or Grossman had the gun when the shots were fired? A No, I brushed over that portion to get to the shooting.

Q Is the position that you demonstrated before the Court here a position that existed at the time Calabrese said he fired the shot? A Yes, sir.

Q Now, Chief, didn't Calabrese say that he fired at the arm of Grossman? A No. He

said this, I told him to let go, "You damn fool, leave go or I will shoot." And he said, "Then, I clipped him," and I said "What do you mean, you shot him?" and he said "Yes," and I said "Will you show me where you shot him," and he indicated a point below the armpit of the left arm and I said "Where do you think you shot him?" and he said "I think I clipped him in the lung."

Q Will you stand up and show the position he said Grossman was in at the time he shot? A He said he was holding him like that (indicating).

Q Out in front of him? A He and Bruno tried to release the right arm from his grip on Lamilino.

Q Now, did he say how far he was away from him at that time? A He indicated about 3 feet.

Q And you did not ask him how he knew where the bullet entered, did you? A I asked him to show me how he levelled the gun and he indicated how he held the gun.

Q Yes. A And he said he thinks he shot him in the lung and pointed to a spot that he thinks he hit him. He said, "I think I hit him in there."

Q Didn't he say he shot at his arm? A No, he did not.

Q If he indicated the position in which the gun was held, wasn't it in the direction of the arm of Grossman that was around Lamilino? A That would depend, Counsellor, upon the grip that Grossman had, as to whether it was a high grip like that, which would have permitted it, or probably a neutral one which would have held that, or an extra low one—

Q And, of course, the demonstration did not show exactly where that point was? A No, we did not go into it in detail as you are going into it now.

Mr. McGeehan: Now, Chief, this may not be proper cross examination, and it undoubtedly is not, and I would ordinarily call the Chief on this subject, and maybe the Prosecutor won't object to it, but I will make the Chief may witness for this purpose.

Mr. Fisch: Are you finished with your cross examination?

Mr. McGeehan: I think so, and if there is something I have forgotten I will ask permission of the Court to ask other questions.

Q Chief, you are familiar with the lineup in the case, are you? A The lineup in this case?
Q Yes. A I was not present at any of them.
Q Weren't you? A No.
Q Who would be familiar with that?

Mr. Fisch: I object to that. This is not cross examination.

The Court: I will permit it.

Q You are deputy chief of police? A Yes.
Q Who was familiar with it? A Captain Sebold.
Q Was he present at whatever lineups there were? A I was not present at the Calabrese and I don't think there was a lineup in the Cort case.
Q That is what I want to question you about, do you know of your own knowledge whether

there was? A As a result of information, I know.

Mr. Fisch: If the Court please, if that is what the purpose of the inquiry is, I will state on the record that the State does not contend that there was a line-up as to Cort.

The Court: Captain Sebold evidently knows, and I assume that he is going to be a witness.

Mr. McGeehan: Yes, that can cover it.

Cross examination by Mr. Becker.

Q Chief Brex, I just want to clear up a few matters that are in my mind, and will you again please tell us when and where did you first see Cort at police headquarters? A In Captain Sebold's office at about four or half-past four or five o'clock on the afternoon of May 1st; that was the first time.

Q And you testified, Chief, that Cort was in charge of your man from 4:30 P. M. until 3:30 A. M. the next day? A No, I did not testify to that.

Q Well, what was that testimony with reference to four o'clock to three o'clock, or something like that?

Mr. Fisch: I object to that, if the Court please, there wasn't any such testimony.

A You probably have reference, Counsellor, to the arrest of Cort which took place around three or half-past three that afternoon.

Q And then he was in charge up to 4:30? A Yes, I came back on learning he was in custody and I got back about half-past four.

Q Now, at that time, at 4:30, on the direct examination, there was a conversation between Calabrese and Cort, is that right? A No, not at that hour. Captain Sebold and I had a conference or conversation with Cort, but Calabrese was not present at that hour not until at eight o'clock at night.

Q Eight o'clock that night? A Well, about half-past seven or eight.

Q When Calabrese said something about the punk upstairs? A Yes, Captain Sebold was not present at that time, he was coming in from Hoboken with prisoner Lamilino. I was in there, in my office, with sergeant Moffett, with these two defendants.

Q And Cort had not volunteered to sign Calabrese's statement or confession, whatever it might happen to be, until about eight o'clock that night? A About eight o'clock; he had denied complicity in the case for about an hour or an hour and a half and then I stepped out of the room and came back about seven or half-past and I had him brought to the office and confronted with Calabrese, and then Calabrese urged him to tell the truth.

Q Now, what did you tell Art, as you testified, with relation to what Calabrese stated that he wanted to sign? A There was an outburst on Cort's part and he took Calabrese to task for telling the story and he said, "All right, give me his statement and I will sign it." I said, "No, I won't permit that, it would be very unfair to you, Art, because there are things in there that you don't know anything about, because Calabrese claims he was in the store and you were not, and I don't want anything added or subtracted. If you wish, you can make a statement about this

whole thing, how it started and how it ended. Are you willing to do that"? And he said, "Yes."

Q Cort at that time was excited, was he? A No, I wouldn't say—I would consider him cool. He was in the same position as he is sitting there now.

Q Did you say, "Just rest up and take it easy until you are in a condition to tell us exactly what you know about the case." A No. Then he was taken out of the room, the written statement was not made in my presence, but before he was taken out, I asked Calabrese whether he had been fixed up with his supper, and I asked Cort, and they said yes, and I said, "How about your cigarettes, got enough cigarettes," and he said, "We can use a little more," Calabrese, and I said, "Is there anything more you would like to have," and he said, "Yes, some ice cream," and then Cort interjected and laughed and said, "You try to get some ice cream," and I said, "Don't be too sure about that," and I sent out and I got four pints of ice cream, one for each of them and two for ourselves, and there was probably twenty minutes consumed in the demolition of this cream, and Cort was taken out and the statement taken by Boland, the written statement was taken by Boland, but he was calm during that period and I am bringing out this after proposition, that he did not complain or say anything, as far as I can recall.

Q Chief, are you sure, in addition to the statement that you told Cort, do you know whether or not you said to Art, "I don't want you to sign Calabrese's statement, because you are not in it as deep as Calabrese," something to that effect? A Well, now, I told him it would be unfair for him to sign it, because he was not in the store,

and that he would be signing things that he had not played any actual part in, and I had reference then to the store episode, and what happened on the sidewalk. I explained to him that we only wanted him to relate to us just the part that he played and saw himself and not what any of the others told him took place in his absence.

Q Now, I heard you say that when Calabrese entered the door of that drug store, he saw Lamilino and Bruno there in the presence of Grossman, is that correct? A No, he says that Bruno entered first and it was agreed that Bruno would buy some chewing gum, and that he, Calabrese, and Lamilino entered at the moment that Grossman was returning the change to Bruno, and then they rushed up and said, "Stick them up," and that Calabrese ran to the rear of the store to take care of anybody that might be back there, and there was a subsequent shuffling which brought Calabrese again to the front of the store, to the cash register, and the subsequent running out and shooting on the sidewalk.

Q Now, after you had this conversation with Calabrese did you ask Calabrese a direct question as to whether or not Cort was in the drug store? A Calabrese told me he was not in there. Calabrese told me that when they rushed to the car that Cort was seated in the car and that the doors of the car were open and the car was in gear and the motor running.

Q So you are answering that question that Calabrese said Cort was not in the drug store? A He said he was not in the drug store.

Q Did Calabrese say as to whether or not Lamilino and Bruno, when he entered the store, had guns? A Calabrese?

Q Yes. A Calabrese said that when he went in there he had a gun, Lamilino had a gun and Bruno had pulled his gun and was holding the druggist at bay with his, Bruno's, gun.

Q Did he say whether or not Cort had a gun on him, did he tell you whether or not Cort had a gun? A He said Cort did not have a gun; that there were only three guns, that Bruno, Lamilino and himself had guns.

Re-direct examination by Mr. Fisch.

Q You have testified that Lamilino was brought in as a prisoner during this performance. A Yes, sir.

Q Do you know where Lamilino is now?

Mr. McGeehan: I object to that.

Q Do you know, yes or no.

The Court: You can answer yes or no.

Mr. McGeehan: I asked him for a description of Lamilino, if he had ever seen him and he said he did.

The Court: I think the prosecutor stated in his opening where he was.

Q Do you know where he is, yes or no? A Yes, sir.

Q Where is he? A In the insane asylum.

Mr McGeehan: I don't see the materiality.

The Court: I don't see how it can prejudice the defendants, and the jury is entitled to know. As a matter of fact, it is

already in, the Prosecutor stated it in his opening.

Mr. McGeehan: I have no real definite feeling that it will harm us, but I don't think it is proper evidence.

Q Where is he, did you say? A In an insane asylum.

Q Do you know whether or not he was committed by the order of any court? A Not of my own knowledge, excepting by information I heard it.

The Court: Now, Mr. Prosecutor, I am ready to permit the Linarducci testimony you offered a little while ago.

JOSEPH .LINARDUCCI, JR., resumes the stand.

Re-direct examination by Mr. Fisch.

Q Lieutenant Linarducci, I believe I have already asked you whether or not you had a conversation with the witness William Cardinale on Friday last in this building? A Yes, I had two conversations with him.

Q Did you have a conversation with him on Friday in the presence of Detective Callahan and Judge Minisi? A Yes, sir.

Q And during the course of that conversation, while you were having the conversation with him, did you make some notes? A I did.

Q And were those notes made in Cardinale's presence? A They were.

Joseph Linarducci, Jr., recalled, direct.

Q I show you a piece of paper and ask you whether this is the paper on which the notes were made? A It is.

Q And are those the notes which you made at the time? A Yes, sir, they are.

Q Did Cardinale say to you at that time that Calabrese had come to his house on April 22nd, about eleven or twelve o'clock? A He did.

Q And did he say to you that Calabrese and Cort then came to his house between four and five o'clock in the afternoon in a Chrysler sedan? A He did.

Q Did he say to you that later Wally and Bruno came? A He did.

Q And that they had a conversation together? A He did.

Q Did he tell you that all four then left about half-past six? A He did.

Q And did he tell you that the next day about nine o'clock Calabrese came to his house while he was sleeping, he was still in bed? A He did.

Q And threw a paper at him? A Yes, sir.

Q And had a conversation with him in regard to the stick-up? A Yes, sir.

Q Did he tell you what the conversation was between himself and Calabrese in the morning?

Mr. McGeehan. I object to that, the Prosecutor has by his previous proper questions neutralized the testimony of the witness Cardinale.

The Court: Yes, I think it is objectionable.

Cross examination waived by both defendants.

William J. Callahan, recalled, direct.

WILLIAM J. CALLAHAN, recalled in behalf of the State.

Direct examination by Mr. Fisch.

Q Detective Callahan, were you present in the Hall of Records building last Friday? A I was.

Q And were you present at a conversation which was had between William Cardinale and Lieutenant Linarducci? A I was.

Q In the presence of Judge Minisi? A I was.

Q And did Lieutenant Linarducci at that time make a pencil memorandum? A He did.

Q I show you a memorandum and ask you whether or not this is the memorandum made by Lieutenant Linarducci in the presence of Cardinale? A Yes, sir.

Q And did Lieutenant Linarducci at that time, in his conversation with Cardinale, ask Cardinale some questions? A He did.

Q And did Cardinale tell Lieutenant Linarducci, in your presence, that Calabrese had come to his home on the 22d of April, about eleven or twelve o'clock? A He did.

Q And that he made a telephone call? A He did.

Q And that he had made a telephone call to Hoboken? A That's right.

Q And did he tell Lieutenant Linarducci—

Mr. McGeehan: I assumed that I could rely on the Prosecutor to ask the same questions which Lieutenant Linarducci was asked. I move that this be stricken out.

The Court: Strike it out.

William J. Callahan, recalled, direct.

Q And did he tell Lieutenant Linarducci in your presence that Calabrese and Cort later came to his house on that day between four and five o'clock in a Chrysler sedan? A He did.

Q Did he tell Lieutenant Linarducci in your presence that an hour later Wally and Bruno came? A He did.

Q And that they had a conversation together? A That is right.

Q And did he also tell the lieutenant that all four of them left at about half-past six? A He did.

Q And did he tell the lieutenant that on the following day, about nine o'clock in the morning, Calabrese came to his house while he was still in bed and threw him a paper? A He did.

Q And that they had some conversation at that time? A That's right.

Cross examination waived by both defendants.

Adjourned until Monday, November 4, 1929, at the same time and place.

SIXTH DAY.

Monday, November 4, 1929.

Continued pursuant to adjournment.

Present: Counsel as before stated.

PHILIP SEBOLD, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Captain Sebold, you are connected with the Newark Police Department? A Yes, sir.

Q And bear the rank of captain? A Yes, sir.

Q And are connected with the detective bureau at headquarters? A Yes, sir.

Q How long have you been connected with the Newark Police Department? A Twenty-two years.

Q And on the first day of May of this year did you see Joseph Calabrese? A The first day of May, yes, sir.

Q And did you have a talk with him at police headquarters on that day? A Yes, sir.

Q That is the defendant in this case? A Yes, sir.

Q And did you reduce what he said to writing? A I did.

Q And after you reduced it to writing, what was done with it? A I read it to him, he read it himself, read it out loud and he signed it and it was witnessed by those present in the room.

Q Witnessed by you and others? A Yes.

Q Who were the others who witnessed it? A I think Callahan, Detective Callahan of the Prosecutor's office, Detective Kenney and, I believe, Lieutenant Zellers.

New Jersey State Library

Q Now at the time your reduced this statement to writing and at the time you spoke to him, before you reduced it to writing, did you make any promises to him of any kind with reference to it? A No, sir.

Q Or any threats? A No, sir.

Q Now, I show you a statement dated May 1, 1929, consisting of several pages and ask you whether or not that is the statement that you refer to? A That is it.

Q And Philip Sebold on each of these sheets —is that your signature? A That's right.

Q The signatures of Joseph Zellers, William J. Callahan, Prosecutor's office—were they made in your presence? A They were.

Q And the signature of Joseph Calabrese on each of these sheets—was that made in your presence? A They were.

Mr. Fisch: I offer it in evidence.

(Counsel argue.)

Mr. McGeehan: To save time, may I make this objection? I object to it upon the ground that it contains matters not relating to the specific crime charged in the indictment and prejudicial to the defendant.

The Court: I will permit it and allow you an exception.

Let it be sealed, and it is signed and sealed accordingly.

WALTER D. VAN RIPER,
Judge.

Mr. Fisch: I would like to have stated on the record that the only purpose in offering it is to prove the defendant's connection of

this crime under this indictment which he is charged with in this case.

The Court: I think you ought to show it is a result of the conversation at the time the record was taken down.

Q This statement, which I have just shown you, was that the result of a conversation which you had with the defendant at the time the statement was made? A Yes.

(Statement marked Exhibit S. 18.)

Q Now, Captain Sebold, at the time that Exhibit S. 18, this statement, was written out, and signed by Calabrese, did you have in your possession a gun in connection with this matter? A Yes.

Q And I call your attention in the statement, Exhibit S. 18, to the fact that the defendant Calabrese states therein that the gun which he used was taken and thrown into the river. Now, bearing that in mind, on the 5th of May, did you have any further talk with Calabrese with reference to this matter? A I did.

Q And at that time did you show him Exhibit S. 16 for identification? A I did.

Q And who was present at that time? A Detective Linarducci and Detectives Kenney, Bolan and several others.

Q What, if anything, did Calabrese say to you and you say to him with reference to Exhibit S. 16? A He retracted the statement with reference to his throwing the gun in the river and he said he had given the gun back to Raymondo and I asked him to look at the gun and see if he could identify it and he said that is the gun, and

he said to make sure see if there is C. 19 stamped in the cylinder, and he looked at it and found it stamped on it.

Q And he told you it was the gun he used? A Yes.

(Gun offered in evidence and marked Exhibit S. 16.)

Q Now, Captain Sebold, I show you a photograph and ask you whether or not this is one of the photographs referred to in Calabrese's statement and bears the signature Calabrese? A It is.

Q And was that one of the photographs you showed him at the time? A Yes.

Q And I show you another photograph and ask you if that bears your signature? A Yes, that is a photograph of Lamilino.

Q I show you another photograph and ask you if that is a photograph showing the picture of Calabrese on the face of it? A Yes.

Mr. Fisch: Now, this is merely cumulative and I make the offer because of what I read in the statement.

Mr. McGeehan: I think it is objectionable.

The Court: I do not see how it is material.

Cross examination by Mr. Geehan.

Q Now, this statement which you took was written out by you in pen and ink, wasn't it? A Yes.

Q And not taken stenographically? A No.

Q And at the time you were writing the statement, was Chief Brex also present talking to the defendant Calabrese? A Not all during it; one part of it he came in.

Q During what part of it? A One part of the statement.

Q And while you continued to write, Calabrese did his demonstrating of certain features of his statement, did he not? A Well, I stopped writing about that period. I asked him to describe to us how it took place and he went through his demonstrations. While he was demonstrating, I stopped the writing.

Q Was he talking while he was demonstrating? A Yes.

Q When did you write down what he said while he was demonstrating? A Well, that was outside of the statement. I was asking him for the statement and when the Chief came in he interrupted and he asked Calabrese to show how it was done.

Q I know that, but you listened to what Calabrese said to the chief in your presence, accompanying it by a physical demonstration, did you not? A I did.

Q And did you put what he said then in the statement? A I did get the gist of it, I put down that he shot him in the lung, his shot hit him about in the lung.

Q And you put the gist of it down? A Yes, sir.

Q And that is what this statement is, the gist of what he said? A No, I am referring to that particular part, the demonstration.

Q Well, you put the gist of it down? A Of the demonstration, yes, sir.

Q And when did you do it, after the demonstration was over? A Yes, sir.

Q So you put the gist of it down from what you recollected, what was said by Calabrese during that rather lengthy demonstration, didn't you? A Yes, sir.

Q Now, Chief, that is true of all the rest of that statement, is it not? A No, sir.

Q One minute—that you would talk to this man by way of questions and answers in obtaining the gist or substance of what he said and write it down in your own words, isn't that so? A No, those are the words that he used.

Q You mean to say that all these words are this defendant's language? A Yes, particularly "death-like grip" and "relaxed," words like that. Those are words that he used.

Q Well, now, here, you have a form of statement that you put at the end of each statement or confession in criminal cases, do you not? A No, sir.

Q Well, don't you usually have at the bottom of your statement "This statement consisting of 9 pages has been read to me by Captain Sebold," or whoever it may be, "and has been read aloud by me. It is the truth and given by me of my own free will and without any threats or promises being made and realizing that this statement can be used at my trial. This is in my own handwriting. Joseph Calabrese."

Mr. Fisch: I object to that.

The Court: Why isn't that proper?

Mr. Fisch: Because the question is "Don't you usually have at the end of your statements in all criminal cases."— We are not concerned with what he usually does.

Mr. McGeehan: I think the cross examination is to determine whether or not this particular part that was dictated by the chief—

The Court: I will admit it.

Q This is at the bottom of all statements, isn't it, Chief? A Not at the bottom of all.

Q Well, it may vary a little? A Yes, sir.

Q A word or two, perhaps? A Yes, sir.

Q So that these several lines that I have just read, that at least is dictated to him in your language, is it? A Yes, sir.

Q And he writes it down himself? A Yes, sir.

Q And the reason you have him write that down himself is so that there can be no doubt about its being voluntary. Isn't that right? A Yes.

Q Now, so, we go back to the other parts of the statement. You would ask him a question, wouldn't you, and he would give you an answer so as to develop the sequence of events. Of course, you would not write down your question in this, would you? A No, sir.

Q And if you asked him a question and he would answer yes, you would put in the result of that question and answer, wouldn't you? That is, if you said "Where did you get the car you used?" and he would say "Cort said he would get it," you would put in there, "Cort said he would get the car that we were to use in the hold-up," wouldn't you? A Yes, in other words, his reply to my question.

Q Yes, but you would modify his words so as to give the proper sense of the question and

answer combined together in a positive statement.

Mr. Fisch: I object to that. That was not what the reply is.

The Court: I think your question is objectionable unless you base it on some particular question and answer of this witness.

Mr. McGeehan: I am coming to that, but I do think we can save time if the chief will tell us how this is composed—if it is a verbatim statement or not.

The Court: Objection sustained.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

Q Now, Chief, take this, for instance, "I am shown a three-button, double-breasted blue chinchilla overcoat bearing the label of the Bell System Clothes, New York. I identify this coat shown to me by Prosecutor's Detective Callahan as my overcoat and the one worn by me while committing this hold-up at Grossman's drugstore Sanford avenue on the night of April 22, 1929." Now, that paragraph is your language, isn't it? A Yes.

Q And that paragraph means that Detective Callahan would turn to Calabrese and say, "Cal-

abrese, is this your coat?'' and Calabrese would say ''Yes.'' ''Is that the one you used during the item of the hold-up?'' and he would say ''Yes.'' Isn't that right, Chief? I mean to that effect. A Yes, to that effect.

Q And then you would carefully put down in formal statement form the effect of those questions and answers, wouldn't you? A Yes, sir.

Q And that is the way the greater part of this statement is made up. Isn't that so?

Mr. Fisch: I object to that.

Q That is the way all of this statement is made up, isn't it, Chief?

Mr. Fisch: I object.

The Court: Overruled.

A That is the way most every statement is made up.

Q I know that. While we may know it, everyone may not know it, Chief, and therefore—the language of this is your gist of what he said, isn't that right? A Yes, sir.

Q And it is not the specific words used by him in his conversation with you, is it? A Most of the words that he used are in it. He may have used ''ain't'' or some other word like that, he may have said something that probably is not in there, but it was submitted to him to read and he read it, read it out loud, and I stood over his shoulder when he read it and saw that he read it word for word and he put his stamp of approval on it, and said it was o. k.

Q I am coming to that later, Chief, as to the reading of it, but I want to first ask you about the composition of it, that is, the language in it.

Now, as he made this statement up, Chief, how long did it take you, about, to write it? A I should judge I started at about ten o'clock at night and I think I got through around daybreak, possibly.

Q Now, in writing this, how much would you write at a time? A Possibly a paragraph.

Q Was he sitting in your presence during all that time, from eleven o'clock until daybreak? A Yes, sir.

Q Now, at the time this was written up, and Chief Brex was questioning him, did you listen carefully to what was said then by Calabrese and by Chief Brex? A Yes, I did.

Q And did you listen to that as it was going on, Chief? A Yes, sir.

Q And how long did that take, how long was the chief questioning him? A Well, that demonstration took possibly two or there minutes.

Q Didn't it take longer than that? A No, sir.

Q Did he get through all that was testified to in court, the placing in positions of others and answers to the chief by Calabrese? A Yes.

Q That took more than two or three minutes, didn't it? A No.

Q Well, when did you put that in your statement, after that two or three minutes was over? A What was that? What are you referring to?

Q The things which were said by Calabrese during that demonstration in front of you and the chief? A Well, I had already inserted it when I had got to that part, "My shot just about hit him in the lung" about that time the chief walked in.

Q You say you had reached the part that covered the action before the shooting? A Yes, just up to that part.

Q Now, when did you put down he kept saying, "No, I won't. The woman then said, 'For God's sake, give him the money.' The druggist then said 'No' and made a run for the door. Wally also made a run for the door, he being a little in advance of the druggist. As Wally opened the door, who I know now as Maurice Grossman, tripped Wally, he fell at the door on his knees." Now is that the exact language of the defendant? A Yes.

Q Was this dictated to you by him? A That was his story to me.

Q I know, but you would write about a paragraph at a time? A Yes.

Q You could not carry the memory of those words in your mind beyond a line at a time, could you? A Every paragraph as I put it down, I read it to him and he said, "That is right."

Q You read every paragraph? A Every paragraph as it went down was read to him.

Q Well, every paragraph you wrote you read to him as being the subject of what he said? A Yes.

Q You did not intend this to contain the exact language of the defendant? A No, it is not verbatim, I do not suppose. I do not suppose everything in there is word for word in the exact pronunciation of every word he used.

Q Now, when you say here, "As Wally opened the door; the druggist, who I know now to be Maurice Grossman, tripped Wally; who fell to the floor on his knees. Grossman jumped on top of Wally and tried to get his gun away from him. This happened right outside the door on the concrete step and Bruno and I in order to get out of the store had to jump over Grossman and

Wally. We tried to pull Grossman off Wally and in doing so helped both to their feet," is that right? A Yes.

Q Now, did you put that down before the demonstration of Chief Brex? A Yes.

Q Well, when they were talking to Chief Brex, did you hear Calabrese say that that took place inside of the door where the revolver was being taken away from Lamilino by Grossman? A No, I do not recall whether that question was asked, whether it was inside or outside.

Q Well, you heard Chief Brex testify yesterday? A Not yesterday, you mean Friday.

Q Well, I mean the day we were on trial here. A I heard him testify.

Q And did you understand the intent of Calabrese to be—to inform you that the gun snatching part of it was outside or inside?

Mr. Fisch: I object to that. I do not think we are concerned with what was the intent of Calabrese.

The Court: Sustained.

Mr. McGeehan: The witness has testified that he put down the gist and substance of the conversation and naturally it is—

The Court: It is perfectly proper to show any part of the statement and say what was the next language, but we are not interested at this time particularly in what he understood.

Mr. McGeehan: He has already said that the exact language of the defendant is not here at all.

Mr. Fisch: I object.

The Court: I did not understand him to say that.

Mr. McGeehan: He said he did not attempt to get it verbatim.

The Court: It is perfectly proper for you to pick out one line or paragraph and ask what the defendant said about that.

Q Well, Chief, did he not say in the presence of Chief Brex that the gun grabbing part of it was inside of the door of the store? A I do not recall him saying that, no.

Q You do not recall it as being said that way? A No.

Q Now, with respect to what occurred on the sidewalk, he said to you, did he not that the time they pulled Wally up, or Lamilino up, was outside on the sidewalk? A Yes.

Q And not inside the store? A Not in the store. Outside.

Q At or near the place where the shots were fired? A Yes.

Q And he said to you, did he not, that it was at that time on the sidewalk that Grossman was trying ot grab Wally's or Lamilino's gun? A That is right.

Q Now, did he tell you where the arm of Grossman was at the time he fired a shot toward his right side? A Yes. He had also made a demonstration to me and showed me exactly the same as he had shown to the Deputy Chief. He showed me his arm was around Lamilino.

Q And did he say that they were moving and struggling at that time? A No. He said he was holding him tight, pressing him.

Q Well, did he say whether or not they were moving from place to place on the sidewalk? A Oh, yes.

Q They were moving about? A Yes, they were moving about on the sidewalk.

Q Now, at the time this shot was fired—withdraw that. Did he say to you in both demonstrations that Grossman had his arms out and forward of him and that Lamilino was in front of him at that time? A Yes.

Q That is, he had Lamilino from behind? A Yes.

Q Did he say to you that when they were in that position and struggling that he fired toward his right side? A He did.

Q Did the demonstration indicate to you whether that gun was aimed at the arm or not? A No, in fact, he said, "My shot about hit him in the lung."

Q Now, what question did you ask him to obtain that? A I said, "Where do you think you hit him?"

Q "Where do you think you hit him?" A He said, "My shot just about got him in the lung."

Q And this was some time in May, the first of May? A This was the first of May, yes.

Q There had been articles in the newspapers prior to that as to where the injuries to Grossman were?

Mr. Fisch: I object.

Mr. McGeehan: Withdraw it, then.

Q You did not ask him then where he aimed that? A No. He said he shot him in the side. I said, "Where do you think you hit him?" and he said, "My shot I think clipped him in the lung."

Q Now, didn't he say at that time he shot him in the arm? A No.

Q Didn't he say he shot about two or three feet away? A Yes.

Q And he told you at the time he was trying to get them apart and extricate Lamilino from Grossman? A Yes.

Q And did he say he shot to get them apart? A He asked them to let go. He said, "Let go, you damn fool," and then shot.

Q Now, before that you said that Bruno had shot, is that right? A Yes.

Q Did he say where he thought Bruno shot in him? A Also in the right side.

Q Now, Captain—withdraw that.

Mr. McGeehan: I think the Prosecutor consented when Chief Brex was on the stand to my using Captain Sebold with respect to line-ups. This is not cross examination but I want to make the captain my witness for the purpose of that.

Mr. Fisch: I have stated in open court that the defendant Cort was not in any line-up at police headquarters.

Mr. McGeehan: The question now is whether the Prosecutor objects to my questioning the captain on that subject now.

The Court: Now, if you make him your own witness you have a right to.

Mr. McGeehan: That is part of the State's case.

Mr. Fisch: I have no objection to that, but I cannot see the necessity of it by reason of the stipulation.

Mr. McGeehan: I would rather have it in evidence in a case of this kind.

Mr. Fisch: I have not any objection.

Philip Sebold, for the State, cross.

The Court: Go ahead.

Q Now, are you familiar with the line-ups that took place in this case? A Yes.

Q And of course you were present when Miss McEvoy was down at headquarters to look at a line-up or some line-ups, which she did? A I was.

Q First of all, was she ever before any line-up whatever that contained the defendant Cort in it? A No.

Q Was she ever confronted with Cort at any time at headquarters? A No, sir.

Q Did she ever pick him out or identify him? A No, sir.

Q Now, with respect to the defendant Calabrese, was she ever before a line-up in which Calabrese was? A Yes.

Q How many times, Captain ? A Once.

Q On that occasion did she pick him out? A She did not.

Q What did she say at that time? A She failed to identify him.

Cross examination by Mr. Becker.

Q Captain Sebold, when that statement was made—

Mr. Fisch: I want to know whether counsel for Cort is on the cross examination of the captain's direct testimony or whether this is his own witness?

Mr. Becker: No, on the direct examination.

The Court: You are making him your own witness now?

Mr. Becker: No.

The Court: You are on cross examination?

Mr. Becker: Yes.

Mr. Fisch: Then, I would like to be permitted, if the Court please, before counsel cross examines to cross examine on the direct testimony elicited by Mr. McGeehan.

The Court: That is proper.

By Mr. Fisch.

Q Captain Sebold, you have said that Miss McEvoy was down at headquarters and viewed to a line-up in which Calabrese was, and you said that she failed to identify him. Now, what, if anything, did she say in regard to that line-up at that time? A You want to know now in the defendant's presence or outside of the defendant's presence?

Q Outside of the defendant's presence.

Mr. McGeehan: I object to what was said outside of his presence. This captain has testified to the question whether she confronted a line-up and whether or not she picked out the defendant when she stood in front of him—as to whether or not she could identify him and the captain testified she could not identify him. I have no objection to questions which go to what took place on that occasion before the line-up, and anything else is not cross examination nor are we bound by it.

Mr. Fisch: If your Honor please, the point is Mr. McGeehan in making the captain his own witness did not ask him what took place in front of the line-up.

The Court: Didn't he ask him if she identified him?

Mr. Fisch: Yes, and what she did or what she said.

Mr. McGeehan: I asked did she pick him out?

Mr. Fisch: I think I am entitled to cross examine on that, if the Court please.

The Court: Yes, you are entitled to cross examine on that, but I don't think you are entitled to have a conversation that took place between Miss McEvoy and the captain or somebody else outside of the presence of the defendant.

Mr. Fisch: It is cross examination on this subject matter.

The Court: It is proper cross examination to show what she did in the room where the line-up took place.

Mr. Fisch: I think it is proper to show what she did at some other time outside of that line-up.

The Court: It may be proper cross examination to show what she did, but not what she said.

Mr. Fisch: The question will be withdrawn.

Q With regard to that proposition of identification, her being there in front of the line-up, will you tell us just what she did—Miss McEvoy?
A Calabrese was lined up in my office with six or seven other men about his own age, size and height. Miss McEvoy was not in the room at the time that happened, nor was Miss McEvoy permitted to see the officers and witnesses that

were in the line-up. Miss McEvoy was then brought into my office and the men were lined up and she was asked to walk up and down the line and see if she could pick out a man that she saw in Grossman's store on the night of April 22, and if so, to place her hand on him. She walked up and down the line several times, and I asked her whether the man spoke to her and she said he did. I said "What did he say?"—I just don't recall just what was said, but I asked them to repeat what Miss McEvoy had said. Everybody in the line-up repeated whatever they were told to say—that is, to get the tone of voice, and she shook her head like this (indicating).

Q In a negative manner? A Yes. So I asked them to turn around and they all turned around and she looked at them and again shook her head in a negative manner and so the line-up was dismissed, they left the room, and I said to her, "Can't you identify anybody? Don't you see anybody in the line-up that resembles the man that you saw in the rear of the drug store or that was in that party?" And she said, "Well, I think the second man from the end resembles him slightly."

Q And who was the second man from the end? A That was Calabrese.

Q So that when you said she failed to identify him, did you mean by that that she failed to positively identify him? A Failed to pick him out of the line-up, is what I am referring to. She did not place her hand on him and say "This is the man."

Q In other words, by her placing her hand on him and saying "This is the man," that is what you would consider to be an identification? A Yes, sir.

Philip Sebold, for the State, cross.

Q But because she did not do that, you said she failed to identify him in the line-up? A That's all.

Cross examination by Mr. Becker.

Q Captain Sebold, when did you begin and finish that written statement of Calabrese? A I think I started about eight or nine o'clock. There was an intermission then for some sandwiches and coffee, and I think I got through about daybreak, as near as I can recall.

Q What day was that? A On May 1.

Q Now, when did you get possession of that gun or revolver? A The night of Simione's arrest, that was on April 30, about 11:30.

Q April 30? A April 30, about midnight, or shortly after midnight, I believe. They caught Simione at 11:30 and I think he fell or something or bruised his knee and was taken to the hospital for treatment and when he came back I got the gun, that was around midnight, it was just about midnight on April 30—May 1.

Q And the following day you had the written statement of Calabrese? A On May 1.

Q When Calabrese made the statement to you in the manner that he told Cort that a man was shot, and Cort replied that he was worried that one of the three that came into the car were not shot— A He said that he was scared when he heard the shooting and he was alarmed that one of them had been shot and he was glad to see them coming running to the car and felt relieved that they were not shot.

Q And you are sure that Calabrese did not say that Cort said to Calabrese he was sorry to hear a man was shot in this stick-up? A Yes.

Q You are sure of that? A I am sure of that. He was relieved to see the men in the hold-up, he said "I was worried it was not one of you fellows."

Q How many line-ups did Miss McEvoy attend?

Mr. Fisch: I object to that. We have been over that.

Objection withdrawn.

A Two.

Q And do you know why Cort was not put in the line-up?

Mr. Fisch: I object to that. I don't see how that is material.

The Court: Sustained.

JOSEPH LINARDUCCI, JR., recalled in behalf of the State.

Direct examination by Mr. Fisch.

Q Lieutenant Linarducci, did you have a conversation with Joseph Calabrese, the defendant in this case, on the 6th of May? A I did.

Q And who was present at that time? A Detectives Kinney and Boland of the Police Department and Detective Callahan of the Prosecutor's office.

Q Now, did you reduce to writing what Calabrese said to you? A I did.

Q And at the time that you reduced that to writing, did you have in your possession Exhibit S. 16, this revolver? A I did.

Joseph Linarducci, Jr., recalled, direct.

Q I show you a statement dated May 6, 1929, and ask you whether or not that is the statement that was reduced to writing by you in the presence of Calabrese? A It is.

Q And does that tell what Calabrese said to you? A It does.

Q And after it was reduced to writing what was done, if anything, with reference to the signing of it? A I read it to Calabrese and then asked him to read it while I looked over his shoulder and then I asked him if he would sign it, and then he signed it and then it was witnessed by the detectives present.

Q That is each sheet? A Each sheet, yes, sir.

Q Now, before he signed it did you make any promises to him of any kind? A I did not.

Q Or hold out any hopes to him? A I did not.

Q Or threaten him in any way? A I did not.

Mr. Fisch: I offer the statement in evidence.

By Mr. McGeehan.

Q Lieutenant, when you took this statement it was subsequent to the statement that Captain Sebold has just testified about? A Yes, sir.

Q And your purpose was to correct the change in the statement with respect to the ownership of the gun?

Mr. Fisch: I object to what the purpose was.

The Court: Sustained.

Joseph Linarducci, Jr., recalled, direct.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

Q And at the time you discussed that with him—that is, when you got the statement, did you take it down verbatim or did you use your own language to show the gist of what he said? A The statement was taken verbatim.

Q You mean that he dictated it to you and you put down the exact words that he did use—you don't mean that, do you? A Yes, I do.

Q Did you take it down in shorthand? A I did not.

Q Well, you used questions and answers to elicit this information, didn't you?

Mr. Fisch: I object to that, if the Court please. The only cross examination to which the defendant is now entitled is to determine whether or not it was a voluntary statement.

Mr. McGeehan: I think the Prosecutor is right. I will withdraw the question. I object to it upon the ground that it contains prejudicial matters outside of the facts that are relevant to the charge in this indictment, specifically referring to the statement of another person mentioned in it as to the purpose of retaining the gun or keeping the gun.

The Court: I will permit it and allow you an exception.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

Mr. Fisch: I would like to have it stated on the record, if the Court please, that the only purpose in offering the statement is to show the connection of this defendant with the charge in this indictment and for no other purpose.

(The statement was received in evidence and marked Exhibit S. 19.)

By Mr. Fisch.

Q At the time Exhibit S. 19 was taken and written and read, and signed, did you have in your possession at that time Exhibit S. 16, this gun? A I did.

Q Did you show it to the defendant Calabrese? A I did.

Q Did he examine it? A He did.

Q Did he point anything out to you? A He pointed in the cylindrical part of the gun, he pointed to No. 19 twice.

Q No. 19 appearing twice, you mean? A Yes, sir.

Q That is in the portion of the gun which ejects the bullet? A Yes, sir.

Calvin Goddard, for the State, direct.

Q The shell, and the portion of the gun, the cylindrical part of the gun which contains the bullet? A Yes, sir. He said that is how he recognized it and identified the gun.

Mr. Fisch: If the Court please, with your permission, I would like to read S. 19 to the jury.

The Court: All right.

(Mr. Fisch reads Exhibit S. 19 to the jury.)

Cross examination by Mr. McGeehan.

Q That mark on the handle of the gun referred to here, Lieutenant, was that made at the time in your presence? A It was.

Q That is the mark that I see on the black part here? A Two marks.

Q And on the other side also? A Yes.

Q I mean it was not so marked before it came into your possession, it was marked in your presence for identification? A By Calabrese, yes.

CALVIN GODDARD, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Major Goddard, where do you live? A Chicago, Illinois.

Q And I have called you Major, is that your correct title? A I was Major in the regular army, yes. I am Lieutenant Colonel now.

Q Then we are going to call you Colonel. What is your occupation? A I am a director

of Scientific Crime Detection Laboratories, Northwestern University, Chicago.

Q Does that occupy all of your time? A Yes.

Q What has been your education to prepare you for this work? A I have an A. B. degree from Johns Hopkins University and M. D. degree from Johns Hopkins University.

Q So you are a Bachelor of Arts and a Doctor of Medicine? A Yes, and I am also a graduate of the Army Medical School in Washington.

Q Now, what special training, if any, have you had with this work? A Well, as an ordnance officer of the army I have served at the arsenals, Federal arsenals, manufacturing pistols, rifles, pistol and rifle ammunition, and the powder that goes into that ammunition, and have taken special courses in the manufacture of these arms and components. I have also visited and studied the process of manufacture by all the American rifle and pistol manufacturers during the past few years at the American ammunition plants. I have also studied arms and ammunition manufacturing overseas at France and Spain and Belgium and Germany and I have worked on the development of apparatus for furthering the investigations necessary to the character of the work. I have had experience also in practical investigations of specific cases.

Q Now, have you had any connections with reference to teaching on the subject?

Mr. McGeehan: What subject? I do not think it has been brought out what subject.

The Court: The subject of which he has been testifying. You can amplify that, if you want to.

Mr. McGeehan: I do not know what the Prosecutor is attempting to qualify him for.

Mr. Fisch: As a ballistic expert.

The Court: All right, go ahead.

Q What teaching connection, if any, have you had with reference to this subject? A Well, with reference to this particular subject, I have had no teaching connection other than I have been a special instructor on the staff of the training school of the Pennsylvania State Police in connection with firearms.

Q Have you made any contributions to any scientific journals along these lines? A Yes.

Q What are they? A The Journal of Criminology, Ordnance Department, Journal of the Ordnance Department of the Army; Military surgeon in the medical service of the Army and various technical journals on arms and ammunitions and the insurance journals dealing with firearms—with deaths from firearms, with the effect of death from firearms and articles of that general character.

Q Now, have you ever testified in court as an expert on this subject? A Yes.

Q And what are some of the states in which you testified? A I have testified in New Jersey, New York, Pennsylvania, Ohio, Maryland, District of Columbia, New Mexico, Kentucky, Illinois, Wisconsin and pretty generally throughout the country.

Q Have you also advised in cases in foreign countries? A No, experts in foreign countries have consulted me on the type of apparatus I have employed and it has been reproduced in London and France and Edinburgh, Scotland, and Cairo, Egypt.

Q Scotland Yard? A Yes, London.

Q Now, confining ourselves for the moment to the past year, can you tell us how many expert investigations you have conducted in the past year in criminal cases in connection with guns and ammunition? A Something over a hundred. I could not tell exactly.

Q Something over a hundred in the past year? A Yes.

Q What equipment and resources have you at your command for your studies about these investigations? A For some years past I have had a laboratory devoted entirely to the investigation of matters relating to small arms and small arms ammunition, the equipment of which consists of microscopes for studying and comparing bullets and a special comparing microscope developed for that subject, instruments for examining the interior of the ball of an arm —the barrel of an arm—to determine whether it has been fired or not and make other investigation in the arm; a rough collection of, I would say, approximately a thousand specimen firearms.

Q That is, you have in your laboratory a thousand specimens of various kinds of guns? A Yes, and several thousands of bullets, shells, loaded cartridges, sample types by makers throughout the complete range of the American cartridges of American makers, and the majority of the more important European makers; unfired, of course, and then several hundreds of bullets fired through known makes of arms as specimens for comparison; also all powders made throughout this country and statistics of arms made throughout this country and throughout the world.

Q Is the equipment you have described used elsewhere to your knowledge? A I have already explained the essential element, the comparison microscope, has been copied overseas and it has already been employed in at least two or three of the largest police departments of this country, St. Louis, Chicago and Detroit.

Q Are you a member of any scientific organization in connection with your work? A Yes.

Q What are they? A Institutes of criminal law, criminology, the association of expert associations, New York Miscroscopic Society, American Miscroscopic Society, and various others.

Q Will you tell us, please, if it is possible to determine by examining a fired bullet the make of the arm from which this bullet has been fired? A Very frequently, yes.

Q Now, will you please explain to the Court and jury how that is done? A May I use the board?

The Court: Yes.

A Different makers of firearms of the same calibre employ different methods or, rather, different specifications in cutting the rifling in their arms. By rifling we mean the grooves which spiral through the bore, the barrel of a pistol, revolver or rifle, in order to spin the bullet for it to pass through the barrel and thereby make it fly further and straighter than it would if the ball were perfectly smooth. It so happens that no two makers ever seem to think that the same standards are equally good; for instance, one maker will use six grooves turning to the left, which is the standard Colt rifling regulation, and another maker will use five grooves turning to

the right, which is the standard of three of our American makes of arms, Harrington & Richardson, Smith & Wesson and Iver Johnson, and although they will have the same number of grooves as these three I have named, they differ in some other specifications They differ in the width or the angle or the rate of speed they turn through the barrel. For instance, the Iver Johnson makes one turn in only twenty-three and one-third inches. It is what we call rather a slow pitch. The Smith & Wesson make a somewhat faster pitch and the bullet fired through an Iver Johnson would show groove marks left by the rifling in the barrel with a very slight slant from the straight line. A bullet fired through the Smith & Wesson would show groove marks with a somewhat faster slant. This, of course, is merely an approximation to show conditions that exist, and a bullet fired through a Harrington & Richardson, which is a turn of one in twelve inches, would show a still faster slant. That is very much exaggerated, but slow pitch, fairly fast pitch, very fast pitch. So two makers may use the same number of grooves turning in the same direction. They will, as I have already remarked, differ in some very definite respect so that it is possible to determine through which particular type of arm the known bullet was fired. Here is a five groove pistol. Now, a bullet fired through a pistol with grooving going through the left would show a groove mark coming in that direction (illustrating). So when we have a bullet referred to us, a fired bullet, we first count the number of grooves on it. Say we find 5. Then we notice whether they are going to the right or to the left, and then we put the bullet under a microscope with a fine little hair

line in the eyepiece, an apparatus attached to it which we call a gyoniometer, whereby we measure the angle at which this groove moves with the vertical, and having measured that angle we measure the width of the groove with this same special eyepiece. Then we take those figures we have secured, the number of grooves, the direction of the groove, the manner of the speed of turn, and refer then to our book of statistics showing the specifications which all the different companies use, and the figures which we have secured, by studying that bullet will match the specifications of some one company and will not match those of another company because of the differences that exist.

Q Now, Colonel, you have told us how it is possible to determine from the examination of the fired bullet the make of arm from which it is fired. You have explained that to us. Now, I want to know, Colonel, if it is possible, on examining a fired bullet, to determine what particular arm of a given make has fired it. In other words you have told us you can determine, for example, by examining the bullet, whether it was fired by a Smith & Wesson or a Colt or a Harrington. Now, what I want to know, if it is possible, from examining a fired bullet, to determine, after you have already determined, for example, whether it was fired by a Harrington—to determine what particular kind of Harrington arm it was fired from? A Very commonly it is, yes, sir.

Q Now, will you explain to us, please, how that can be determined, how that is done? A That is due to the fact that the cutting of these grooves is done with a sharp instrument known as a rifling cutter, which is just the width of the groove we desire to cut. I can illustrate that

better with a chart. The pistol barrel starts out as a cylindrical barrel of steel without any hole into it. I have here a Harrington-Richardson barrel from the same company, the same type of revolver as in evidence.

Q That is Exhibit S. 16? A Yes, sir. The barrel starts out as a solid rod of steel, which we have illustrated here diagrammatically. Through that rod of steel is passed a drill which hollows out a cylindrical hole. The drill has been sectioned here to show the hole. Now, it is a rough job, they do not try to finish the barrel at this operation, and a lot of circular scars are left at the cutting point of the drill. To remove those scars a reamer with a long delicate cutting edge is passed through, polishing the barrel out to the condition that you see in the shotgun, a nice, shiny, cylindrical hole.

Through that barrel is then passed what we call a rifling cutter, which has the small cutting edge, which is the width of the groove we intend to cut. Here is the edge, here is the groove it is going to cut (indicating).

The barrel starts out as a cylinder, this rod, with the tiny cutting edge is brought through it, shaving out a minute bit of metal in one groove. The whole barrel is then turned back enough to start the second groove and the same cutter working in the same location; the cutter is not revolved, but the barrel is revolved to meet the cutter, and it starts and begins shaving on the second groove, the third or fourth or fifth or sixth, as many as we are going to cut, and it is shaved and cut and it gets back to the first groove. It should be in this way (indicating), it goes around, taking the little shaving out of each groove until the groove is cut to its proper

width, which in this particular model is five-thousandths of an inch. After that the bar of steel is laid around the barrel in a spindle and then hot lead is poured in oil and emery to cool it out, but that is not done in this model, so it is eliminated. Then, we continue to cut all the grooves and we have only four of them on this type, but the arm has five, but it is the same no matter how many you have, and while they look like finished grooves actually they have tiny irregular parallel lines in which will be found tiny irregular teeth where this cutter goes. You cannot produce any piece of metal, no matter how perfect and how hard, which when you examine it under a microscope does not show a series of little teeth in it, just as a razor blade does under a microscope. Every time this cutter is pulled through the barrel there is a very minute wear on the teeth, and the teeth are changed, but at the same time that change, although minute, can be seen under a microscope. Furthermore, it has never been recorded to date, at least, that you can produce a barrel of steel that is so uniform from end to end that the steel would not give a little more when cut, a little more rapidly at some part, or where in one groove it will cut with greater difficulty at the same spot, and at another groove the composition is practically uniform, and the metal will give away easily and will cut in the groove differently and leave a slight scar in one groove, and, of course, that sheathing comes out, and there is no scar in the next groove the result being that the bottoms of these grooves bear a series of parallel lines due to the scratching or the shaving, due to the fact that the metal gives way under the cutting differently in the different grooves and due to the lack

of uniformity, so that the final result is, in each groove we have a series of parallel lines running through grooves according to the way that has been cut, which deepens another groove. This little series of ridges here is different from this or this or this (indicating). Now, when you cut a given barrel, the same condition develops, the grooves in some, although the same number and they run in the same direction, are each, each groove is different, it has different parallel lines in each one. In other words, that is the slight difference, and not only is it different there, but, as I have endeavored to explain, we have grooves in the same barrel which are different.

Q Colonel, I believe you were telling us about the fact that even in each individual groove there are individual scratches or marks of identification that differ, one from the other? A Yes, sir.

Q Will you proceed from there, please? A We have here the finished barrel of this type of arm, the barrel section, and under very low magnification it is possible to see these scratches, these very fine scratches that have gone through the bottom of the groove. There are also scratches on the surface of the lands, what we call the elevated portions between the grooves.

Q Those are known as lands, are they? A Yes, and those are left from the original boring, the drilling of the arm, but they are not in the same profuse number of parallel lines that you get from the bottom of the groove. The effect, when you fire a bullet through such a barrel, through any rifle barrel, the bullet receives a groove for each line in the barrel. There is just the opposite, the elevated part in the barrel cuts out a groove in the bullet and here we have a

bullet of the same characteristic as the one fired through a Harrington-Richardson, in that it has five grooves inclined to the right. We have actually represented on this bullet the fine scratches which it receives from the groove and the bullet is made in two parts to illustrate what the result would be if they were compared under a microscope. When the bullets are fired through a barrel to determine whether they have been fired through the same barrel, this comparison was made by holding one bullet fixed, and comparing first one groove of the second bullet against a fixed groove on the first, and then another groove and then another and then another, until we have been all the way around, it having been fired through the same make of arm, that it will represent the same number of grooves of the same width inclined in the same direction, but unless fired through the same identical arm, we cannot be able to find any position where not only the grooves match in width and in angles, but where the fine lines match, and also if fired from the same arm in about the same condition, but the two shots are fired, we can find points where these lines will flow right across, these microscopic scratches taken from the bottom of the groove, and after finding that point we will find similar markings of identity all the way around, but unless through the same particular gun, all we can get is the scratch, the width and the groove and the particular angle, but never the matching of the fine scratches.

Q Then, in making your examination of the bullet, or in making your examination of the two bullets for comparison purposes, you say that you make that examination under a microscope?
A Yes, sir.

Q Now, will you be good enough to explain to the Court and jury the manner in which you placed those bullets in the microscope and what kind of a microscope you use. A We take our fired bullet, which is the bullet under consideration, being studied, and we fire through the arm which is supposed to have fired that bullet, a second bullet, which is not a bullet of the same manufacture and the same type, because bullets of the same calibre differ according to their manufacturer. A 38 Smith & Wesson bullet made by the Winchester Company is quite different from the 38 Smith & Wesson made by the Remington Company, although they are made for the same type of arm and shot through the same type of arm. Therefore, to reproduce our condition properly we determine the make of our fired bullet by comparing it with unfired bullets of similar make, and it will match with some and not with others. We then take our bullet in evidence, the bullet we are studying, and place it on a little rotating mount under the microscope, which I will explain.

Q How do you place that bullet on this rotating mount? A We take a bit of wax of very high melting quality, very sticky adhesive wax and place that on the base of the bullet. We use that because if we grasp the bullet in any mechanical holder it would make marks on it, and we, of course, did not want to put any marks on the bullet it did not have when it came to us. Therefore, we placed a layer of wax on the bullet and remove that wax after the examination by washing and if that is not sufficient by using some solvent. This is placed on a rotating mount which can be revolved—spun around by hand on the mechanical stage of a microscope.

Calvin Goddard, for the State, direct.

This will give you an idea of the objective of a microscope. Instead of using a single microscope, we used two placed side by side in this manner (illustrating). Two microscopes exactly alike. These lenses have the same power, picked out especially to be identical in every way. Now, the tops of these microscopes are joined by what we call a comparison eye piece. In that eye piece are set prisms which shows the images of this bullet. The image travels up the center of this microscope and strikes a prism which revolves it at 90 degrees right through that tube until these meet the second, the prisms again which revolves the image up into the naked eye. The same thing happens on the other side, so that when we look into the eye piece, we see a compound image of one half of which is made up from this bullet, takes in this image of this bullet and the other half of which takes in the front end of the other bullet, the effect being this, when you look into the eyepiece you see a bullet, the butt or base end of which comes from this bullet and the ends or front end of which is supplied by this bullet, just as though you cut the two bullets in two and stuck them together. We cut them in two optically, although we do not touch them in any way. Now, as I explained in canneluring this specimen bullet we will rotate this bullet to a given position and let it stay still. Then we will rotate this bullet, this being the bullet fired under suspicion. This being the bullet in evidence, we rotate our test bullet through our arms, and join one groove of it up against the groove of the evidence bullet. If they are fired through the same grooves, the grooves will be the same kind, the same slant and same width. If, in addition, they are fired through the same arm by testing one

against another, and then another, we will find a point up on the broad edges of the bullet match, but these broad microscopic edges of every bullet fired through that gun will match together too, and then finding a place that match like that, we turn both bullets and we will get this matching all the way around. This matching varies in a direction where every lense agrees, where anyone who had never looked through a microscope before could say they are through the same gun to a point where it becomes very difficult in certain places to pick out enough characteristics to make an identification or not, the variations being where a bullet is fired where a barrel is clean or a barrel is foul.

Q In other words, when the bullets are made of different substances, or by different manufacturers, would that have any effect upon the manner in which the impression is obtained on the grooves? A Yes.

Q In looking over a gun and in looking through S. 16 with the naked eye, are the lines and groove marks visible to the naked eye? A Very definitely.

Q And then I understand you to say you have an instrument whereby you can observe these lines and grooves more definitely? A It is a periscope we pass into the barrel and it is identical if the eye were right into the interior of the barrel.

Q Now, Major, is it possible by examining a fired bullet, to tell by what company that bullet was made? A Yes.

Q Please explain how that is done. A I have said a little about that already. I have pointed out the different manufacturers produce bullets of the same type, the same calibre, with

different characteristics; for instance, a 32 Smith & Wesson made by Remington—I do not carry in my head the details of each particular type, but they differ as much as I illustrated here. A 32 made by Smith & Wesson, would have a cannelure. That is a groove. Now, that groove in a 32 Remington Smith & Wesson would have 100 ridges around it in a complete revolution. It would cut in with square edges. It would be a certain distance from the bottom of the bullet. Now, the same type of bullet made by another company would have a cannelure cut in on a circle, and instead of having 100 ridges in it, it would have 75 in a complete circumference and would be much further from the base of the bullet than the first make. This one might be tapered off and this might be square. Looking at them this way, this might be flat and this cut. The two bullets of the same type always differ. So that if we have a rough collection of unfired bullets of the same make, all we take is a specimen bullet and compare it with our unfired bullet.

Q I understand you to say you have several thousands of unfired bullets in your collection of various calibres made by the various companies?
A Yes.

Q Now, I show you Exhibit S. 3 and ask you whether or not you have ever seen that before.

The Court: What is the testimony with reference to S. 3?

Mr. Fisch: Exhibit S. 3 is a steel jacketed bullet, .32 calibre.

The Court: That came from where?

Mr. Fisch: It came from the body of the deceased.

A Yes.

Q When and where did you see that? A In my office on the 5th of June, 1929.

Q Was it brought to you by Detective Callahan? A Yes.

Q And did you make an examination of that? A Yes.

Q What examination did you make of it? A Well, I studied its diameter and weight, shape, and what we call the gnarling, the little vertical ridges in the cannelure.

Q That is the ridges you have described before on the blackboard? A Yes, and determined from its general specification, size, weight appearance and gnarling, that it was what we call a .32 automatic type of pistol bullet with a full metal jacket and had been made by the Remington Arms Company, fired with somekless powder.

Q And when that bullet was presented to you for examination, did you notice any identifying marks on it? A An X on the base, which I see here today.

Q Did you also examine that bullet under the microscope? A I did.

Q And when you examined it under the microscope, did you fasten it to the mount with this wax that you have described? A I did.

Q And when you examined it under the microscope and had come to your conclusions with reference to it, what, if anything, did you do with regard to the removal of the wax? A Well, to the best of my recollection I took a little bit of soft lens paper and wiped the wax off.

Q The base of that bullet was rather flat? A Flat, yes.

Q And you just took it and wiped it off? A Yes.

Q Now, then, I show you Exhibit S. 4 in evidence, which it has been testified was removed from the body of Maurice Grossman, and ask you whether you have ever seen that bullet before.

Mr. McGeehan: That is a lead bullet?

Mr. Fisch: Yes.

A Yes.

Q And where did you see that and when? A In my office on the 5th of June, 1929.

Q Presented to you by Detective Callahan at the same time Exhibit S. 3 was presented to you? A Yes.

Q Did you make an examination of it? A Yes.

Q What examination did you make of that? A I studied its shape, weight, diameter, and the character of the gnarling in this cannelure and determined it was what we call a .32 Smith & Wesson type of revolver of ordinary lead injected bullet made by the Winchester Repeating Arms Company.

Q Now, in making your examination of that, did you have occasion to mount it on the stand of a microscope? A I did.

Q And did you have occasion to stick it in wax? A I did.

Q And after you had stuck it in the wax and had made your examination under the microscope, did you remove the bullet from the mount? A Yes.

Q And what, if anything, did you do with regard to the wax? A Well, ordinarily I have

at hand a little bottle of a solvent and I pour some of this in a little glass and drop the bullet into it and let the solvent dissolve the grease. In this instance, as I remember it, there was no solvent, so I took a wad of this paper and rolled it into a ball and removed the material as best I could.

Q Did you remove all of the wax substance? A I doubt if I did, because you would have to use a liquid solvent. Carbon tetrachloride they usually use.

Q When this bullet came to you was any wax on it? A Not the base.

Q And the base of this bullet was quite deep? A Yes.

Q And do you notice that same identification on the bullet at this time? A I see some remnants of it. It is not as plain as when I saw it, but there are some remnants of it there, and I also made an identification mark around the rim, which I see, the three little pin marks.

Q And you are sure that that is the same bullet which you examined? A Yes.

Q Can you tell us whether or not in looking through this little glass all this wax has been dissolved? A Well, it looks to me as though there might be—no, I would say it was pretty well all out.

Q Pretty well all out now? A Yes.

Q Now, then, I show you—withdraw that. Now, at the time you made your examination of Exhibit S. 3 and S. 4, these two bullets, did you at that time, in making your examination, and coming to your conclusion as to the make of bullet that these respective bullets are and the kind of arms they were fired from, did you have in your possession at that time any arm that had

been turned over to you by the Prosecutor's office? A Yes, an arm came with the bullet.

Q Now, I show you Exhibit S. 16 and ask you whether or not you have seen this exhibit before. A Yes.

Q Did you see that at the same time you saw Exhibit S. 3 and S. 4? A Yes.

Q Was that turned over to you by Detective Callahan of my office? A Yes.

Q Did you make any examination of it? A Yes.

Q What examination? A First I inspected its exterior to determine the make and type. It proved to be a .32 Harrington-Richardson, what we call .32 hammer type, the hammer spur being absent, automatic ejecting revolver shooting a .32 Smith & Wesson type cartridge and it had a special mark on it in that the rubber set on either side had been scratched with an X. It also bore a serial number which I noticed at the time G-90019.

Q Now, I show you Exhibit S. 17 for identification, four steel-jacketed bullets and one lead bullet, and ask you whether you have seen them before.

Mr. McGeehan: I object to the witness being interrogated upon any exhibit not in evidence.

Mr. Fisch: I intend to offer them.

The Court: I will permit that question, Mr. McGeehan.

A Yes.

Q And did you see those at the same time you saw Exhibit S. 3 and S. 4 and S. 16? A Yes, sir.

Mr. Fisch: The only reason, if the Court please, that these bullets have not been offered in evidence up to the present time is that the officer who took them from the possession of Simione at the time of his arrest was not present in court at that time. He is here now, and if there isn't any objection, I would like to offer these bullets at this time and if there is any, I would simply have to ask Colonel Goddard to step down from the stand, and prove that these are the bullets which were taken from Simione's possession at the time of his arrest.

Mr. McGeehan: I will stipulate that the officer will testify to what the Prosecutor has stated he would, but I still have an objection on the ground that they are bullets not in any way connected with the defendants.

The Court: These are bullets found in the possession of Simione at the time of his arrest and there is no evidence that they were in the gun?

Mr. Fisch: No, but the bullets were turned over to him at the same time the weapon was turned over to him by Raymando.

Mr. McGeehan: Not that the bullets were in the gun.

Mr. Fisch: I do not recall that.

Mr. McGeehan: That is the objection.

Mr. Fisch: And there is also testimony that at the time the gun was turned over to Calabrese it had metal-jacketed bullets in it and lead bullets.

The Court: There were bullets in the gun.

Mr. Fisch: And the purpose of my offer, if your Honor please, is this, that I intend to connect up these bullets with the evidence bullets S. 3 and S. 4.

Mr. McGeehan: I don't think what the Prosecutor's future intentions are will make something admissible that is not admissible in the present state of the evidence.

The Court: The difficulty, as I see it, is that the testimony was that these bullets were in the hands of Simione and Raymando but there is no evidence, as I recall it, that they were in the possession of Calabrese.

Mr. Fisch: My purpose in making the offer is to prove that these bullets were of the same make as the defendant's bullets S. 3 and S. 4.

The Court: Assuming that that is true, how does that make them admissible unless it can be shown they were in the possession of the defendant.

Mr. Fisch: If it is objected to, I will not press it.

The Court: I will not admit them at this time, but you may renew the offer later on.

Q Now, Colonel, did you make an examination of the bullets, Exhibits S. 3 and S. 4, for the purpose of determining whether or not those bullets had been fired from the same gun? A Yes, sir.

Q And what conclusion did you come to? A My conclusion was that I was of the opinion that they had been fired from the same gun.

Q Now, then, did you make an examination of the bullets, Exhibit S. 3 and S. 4, for the purpose of determining whether or not those bullets

had been fired from the gun Exhibit S. 16? A I did.

Q Will you tell the Court and jury what you did in order to arrive at that conclusion? A Why, having determined the type of make of each bullet, I took another bullet of the same type and make in each instance, another cartridge—for instance, the metal-jacketed bullet in evidence, I have already stated, happened to be of Remington make. So I took a Remington .32 automatic cartridge, metal-jacketed, and fired a specimen from this revolver into a receptacle of cotton waste, which stops the bullet without leaving any mark on it. I recovered the bullet and compared it under the microscope with this metal-jacketed bullet. With regard to the lead bullet I did the same thing. I secured a cartridge of the same make and calibre and fired a bullet through this revolver in to cotton waste and recovered the bullet and compared it with this lead bullet in evidence.

Q Have you those test bullets with you? A Yes, sir.

Q Will you produce them, please. A This is the lead and this is the metal-jacketed.

Q And the lead bullet is contained in a little box marked ".32, S. & W. Winchester, Case 1343"? A Yes, sir.

Q And that bullet was fired by you from this gun, Exhibit S. 16, into this cotton waste? A Yes, sir.

Mr. Fisch: I offer the bullet in evidence.

Mr. McGeehan: Which bullet is that?

Mr. Fisch: The test bullet fired by the colonel out of Exhibit S. 16.

Mr. McGeehan: Is that the lead bullet?

Mr. Fisch: Yes, which the colonel has testified is the same calibre and the same make as the bullet Exhibit S. 4.

(The bullet in question was received in evidence and marked Exhibit S. 20 of this date.)

Q Now, Colonel, what tests, if any, did you make, microscopically or otherwise, with regard to Exhibit S. 20, that is the test bullet, the lead test bullet, and Exhibit S. 4, the lead bullet in evidence. A I place the two bullets under a microscope, such as I have diagrammatically outlined on the blackboard, putting the evidence bullet on the left side, as in the picture, and the test bullet on the right side and rotated the test bullet, comparing it bit by bit with the evidence bullet until I made a complete study of the marks on both bullets and reached the conclusion as to what relationship they had, if any.

Q What conclusion did you come to? A That both bullets had been fired from the same revolver.

Q And you having fired Exhibit S. 20 from this revolver, what conclusion did that lead you to with regard to Exhibit S. 4? A That it had been fired through the revolver, Exhibit S. 16.

Q Now, then, what tests, if any, did you make with reference to determining whether or not Exhibit S. 3, the steel-jacketed bullet, had been fired from Exhibit S. 16, the gun in evidence? A I compared it microscopically in the same manner as I have just described with the Exhibit S. 3, and rotated the one and kept the other fixed until I had finally come to an opinion on their relationship.

Q Now, did you fire this bullet, the test bullet which you have produced in a little box marked Case No. 1343, .32 A. C. P. Remington—did you fire this out of Exhibit S. 16? A I did.

Mr. Fisch: I offer it in evidence.

(Same received and marked Exhibit S. 21 of this date.)

Q And, Colonel, did you then take Exhibit S. 21 and make some tests with that, that is, your own test bullet, as compared with Exhibit S. 3, the steel-jacketed bullet already in evidence? A Yes, sir.

Q And did you make those tests microscopically in the manner which you have illustrated? A Yes, sir.

Q And what conclusion did you come to? A My conclusion was, I am of the opinion that they both passed through this same barrel. I want to modify that statement with the remark that the markings were much more difficult on this bullet to work with, on account of it being a bullet not adapted for this kind of revolver, whereas there was no least question of doubt in my mind on the first bullet, the lead bullet. I reached this opinion after some difficulty with regard to the second bullet because the marks of identity were not so pronounced and the characteristics fewer.

Q How many points of similarity, approximately, and characteristics were there between the bullet in evidence, Exhibit S. 4, that is the lead bullet, and the test bullet which you fired, Exhibit S. 20? A I cannot give you the actual numerical number, but as I went around that under the microscope I will say I picked up on

the entire circumference, anywhere between 80 and 100 of these fine microscopic marks that were the same, and, as I say, there was no question about it in my mind as to the first bullet.

Q The lead bullet you are positively sure was fired out of this gun, Exhibit S. 16? A Yes, sir.

Q How many marks of similarity, approximately, were you able to determine as between Exhibit S. 3, the steel-jacketed bullet, and Exhibit S. 21, your own test bullet? A I would not say there were any more than 15 or 20.

Q Well, your conclusion with regard to this bullet, Exhibit S. 3 is that you are of the opinion that it was fired from Exhibit S. 16? A Yes, sir.

Q And there are not so many marks of identification and resemblance as there were in Exhibit S. 4, the lead bullet? A No, sir.

Q Now, Major, I am going to show you something you have not seen before. Exhibit S. 12. Will you examine that carefully, please, and tell me what, in your opinion, it represents, what part of a gun it represents. A It represents the trigger of what I would say is a double action revolver or gun, by that I mean one which can be fired by pulling back on the trigger and which does not have to be cocked for each shot, and a piece of it has been broken off. Furthermore, it has been reglued, not at the factory, some home job of regluing.

Q Now, Major, I really want to be enlightened about this. I want to know whether or not it was a trigger or whether or not it was possible that it was a part of the guard around the trigger, noticing it is broken on the end and that there is a pin hole through it. You have never

seen that before on the stand? A No, sir. Yes, they are very much alike in general contour, the guard and the trigger. I think it could not have been a part of the rear portion of the guard from this type of arm.

Q Well, I mean from any gun. A Yes, sir, I think it could have been, and, on comparison of the curve, the curvature, the angle curvature of the shank, it is much more likely to have been from the guard than the trigger, because it is less curved than a trigger would be.

Q You think, then, that the likelihood is that that piece of iron or steel or whatever it may be, is a piece of a guard around the trigger of a gun. Is that right? A Yes, on second comparison, that feature makes me think it is more likely to be a guard than a trigger.

Q And on first examination it looked as though it were a part of a trigger, the end of it which had been broken? A Yes.

RECESS UNTIL TWO P. M.

AFTER RECESS

CALVIN GODDARD, resumes the stand.

Cross examination by Mr. McGeehan.

Q Now, Major, when you had these exhibits submitted to you, of course, you knew that the purpose of the State in submitting them to you for your comparison was to determine whether or not the two bullets in question had been fired from the particular revolver presented to you with them, did you not? A Yes.

Q And you examined them in your capacity as an expert? A Yes.

Q Intending to be a witness, if your opinion was favorable to the contention of the State, is that right? A Well, I knew I was subject to being called as a witness whatever my opinion might be.

Q Well, where did you make this examination? A In New York. I have an office in New York.

Q Well, when you say you were subject to being called as a witness, you mean you knew you could not be compelled to testify, of course? A No, sir.

Q You knew that? A Yes.

Q You testify in these cases as a State expert, do you not? A Yes.

Q And in the various courts you testified in, those were all actions when you were paid as an expert to testify and give expert testimony, is that right? A Yes. I have testified without pay, I remember on one occasion, for a defendant.

Q But that was an exception? A That was an exception.

Q And you are not testifying without pay here, are you? A No.

Q Now, before you examined this piece of the gun, you did not know what the purpose of the State was or what its theory in connection with it— A Not at all.

Q And it was just put up to you to give your fair opinion as to what this piece of metal is? A Yes.

Q Now, you have taken guns apart, haven't you? A Yes.

Q And you are familiar with the mechanism of the trigger? A Yes.

Q Except that this has a curved shape, it has none of the characteristics of the trigger at all, has it? A I would say it has, yes.

Q Well, I mean on the part inserted in the gun. A It has the pin by which the trigger is swung. It has a notch in which a spring could rest. It does not resemble the trigger of this particular arm. I would never have mistaken it for a trigger of this particular type of arm.

Q But you described it by looking at it, as a reversible trigger? A A trigger from a double action revolver.

Q And you did not change that opinion, did you, until Mr. Fisch asked you, "Will you look at it again and tell us whether or not it might not be the guard or handle underneath the trigger?" A No, sir, that was my opinion as I gave it.

Q Now, the object of all examinations in your professional capacity is to reach an opinion, isn't it? A Yes.

Q You are never certain of your conclusions? A I am certain in my own mind, yes.

Q Now, in using these various exhibits for comparison you do it under a microscope, do you not? A Yes.

Q You cannot determine any of these things you have testified to by the comparison of the bullets or the identification from which they came with the naked eye, can you? A You can make some rough generalization, but you cannot reach a definite opinion.

Q No, but looking at them in their original state, or the state they are now in, you cannot demonstrate very easily the comparative features of both? A No.

Q Of course, you can take microscopical photographs? A Yes.

Q And those photographs are similar to the enlargement of finger prints and so forth, aren't they? A Yes.

Q So that with a photograph you could show a picture of your comparison bullet in apposition to the very end of the compared bullet, couldn't you? A Yes.

Q And you could then point out and it would then be demonstrable to a jury the things that are or indicate a similarity between the two, is that right? A Yes, sir.

Q Now, you did not bring any such pictures, did you? A No, sir.

Q Did you make any such pictures? A No.

Q Even for your own examination a picture enlarged is more accurate than the judgment based upon the view with your eye through a microscope, is it not? A No, sir.

Q You do not think it is better? A In rare instances, the picture will bring out something the microscope would not, but that is unusual.

Q Yes, but here you had one bullet that your opinion is uncertain as to whether the steel bullet came from that gun? A Yes. I didn't deliver it without qualifications.

Q I know that you said it very fairly. Now, that being the case, did you or did you not make these pictures that in rare instances help you beyond mere view of the eye through a microscope? A No, sir.

Q Now, I understood you to say that while the barrel of the gun between the rifling leaves certain marks that are somewhat helpful—now, I understood you to say, Major, that the barrel

between the rifling lines, that is this portion indicated here— A Which we call the land.

Q Yes, is not used with the degree of accuracy that the actual rifling recessions are used with in your comparison, is that right? A Not exactly, I said it did not have ordinarily as many fine individual markings in that area, as it does in the bottom of the grooves.

Q And you pay most attention to the bottom of the groove which leaves a raise on the bullet? A Ordinarily.

Q And you said the reason for that was these delicate tools in coming through and gouging out that land leaves a little different line each time they go through, is that right? A Yes.

Q Now, this illustration you put upon the board shows the number of grooves in a barrel of this type? A Yes.

Q But the grooves are much smaller in relation to the distance between them than the relative size as shown upon this illustration, are they not, the grooves themselves run much wider than the point of a pin, are they? A In the barrel.

Q In the barrel of the gun? A They are nine and a half, practically one tenth inch wide, .095.

Q Now, they are visible in this revolver in evidence when you look through it from the rear, are they not? A Yes, sir.

Q What I am getting at is on here the rifling lines appear to be one-half as wide as the distance between them? A Yes, sir.

Q There is no such actual condition, is there —take a look at it. A I have my figures in my bag, the width is identically the same, .095 for the width of the line and .095 for the width of the groove. They are exactly alike.

Q You mean to say that the grooves in that are as wide as the distance between the grooves? A Yes, sir, exactly.

Q Are the black lines that go to the left of this the grooves that you are speaking of, five of them in number? A Well, there are ten lines altogether, one on either side, making the two edges of the groove, five times two.

Q Well, there are five grooves, aren't there? A Yes, sir.

Q Each with two sides? A Each groove has two sides.

Q Do you mean to say that those grooves in there are as wide as the distance between those grooves? A Yes, sir, the same width exactly.

Q You would not say that the distance between the grooves is at least eight or ten times the width of the groove? A No, sir, my eye confirms what I know from the manufacturing standards of that gun, the groove is 9½ thousandths of an inch, that is what the manufacture is—

Q So the interior of that gun consists of grooves and then lines that are each equally as wide. Is that right? A Yes, sir.

Q So the five spaces between the grooves and the five grooves are just the same in width? A Yes, sir.

Q The delicate marks that you speak of, left by the instrument that makes that groove, are in the recessed part or lines that you find by looking through that gun. Is that right? A Yes, sir.

Q Now, in addition to that, are there not certain characteristics consisting of deep gouges on the side of the bullet when it comes through? A It depends on the condition of the barrel, there

may be a series of gouges left on the bullet in addition to the normal barrel marks.

Q Now, I show you Exhibit S. 4 for identification, which is a .32 calibre lead bullet. A Yes, sir.

Mr. Fisch: Which is in evidence.

Mr. McGeehan: Yes, the one that is in evidence.

Q And I ask you whether on that bullet there are not numerous irregularities visible to the eye, changing it from a round bullet to one with certain surfaces that are wide enough to see, that appear to be flat? A Yes, sir.

Q Now, what does that come from? A That comes from the passage through the barrel of the revolver.

Q Well, if another bullet was shot through that same barrel would those same irregularities appear? A In large measure they will be the same, but there will always be some minor differences, even in two bullets shot one after another from the same barrel.

Q Now, would two bullets which are shot from the same revolver have the same number of rifle marks appear at the same distance apart? A Yes, subject to certain modifications due to the slippage in between the cylinder and the barrel, the slippage that the bullet undergoes when it passes through that gap between the cylinder and the barrel.

Q Well, they both slip through the same barrel, don't they? A Yes, they traverse the same space.

Q Now, you have said, have you not, that in order to get a fair basis for comparison, the

comparison bullet and the bullet that is being considered must be of the same type as each other? A Yes, sir.

Q That is, the size, shape, weight, must correspond? A They should, yes, sir.

Q Otherwise, your test is not very accurate, is it? A May or may not be accurate, it is always more accurate when you have the exact duplicate of the original to work with.

Q Now, does the speed with which the bullet is propelled through the barrel of a revolver have anything to do with the effect of the markings in the barrel? A Theoretically it does, but practically you can drive a bullet through a revolver with a hammer, or long stick and get markings by which you can identify the markings on another bullet fired through it with powder at 700 or 800 feet a second.

Q You mean that you can push one through and it will leave the same markings as it does on one that went through at shooting speed? A Not all the same, but enough to identify it.

Q These two lead bullets that you used are both of the same calibre, aren't they? A Yes, sir.

Q Made by the same company? A Yes, sir.

Q And what are they known as? A .32 Smith & Wesson.

Q Made for a particular gun? A Made for arms chambered for .32 Smith & Wesson cartridges, of which there are many, many types on the market.

Q Now, the Smith & Wesson Company manufactures a .32 calibre bullet made for that type of gun and it differs somewhat from those made by other companies. Is that right? A You have not the exact status. The Smith & Wesson

Company do not manufacture ammunition. That is, they designed a particular cartridge for their .32 calibre revolver and thereupon ammunition companies produce what is known as a .32 Smith & Wesson cartridge. It is merely the design of this revolver company who do not manufacture it, but it is manufactured by the ammunition manufacturers all over the country.

Q Then, you don't know whether those two bullets are made by the same company, do you? A Yes, sir.

Q What company are they made by? A They are made by the Winchester Repeating Arms Company.

Q Now, do the sizes and shapes of bullets differ from time to time in the manufacture of one company? A They allow themselves a variation of about 1 grain in weight and 1/1000th of an inch in diameter on their curret types, but they do change their model of bullets from time to time over long periods of years.

Q Was that bullet distorted from its shape in its passage when shot, do you know? A It is very evidently out of line, it is not a perfect cylinder, yes, and the distortions and markings of the barrel on it lead to the natural conclusion that the distortion arose in passing through the barrel.

The Court: And you are now referring to what bullet?

Mr. McGeehan: Exhibit S. 4, the lead bullet.

Q So, whatever distortion there is in that came through passage through the barrel of the revolver? A In my opinion, yes.

Q Not from striking anything? A I don't see any distortion of the nose of the bullet beyond some fine cuts, but there is evidence that it did strike something, that something brought it to rest other than just dropping from exhaustion, owing to these fine parallel cross marks on the point.

Q Well, is this the regular shape of this bullet? A This is, approximately, yes.

Q That is, the bullet, the comparison bullet was shot out of the same revolver, in your opinion? A Yes,

Q Did the shooting of it have the same effect upon this? A In large measure, yes.

Q But these bullets are not the same shape, are they? Look at them from above and compare particularly the apparent thickness of the two at the apex. A The comparison bullet seems to be—

Q (interrupting). Heavier and thicker, isn't it? A No, sir, not to me.

Q Sir? A No, sir, it has not undergone the identical type of distortion that the other has.

Q Well, does that mean anything to you when two bullets, substantially the same, are shot out of substantially the same revolver? Is there any reason why they would not undergo the same character of distortion when that distortion is due to the firing of it through the barrel? A A very great reason.

Q And what is the reason? A I could illustrate the reason with a chart that I did not put in my direct examination.

Q Can't you give us it without the chart? A The reason is this: When the bullet leaves the cylinder it has to jump through the gap in the cylinder through the throat of the barrel, during

which it is not supported on any side, it is traveling through space from the front end of this cylinder into the barrel, through a hole a little bit larger than it is. Now, it naturally has to tip a little one way or the other in order to land against the side of the barrel as it goes into the barrel, and by tipping as it enters it straightens up, and the result of that tippage shows on the bullet, and when you examine it all the way around you see the groove marks higher on one side and lower on the other, and that indicates that the bullet did not enter the barrel in the center of the axis, but tipped to one side and straightened up after it entered the barrel.

Q Well, does not that have an effect upon the marking, too? A Yes, a very definite effect, and that happens in all revolvers. You never have a revolver bullet where these markings are not higher on one side than they are at the other, and you will find one tipped at the left and one to the right, the result being that the grooves are higher on one bullet and register lower on the other, the result being that on one bullet it is cut practically all the way across, for the full length of one bullet, and on another not for the full length, and these conditions are all corrected in an automatic pistol, but not in a revolver.

Q I understood you to say, Major, that one of the things that enables you to distinguish the kind of bullets that have been fired is the grooves in the part where the grease is placed. I don't know what you call that. A The cannelure, we call that.

Q In these two bullets is the cannelure the same? A The cannelure was the same before it passed through the barrel. It has been distorted in some measure at passage, but we deter-

mine its identity by fusing these images under the microscope and by meshing the ridges of the cannelure together.

Q But you can see that cannelure in there by the naked eye, can't you? A To the naked eye, they have the same amount, just as many teeth.

Q But one of them is more distorted in the passage through the barrel, isn't it, than the other? A They are both distorted.

Q But one more than the other—S. 4 has less or more than the comparison bullet, hasn't it? A I don't think so, no.

Q You don't think it is? A No, sir.

Q In the comparison bullet is there any point in the entire circuit of the cannelure that is not open and visible, maybe not the marking, but the recession of it itself? A No, sir.

Q Now, I show you a point on S. 4 and ask you if there is a point where it is closed? A Yes.

Q Now, that closing is due—they differ from each other there, don't they? A Yes, sure.

Q And the space in which this is closed, S. 4, is approximately ⅛th of an inch wide, isn't it? A Approximately the width of one groove, a little less than the width of one groove—yes, 1/10th of an inch. However, this is another part at which this is completely closed, whereas the test is partly closed over a much larger area, and that is the reason why I say relatively I don't think one is more closed than the other in relative area.

Q Now, does that mean something, the difference of the appearance of the bullet to the naked eye after they come out of a gun that has been shot? A It merely illustrates the action of this tipping of which I spoke, and that is all it means to me.

Q That is a mere element, is it not, making it more difficult to decide whether the bullets came out of the same gun? A It makes it extremely difficult if you rely on the naked eye, but it does not play any part in a microscopic examination.

Q Now, will you point out on your comparison bullet one of the raised portions you say results from the recessed rifling in the gun? A This space from here to here. Right across there the line of the bullet corresponds to the groove of the gun.

Q Are there two perfect lands alongside each other in your comparison bullet? A You mean a good land and a good groove next to it?

Q Yes. A Here is a fairly—in a cheaper made revolver such as this you never get approximately perfect cuttings, but, for instance, from here to this and this mark is a groove which corresponds to the elevated high land points of the gun. From this part to this part is the land portion of the bullet corresponding to the land portion of the bullet.

Q On this part of the bullet do the edges of these two edges run parallel with each other, or does one run straight up and down and the other two at a slant? A They run diversely.

Q What does that mean? A It means as the bullet enters the barrel its natural tendency is to fly straight without revolving. Therefore, the first mark it receives on entering the barrel are marks parallel to its axis.

Q In other words, straight up and down? A Yes.

Q After that it does not do that? A After that it starts turning.

Q So that is at least one groove on it that does not follow the angle. A No. That applies to all the grooves.

Q There is one at least that does not— A In all the grooves that, of course, holds.

Q Are all your grooves straight up and down? A All the grooves are a combination of the straight up and down with the angle superimposed on top. On one side you may see the straight up and down effect pronounced and on the other side the angle effect.

Q Now, you cannot demonstrate from the bullet you have here any of the points of resemblance in these grooves? A No.

Q You knew you were coming here to testify? A At the time I made the examination I did not know, to the best of my recollection whether any arrest had been made.

Q Oh, you knew this week you were coming over here? A I just got back in this country.

Q Now, just as something visible to the naked eye, Major, on the comparison bullet, there are three well-defined lines, are there not, at the point? A You mean those three sort of shiny ones there?

Q Yes. Turn it that way. A That is not the way you handed it to me.

Q There are one, two, three well defined lines together? A At least. I would say more.

Q Well, there are at least three you can look at and see right away? A Yes.

Q Looking at the bullet slightly to the right as it is held upward of the wide part of the grease area, I will call it. A Yes.

Q Now, can you find any similar well-defined lines about that distance apart on this (indicating S. 4)? A Well, to me there are.

Q Well, suppose you hold the two together and compare them, having in mind the distance apart, the direction in which they run and the general appearance. A No, this particular area here I will show you what looked to me line, line, line, line, line, line, line, line, line, line, line, line, line, line, line, line, line.

Q And they look like all the same lines to you? A They could to me have been left by the same groove.

Q And they could be left by different grooves? A To the eye, sure.

Q Now, after comparing them, you have it as your opinion that that came from the same revolver, is that right? A My very positive opinion, yes.

Q The others you are not positive about? A Yes.

Q And yet you gave it as your opinion? A It is my opinion they are not characteristic to make me feel so.

Q Now, what is the material in the body of the lead bullet that you examined, what is it made of? A Oh, it is lead with a small percentage of tin. About 1/16th per cent. of tin.

Q And does that comprise the whole bullet? A Yes, the uniform composition.

Q Now, what is the material in the steel-jacketed bullet? A The core which you see uncovered at the base is the same type of lead as exists in the lead bullets.

Q And the rim. A No, the rim is gilting metal 90 per cent. 5 per cent. zinc, nickel plated.

Q Now, these bullets I understood you to say, were compared together by putting two of them —putting each of them under a separate lens of the microscope and having them by means of

prisms brought up to a single viewpoint, is that right? A Yes.

Q So that in looking at and making a comparison of the two bullets, one of which you fired from a revolver, the other which you had handed to you to compare with it, you would see one end of one and the other end of the other so that it would look like one end of a bullet, is that right? A Yes.

Q Now, would you do that twice or once? A I do it many times.

Q Well, what I am getting at is this. When you put it in that machine, the first time you say you see the front of this bullet and the back of this bullet? A Yes.

Q Now do you interchange them? A Sometimes I do and sometimes I do not.

Q Did you in this case? A Yes.

Q What makes you do that? A I remember on those particular bullets I had to change them a number of times, because there was a certain amount of difficulty. As you know, there is difficulty, considerable difficulty, in reaching your opinion. I could not tell you whether I changed the lead bullet once. When I find the necessary number of marks without difficulty, I do not necessarily change.

Q In the first place, you described, as a steel bullet—you described it as an automatic bullet? A The type of cartridge is called .32 Colt automatic type.

Q What does that mean? A It means it was developed for a .32 automatic pistol and produced by the Colt firearms.

Q Not designed for a revolver at all? A No.

Q And the steel bullets do not leave as much indentation or raise as a lead bullet in going

through a gun? A Well, if they are a large diameter they do, if they fit deeply, yes.

Q These are not bullets that fit the barrel deeply? A They are not made for that purpose.

Q No. So that the barrel for determination does not apply in connection with those for a revolver as if they were shot from an automatic gun? A No. They did not fit the barrel to take the marking.

Q At any rate, they were the same size? A The same calibre.

Q And did they have the same depth of that oil canal that runs around them? A Yes.

Mr. Fisch: Canneluring.

Q Now, one great difference is discernable in looking at these two even with the naked eye, is there not, and that is that one of them, your own comparison bullet, the cannelure remains deep with all the markings all shown upon it, is that right? A Yes.

Q And in the bullet that you used that for comparison with, the cannelure is flattened out considerably as compared with the other, isnt' it? A Well, to me there is not any very marked difference between the two cannelures.

Q You say that looking at them— A There are differences.

Q This is yours, the one in your right hand now? A Yes.

Q Now, can't you tell which is this and which is the other by looking at the side of it as I did now? A I can, but I am not going to allow myself to say yes without being completely sure. There are differences.

Q This is yours on the right? A On the right, yes.

Calvin Goddard, for the State, cross.

Q You can see that by looking at the side of it and looking at the cannelure? A There are marks.

Q You interchange them in your own hand and can't you tell them apart by the very cannelures as an expert? A Why, yes, you could if you based your examination on the cannelure alone, they are different, but they are not greatly different.

Q Yes, somewhat different, aren't they? A Yes.

Q In looking at those from a distance, you can see the markings very clearly all the way around, can you not? A Yes.

Q And you can see the depth of the cannelure? A Yes.

Q Isn't it more distinct in the one that you have marked with an R, than the one marked with X, particularly with reference to the cleanliness of the top line at that point, at least? A Yes, the top line is not smeared with a dark color as it is in the evidence bullet.

Q Now, to that extent there is some difference in the appearance of these bullets, is there not? A Yes.

Q Now, taking the head of the bullet with it marked with an X, which is Exhibit S. 4, there is not much indication of rifling on that, is there? A There are very few and faint markings.

Q But the marks that are on it, Major, appear at numerous places, don't they, without going up near the nose of the bullet—they do appear in numerous places all of the way around that bullet? A Oh, yes, there are many, many marks all the way around the bullet.

Q Now, take this one I show—you can see about half of that bullet? A Above the cannelure.

Q I mean above the cannelure. I am speaking now of this nose part, that is much cleaner of marks. A Yes. It has hardly touched the barrel at all.

Q It differs materially in that respect from the other one? A From the markings you see.

Q Yes, from the markings you see with the naked eye. A Yes.

Q Now, if there is anything to this business, that is important, isn't it? A Yes and no. The visible examination is not important, because you cannot make an identification on a visual examination.

Q Is it true that a bullet going through the barrel of a revolver can be determined by an expert with respect to what barrel it went through by shooting another bullet through the same barrel and seeing how the marks compared on it? A Yes.

Q Now, if two bullets are fired through the same barrel and are the same size and are fired within two or three weeks of the two times in question for the expert to decide, isn't it important if one of them goes through marked in a number of places where the other one has no mark upon it? A No, sir.

Q Oh, it is not? A No, sir.

Q In other words, the bullet of that—the general appearance, the things visible to the naked eye, do not make much difference, is that right? A Yes.

Q That is right? A I would not say they do not make much difference. Yes, they do not make a difference that counts. I will say that.

Q Now, were you able to take any part of this steel bullet—is one of them pointier than

the other? A Originally they were the same contour.

Q Is one of them a little pointier than the other, the steel jacketed bullet? A No, I wouldn't say it was. One is a little flattened.

Q Which one, S. 4? A Yes, S. 4.

Q At the nose? A Along the side as you turn it it would make it look flatter on one side than the other, but I would say the contour was the same originally before they were fired.

Q But after they were fired they were a little different contour? A One is flatter on one side, yes.

Q Now, wouldn't that be something in determining whether the effect upon the bullet was the same on a bullet being fired from a gun? A I think that flattening did not come from the gun.

Q What did you shoot the bullet at that you shot for comparison? A Cotton waste.

Q What was behind the cotton waste? A Cotton waste filled a basket about two feet deep, and nothing but the wooden bottom of the basket behind the waste.

Q Well, now, you could not get any spot on these that you could line up with the bottom of the other bullet, could you? A The markings varied so both to the eye and also to the microscope that it was quite a long time that I could get any point to work from, but I eventually got a basis of comparison and went all around and found, as I said this morning, enough microscopic lines to make me feel that they were of the same origin.

Q But your mind was entirely doubtful on that? A My mind was doubtful to the point I was not completely positive, yes.

Q And of course, you cannot tell us now where those lines of similarity were? A I could not identify them positively without a microscope.

Q You did not bring your microscope? A No.

Re-direct examination by Mr. Fisch.

Q Why didn't you bring your microscope?

Mr. McGeehan: I object to that.

The Court: I will allow the question.

A Well, I am due today at Chicago at four o'clock this afternoon and my microscope is not a thing I can handle so conveniently. It is a very heavy and ponderable affair. It weighs fifty pounds or more.

Q Why didn't you make any comparative pictures of these bullets we have been talking about and which were offered in this case? A Well, as I said here, when I first examined the bullets to my recollection the case not having developed and I was getting ready to make a trip out of the country, and as you know, I got back much later than you expected me to get back, and had I gotten back at a reasonable time, I imagine you would have told me to make pictures. As a matter of fact, I only got here after the trial started and the preparations of pictures of this nature is a pretty lengthy thing. It may take a full day to get the negatives and not get them in that time, and the printing and lining in of the characteristics is anywhere from one to two days more and not having gotten here until after the starting of the trial—

Q In other words, you got in this country too late to make the pictures for the trial? A Yes.

Q Did you receive a cablegram from me to come back to testify in this case? A Yes.

Q And it was the result of that cablegram you started back to this country? A Yes.

Q Now, you have been examined with reference to the difference in the contour of these bullets and you have said that you would be able to illustrate from a diagram which you had with reference to some slippage. Now, will you be good enough to tell us what, in your opinion caused the difference in the contour of the bullets and yet enabled you to determine the arm from which they were fired and determine through the use of the microscope they were fired from the same gun? A Well, I think I have gone over how we picked out our lines through the microscope. Now, those lines are modified by other conditions which I did not describe before. These are what we call slippage. The bullet in leaving—the bullet as it slips in the cylinder of a revolver is, as I said, supported on one side there when it leaves that cylinder. Here is the shell (illustrating). Of course, the shell comes up here and the cylinder is made a little wider than the bullet. The shell fits into the chamber quite snugly. At the head of the shell on the other side of the cylinder is a clearance of several thousandths of an inch on the nose of the bullet. Now, when that bullet is shoved out, it actually has to shift one side or another to get something to bear against as it goes forward. Furthermore, the rear end of the barrel is floated so if the chamber did not come directly opposite the barrel it has a chance to go down this ramp and seat itself. Now, the first bullet you fire

out of a revolver may sit in this direction. If it sits in this direction you will begin to get a mark away up on the nose of the bullet, so the groove on this left side of the barrel would get the full length of the bullet from the nose down. If the opposite course occurs the barrel would only begin to get on the base and that bullet if you take it and roll it out on a flat surface, the marks left by the grooves on the bullet instead of being all left as they should be, may be fired any height. This groove will vary as they are over here and this over here vary on the other side. Now, you fire another bullet through that revolver. There is nothing to make the second bullet tip the same way, it may tip the other way, as we show here. In that event, we have a groove cut high on the second bullet, where we got a low cut groove, and where we have a groove cut low on the first, we get a different cut, a high cut on the second. If we roll that bullet out and compare it, where we have a great long curve on the first one we get a short one on the second, and where we have a short one on the first we get a long one on the second. Now, this tipping causes various parts of the bullet to come in contact with the barrel. In one bullet we may get a bullet which is fairly well centered, the bullet may come in contact with the barrel for its entire cylindrical length, and where it is not in the center, the whole area of the bullet may not touch the barrel, as defendant's counsel has pointed out, and the next bullet may have more contact with the bore, and it varies with each bullet, so the long big cross markings appear, and it plays no part in our identification beyond the fact that there are so many markings, from so many grooves in a given type of gun. The second condition here is

what we call—pardon me, I have been calling this slippage all the time, I meant tippage. The bullet tips—slippage, as I have explained in answer to a question by the defendant's counsel, is where the bullet starts to go down the barrel perfectly straight, and its natural tendency is to go straight, and when it hits these lines in the barrel they begin to cut a perfectly straight line on the bullet immediately it enters, the bullet is grabbed by the lands and starts to turn, so you get a series of angular lines, and that is all you would get on the bullet if you could stop it dead, a series of these straight lines, but it enters and settles down in the grooves, and you get the grooved, angular lines a little bit apart, and it spreads over into an angular or a fan-shaped series of lines. These bullets that we have here in evidence, if you care to look at them, you will see that fan-shaped condition on some side or at least at one point of the bullet.

Q Now, the fact with regard to the tippage, and the fact that the land with groove marks may be longer on one bullet and shorter on the other, will that in any way interfere with the particular lines, identifying lines on each particular land and on each particular groove of those bullets? A No, sir.

Q And is it or is it not a fact that the identification is made from these fine scratch marks on the lands and grooves? A It is.

Q And the distance between them? A Yes, sir.

Q So that I am correct in saying that the fact that some of the marks are long and some are shorter does not interfere with your ability to identify the bullets as having been fired from the same gun? A No, sir.

Q Is that correct? A Yes.

Re-cross examination by Mr. McGeehan.

Q I understood you to say, Major, that the reason you did not get the pictures is you did not have time to make them, because you just got back from Europe? A Yes, sir.

Q The time you make the pictures is when you examine them, is it not? A No, sir, in some doubtful cases when we want to confirm the microscope with the photographs we do. Otherwise, if the microscopic picture is sufficient we never take a photograph until the date of the trial is set and we know it is actually going to go to trial.

Q Now, when you made this microscopic examination, by having a microscope camera there, you could have taken the pictures, couldn't you? A I could have, yes.

Q If you had been ordered to? A Yes, sir.

Q It would have been handier to do it then than to put it in the microscope machine later? A I would not say it would be handier, it would have been just about the same either way.

Q You just did not make them, not having been ordered to do so? A Yes, sir.

Q Now, these fan-like designs, whether one is made at an angle and the other straight, it always appears the same? A No, sir.

Q Doesn't that make any difference? A No, sir.

Q Then, where do you get the ability to compare, as you did in your first demonstration, where there is five and in another a little bit more than eight, how do you get these in line and with each other if they deviate from each other and

are not always the same? A You can always tell, no matter how much or how fine a condition exists, you can always pick out, unless the bullet is deformed from striking some object, or is fired through a barrel so terribly rusted that its markings are destroyed, you can always pick out the edge of at least one or two or three of the permanent groove markings, and in using them, even if one edge only is straight—suppose the other is fine, we can then start from that as a base line and take the groove on our other bullet and compare this one with this one, even if the condition is much different here from what it is there. We can use the one side of the groove as a base line and work from that, and go off our fine lines between it and the other side of the groove.

Mr. Fisch: Now, if your Honor please, I have received a request from the witness Cardinale, through his counsel, Judge Minisi, that he be permitted to take the stand and testify in this case at this time. Your Honor will remember that this is the witness who testified and at whose testimony I pleaded surprise and offered evidence to neutralize his testimony.

The Court: Do you want to call him?

Mr. Fisch: I would like to give him the opportunity to take the stand.

The Court: You have a perfect right to call him, if you want to.

William Cardinale, recalled, direct.

WILLIAM CARDINALE, recalled.

By Mr. Fisch.

Q Cardinale, I understand through your counsel, Judge Minisi, that you wanted an opportunity to take the stand again and testify in this case. Is that right? A Yes, sir.

Q I asked you some questions the other day when you were on the stand and I am going to ask you questions along the same line now. On the 22nd of April, you testified, the other day, that on that day Calabrese came to your house about eleven or twelve o'clock. Is that correct? A Yes, sir.

Q Now, what did he do when he came to your house at that time?

Mr. McGeehan: What date is this, Mr. Fisch?

Mr. Fisch: The 22nd of April, 11 or 12 o'clock in the morning.

Q What did he do when he came to your house? A He spoke to me, but I don't remember what we were talking about.

Q Did he make a telephone call or not? A Not at eleven o'clock, no, sir.

Q Did he make any telephone call that day at your office? A That night he did.

Q Who did he call up? A He called up Wally.

Q Who is Wally, do you know? A Dominic Lamilino.

Q Did you hear what he said to Wally over the telephone? A He wanted him to come over to Newark.

William Cardinale, recalled, direct.

Q Did you hear what time he wanted him to come over? Just tell us what you heard him say over the telephone. A He said he wanted him to come over to Newark, that they wanted him to go upon a stick-up.

Q Wanted him to go upon a stick-up? A Yes, sir.

Q Now, did Calabrese and Cort then come to your house later in the day? A That is when they came over.

Q What time was that? A About a quarter after five.

Q And where was Cort while Calabrese was making the telephone call? A He was in the parlor.

Q And where is the telephone? A In my bedroom.

Q And how did they come over to your house, did they walk over or what? A They had a Chrysler.

Q Now, then, later on did anybody else come to your house? A Yes.

Q Who? A Wally and Bruno.

Q And were Calabrese and Cort there then? A Yes, sir.

Q Did they all come together? A No, Calabrese was there and Cort.

Q And did they have a conversation between them in your presence—in which Calabrese and Cort took part or while Calabrese and Cort were there, did they talk to one another? A When Bruno and Wally came in I was eating, so I said "Go in the parlor"— Well, he already knew that Calabrese and Cort wanted them—

Mr. McGeehan: I move that that be stricken out.

William Cardinale, recalled, direct.

Q Not what he knew, what did you hear them say, if anything? A Well, when Wally came in I shook hands with him and he said "Never mind, you can eat, I will go in the parlor," so I kept on eating with my people.

Q You kept on eating with your people while he went into the parlor where Calabrese and Cort were with Bruno? A Yes.

Q Now, then, what time did they leave? A About half-past six.

Q Did they all leave together? A Yes, sir.

Q Now, the next morning did you see Calabrese? A Yes, sir.

Q Where? A At my house.

Q About what time? A About nine or half-past nine.

Q And where were you when he came to your house? A I was in bed.

Q What did he do?

Mr. McGeehan: I object to that as immaterial, being after the occurrence.

The Court: I will permit it.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

Q What did he do? A He showed me a newspaper.

Q A newspaper? A Yes, sir.

Q What kind of a newspaper was it? A It had the headlines of what had happened that night, the night before.

Q Do you know what paper it was? A The Ledger, the Newark Ledger.

Q And what, if anything, did he say to you? A He says that they went on a stick-up and they had a tussle with some fellow and Bruno fired a shot and he fired a shot.

Q How long did he stay with you that morning? A About fifteen minutes.

Q And then he left, did he? A Yes, sir.

Q I show you a newspaper and I ask you whether or not this is a copy of the newspaper which Calabrese showed you that morning while he was talking with you? A Yes, sir.

Q Then, did you read it? A Yes, sir.

Q Now, Cardinale, will you tell the Court and jury why it was that you testified as you did the other day and now you are testifying as you do with reference to this matter?

Mr. McGeehan: I object to that as immaterial. It may be a proper question on cross examination.

The Court: Overruled.

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

WALTER D. VAN RIPER,
Judge.

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

WALTER D. VAN RIPER,
Judge.

William Cardinale, recalled, cross.

A When I was brought to the Prosecutor's office, I wanted to admit my guilt about selling the gun and I did not want to hurt anybody else. If there was anybody to get hurt I wanted to hurt myself, so now I understand that the defendants are—

Mr. McGeehan: I object. I cannot see the propriety of this.

Mr. Fisch: Not what you understand.

Mr. McGeehan: I contend that the statements of this witness are immaterial and that I might ask him on cross examination—

The Court: Mr. Prosecutor, the record shows that this witness who is now on the stand, after testifying the other day, or his refusal to testify, whatever you might want to call it, the record shows he is now on the stand at his own request through his counsel and it is quite possible that this witness may bring in, in answer to this question, something which is highly irrelevant.

Cross examination by Mr. Becker.

Q Mr. Cardinale, what time did Bruno and Lamilino come into your house, if you remember? A About a quarter after six.

Q And did I understand you to say that Calabrese and Cort were in your house when they arrived? A Yes, sir.

Q When did they get into your house or come into your house? A Who?

Q Calabrese and Cort? A About a quarter after five or half-past five.

Q Now what time did Calabrese call Wally on the phone? A About half-past five.

William Cardinale, recalled, cross.

Q Did you hear any part of that conversation? A No, sir.

Q Now, where is the telephone? A In my bedroom.

Q Where is that relative to the parlor? A Sir?

Q Where is your bedroom and the parlor situated in that house of your parents? A Why, the bedroom is right opposite the parlor.

Cross examination by Mr. McGeehan.

Q I understood you to say you did not hear any part of that conversation. A No, sir.

Q Didn't you testify before that you did? A I said I heard—Calabrese told me he was going to call up Wally.

Q You did not hear what was said on the telephone at all, then? A No, sir.

Q And if you said today that you heard him call up and he asked a man, who you describe as Wally, to come over in connection with a stick-up, you did not hear that at all, did you? A No, sir.

Q And if you said that, that was not true, was it? A He told me he was going to call him up for that purpose, but I did not hear him.

Q But you did not hear him actually 'phone, did you? A No, sir.

By Mr. Fisch.

Q Did you see him go to the telephone? A Yes, sir.

Q Did you hear what number he called up? A No, sir.

Q But it was known to you after he had made the telephone call? A Yes, sir.

William J. Callahan, recalled, direct.

Q Did he say anything to you after he made the call? A No, sir.

WILLIAM J. CALLAHAN, recalled in behalf of the State.

Direct examination by Mr. Fisch.

Q Detective Callahan, you arrested Simione, did you not? A Yes, sir.

Q At the time you arrested him, did you take Exhibit S. 16 from his possession? A I did.

Q And at the time that you took S. 16 was it loaded or not? A It was loaded.

Q I show you these bullets and ask you whether or not these are the bullets that were in the gun at the time it came into your possession.

Mr. McGeehan: I object to it on the ground that Simione is not a defendant in this case and there is no evidence to show that the bullets which were in the gun at the time the officer arrested Simione were the same bullets that were in it at the time they were in the possession of the defendant.

The Court: There is evidence that the gun was in his possession.

Mr. McGeehan: Yes.

The Court: Didn't Raymondo testify when Calabrese gave him back the gun that he, Calabrese, said there had been a shot fired out of it?

Mr. McGeehan: Yes, and he further said there were five bullets in it when he got it

back from Calabrese; that was definitely testified to, if your Honor recollects. Now, no evidence exists that the defendant had the gun after that and the six bullets are now presented here, and furthermore, there is no testimony by Raymondo that when he turned the gun over to Simione that they were the same bullets in it as there was before, in fact, that express question was asked him and he said he did not know.

Mr. Fisch: It does not seem to me that it makes much difference in this case and the only reason I am offering it is because the gun is in evidence and I wanted the Court and jury to have the benefit of the bullets which were taken from Simione at the time the gun was taken from him. If it is objectionable, I will withdraw the offer.

Mr. McGeehan: Of course there is an objection to it, it is illegal.

THOMAS BOLAND, sworn in behalf of the State.

Direct examination by Mr. Fisch.

Q Detective Boland, you are connected with the Newark Police Department attached to the Detective Bureau at Headquarters? A Yes, sir.

Q How long have you been connected with the Police Department? A Sixteen years.

Q Do you know the defendant, Arthur Cort? A Yes, sir.

Q Did you have a conversation with him at Police Headquarters on the second of May of this year? A Yes, sir.

Q And as a result of that conversation did you take a statment from him? A Yes.

Q Did you put down in writing what he said to you in response to your questions? A Yes, sir.

Q I show you a statement dated May 2nd, 1929, and ask you whether or not it is in your handwriting? A It is.

Q And is that the statement which you took from Cort? A Yes.

Q Where did you get the information which is contained in that statement? A From Cort.

Q And after you had obtained the information and you had committed it to writing, what, if anything, did you do with it? A Read it to Cort and had it signed.

Q And did anybody witness it? A Yes.

Q Who? A Sergeant Moffett and Detective Kinney.

Q How about yourself? A And myself.

Q And did he sign each page? A Yes, sir.

Q And did you and Detective Moffett and Sergeant Kinney sign each page? A Yes, sir.

Q Now, after having committed it to writing and having read it to him, and before he signed it, did you make any promises to him with regard to it? A No, sir.

Q Or hold out any hope of reward? A No, sir.

Q Did you make any threats to him? A No, sir.

Mr. Fisch: I offer it in evidence.

Mr. McGeehan: I object to it on behalf of the defendant Calabrese as not binding upon him.

Mr. Fisch: I am only offering it as binding upon the defendant Cort.

The Court: Any objection, Mr. Becker?

Mr. Becker: I would like to see it. I object to this statement going into evidence, your Honor, at this time for the reason that, on behalf of Arthur Cort, I haven't had an opportunity to go into it fully, and on the further ground that there are certain statements made in this certain instrument which have nothing whatsoever to do with the indictment charging the defendant Cort with murder.

The Court: I will admit it and allow you an exception.

Counsel for defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Mr. Fisch: May it appear on the record, if your Honor please, that the only purpose of offering it by the prosecution is to prove the crime charged in this indictment against the defendant Cort and for no other purpose.

Mr. McGeehan: I assume it is admitted only as evidence against the defendant Cort.

The Court: I will take care of that in my charge.

(The paper in question is received in evidence and marked Exhibit S. 22.)

Mr. Fisch: And may I, with your Honor's permission, read this to the jury at this time?

The Court: Yes.

(Mr. Fisch reads Exhibit S. 22 to the jury.)

Cross examination by Mr. Becker.

Q Detective Boland, when did you interview Cort? A While taking the statement on May 2nd.

Q May 2nd, where? A At Headquarters.

Q What time, what time of day? A Sometime in the evening about nine o'clock.

Q Is that when you started to take the statements from Cort? A Yes, sir.

Q And it continued until what time? A I guess about one or two in the morning.

Q How many hours was it in taking the statement, how many hours was consumed in taking the statement? A Oh, I guess about four.

Q And was Calabrese in the presence of Cort at the time this statement was taken? A No, sir.

Q And the statement of ten pages, were these the exact words addressed to you by Cort? A No, sir.

Q They were not, were they taken verbatim? A No, not verbatim.

Q And you asked Cort a certain question and he answered it, is that right? A Yes, sir.

Q Did he say to you in the words, "That about four o'clock Monday, that day of the Grossman hold-up, I stole a Chrysler sedan that was parked on the west side of Milford avenue, about a half block south of Clinton avenue, and the color of the sedan was blue?" A He may not have told every word of that.

Q Well, in that paragraph, what did he say? A That is the substance of his answer.

Q What was the condition of Cort at the time he started to give you the statement?

Mr. Fisch: I object to that unless we understand what he means by condition.

The Court: With reference to what?

Mr. Becker: His physical condition.

Q Was he exhausted? A No, sir.

Q Wasn't he perspiring and exhausted at the time you started to get this statement from Cort? A He did not appear to be exhausted.

Q I don't mean that you used force, but you had him under observation many hours before you started to take the statement.

Mr. Fisch: I object to that, there is no evidence that he was under observation at all.

The Court: I think you mean in custody.

Q In custody. A I did not have him under observation at any time.

Q When you took him in charge did you immediately start to get the statement from him? A Yes, sir.

Q You are not positive as to whether he was calm and cool at the time you started to give him the statement, are you, officer? A He appeared so.

Q Can't you tell of your own personal knowledge? A I am only testifying to what he looked like to me when I took the statement off him.

Q And he was in the presence of Moffett and Kinney? A Moffett and Kinney.

Q Where was this statement taken, in that little room at Police Headquarters? A It was taken in Deputy Chief Brex' office.

Q Did he tell you that he drove to Billy Raymondo's house at 18 Jay street? A Yes, sir.

Q Did he say that Raymondo met him on Jay street? A No, he said he drove from Calabrese's house to Raymondo's house on Jay street.

Q He told you that he drove to 18 Jay street and there he picked up Billy Raymondo? A Yes, sir.

Q Who did Cort refer to as "We decided to hold that place up?" A Well, there were four in the car at the time.

Q Do you know which four? A Lamilino and Bruno and Cort—this was in the morning, that was Simione and Calabrese, Cort and Raymondo.

Q Were in the car in the morning? A In the morning, if that is what you refer to.

Q This is in reference to the butcher shop episode? A The butcher shop episode and the drug store.

Q Well, the butcher shop episode was in the morning? A Yes, sir.

Q And if anything was said with reference to the holdup of this butcher shop, did Cort give the reason why that place was not held up? A The reason he gave in his statement, that Simione, Raymondo and Calabrese got out of the car and they walked back to the butcher shop and he remained in the car and they came back to the car and told him there were three butchers in the butcher shop and they only had one gun, so they decided not to hold the place up.

Q Well, did you put down in here that there were three butchers in the butcher shop?

Mr. Fisch: I object to that, the statement speaks for itself. What is in there is in there and what is not in there is not.

The Court: Overruled.

Q Why didn't you put that in the statement, that there were three butchers in the butcher shop and that is the reason why they did not hold it up? A They only had one gun.

Q Why did you not put in here that there were three butchers in the butcher shop, if that is the statement of Cort? A That is what he told me.

Q Why didn't you put it in there? A That there were three men in there?

Q But you haven't got three men in the statement. A That was his story.

Q Are you sure that Cort said, "I thought this drug store would be a good place to hold up." Did he say he thought it would be a good place or that "we thought it would be a good place."

Mr. Fisch: What are you reading from in the statement?

Mr. Becker: I am reading from the first page of the statement.

Mr. Fisch: That "I thought this drug store would be a good place to hold up."

Q What do you say to that, officer, are you sure he said, "I" or "We"—you have "we" in the upper part of the statement.

Mr. Fisch: If your Honor please, I object to that last portion, the upper part of the statement does not mean anything and put-

ting it in the question form. It might appear in the preceding portion of the statement, and it has no reference, as I recall it, to the paragraph which counsel is now reading, but which says, "I thought it was a good place to hold up."

The Court: The question is did Cort say "I thought" or didn't he say "I thought."

The Witness: He said, "I thought."

Q Are you sure he said, "I thought"? Now, you start the next paragraph, "When we first looked at the drug store." A Well, that is just the way he gave it to me.

Q First he said, "I thought it was a good place to stick up," and then he said, "And we first looked at the drug store and it was closed," and that is exactly the way Cort gave it to you and you put it down word for word? A Yes, sir.

Q Then you continue by saying, "When we came back it was open." Do you know who he was referring to when he said, "We came back?" A Simione, Calabrese and Raymondo.

Q Officer, how did you get the statement from Cort, if you did, where it is stated here, "When I left Calabrese's house, Calabrese told me to meet him at the D. L. & W. station, Broad street, at six o'clock. A How did I get it?

Q Yes. A I got it off Cort.

Q Cort told you that? A Yes, the question was put to him and that was his answer.

Q How was the question put to him? A "Where did you go then?"

Q Was there anything said by Cort in reference to meeting Lamilino and Bruno at the home of Cardinale? A No.

Q You are sure that Cort said "Wally, Calabrese, Bruno and myself talked for a few minutes. Our conversation was regarding the hold-up, the man in the drug store on Sanford avenue near Lenox street?" A Yes, sir.

Q Now, you are sure that Cort said that Wally, Calabrese and Bruno had that conversation? A And Cort.

Q And Cort? A In the automobile.

Q In the automobile? A Do you say in this statement that it was in the automobile?

Mr. Fisch: Now, I object to that, if your Honor please. The statement speaks for itself.

Mr. Becker: Your Honor, the detective testified that the conversation was in the automobile. Now, I am just trying to find out whether or not that statement was made and why it was not put in the written statement.

The Court: Ask him why it was not put in there.

Q Why wasn't it stated that the four of them had a conversation about holding up the man, and the conversation was held in the automobile? A That it was held in the automobile.

Q The conversation was held in the automobile? A Yes, doesn't it say that in the statement?

Q He doesn't say that it was held in the automobile. A It is my recollection that that is where the conversation was held.

Q Are you sure that Cort said that he left his overcoat and a gray soft hat in Calabrese's room? A Yes, sir.

Q Are you sure he did not say a cap? A He said a hat.

Q Now, in reference to "this statement of ten pages; which has been read to me by Detectives Boland and Kinney, has been read aloud by me"—who dictated that to Cort? A That last paragraph?

Q Yes. A I dictated it to him.

Q "And this is the truth given by me of my own free will without any threats or promises being made and realizing that this statement can be used at my trial. This is my own handwriting. Arthur Cort." You dictated that to Arthur Cort? A Yes, sir.

Q And this is the usual form at the end of a statement made similar to this? A Well, that was dictated to him in this statement.

Q What was done with Cort after this statement was taken? A He was taken upstairs and put in a cell.

Q And that is all you know about it? A Yes, sir.

(Adjournment until Tuesday, November 5, 1929, at 10:30 A. M.

INDEX TO VOLUME II

PAGE

Witnesses for Defendants.

Arthur Cort,
direct examination..... 475
cross " 482
re-direct " 520
re-cross " 526

Joseph Calabrese,
direct examination..... 529
cross " 545
re-direct " 580
re-cross " 582

State's Rebuttal.

Philip Sebold,
direct examination..... 582
cross " 584

Warren T. Moffett,
direct examination..... 587
cross " 589

Harry T. Morley,
direct examination..... 590
cross " 591
re-direct " 591
re-cross " 591

Joseph J. Kenney,
direct examination..... 592

Frank Brex,
direct examination.....596, 597
cross " 597

Joseph Zeller,
direct examination..... 609
cross " 610

Court's Charge to Jury 612
Exceptions to Charge 623
Defendants' Requests to Charge 626
Certificate of Court Stenographers 627
Certificate of Trial Judge 628

New Jersey State Library

		Off'd	P't'd
S. 1.	Map	101	opp. p. 682.
S. 2.	Map	105	
S. 3.	Bullet	113	
S. 4.	Bullet	121, 171	
S. 5.	Photograph	128, 134	opp. p. 682.
S. 6.	Photograph	129, 134	
S. 7.	Photograph	129	
S. 8.	Photograph	131	opp. p. 682.
S. 9.	Photograph	132	
S. 10.	Photograph	132	
S. 11.	Photograph	133	
S. 12.	Piece of Steel	265	
S. 13.	Automobile Registration No. 3E 4477	268	629
S. 14.	Original negative and print of finger prints of William Raymondo	275	
S. 15.	Photographs of Finger Prints	276	
S. 15.	Four steel jacketed bullets	331	
S. 16.	Gun	305, 386	
S. 18.	Statement of Joseph Calabrese to Police	385	632
S. 19.	Statement of Joseph Calabrese to Prosecutor's Detectives	406	642
S. 20.	Test bullet	429	
S. 21.	Test bullet	430	
S. 22.	Statement of Arthur Cort to Police	467	644

Assignment of Errors
- Joseph Calabrese 651
- Arthur Cort 667

Specification of Causes
- Joseph Calabrese 659
- Arthur Cort 675

SEVENTH DAY.

Tuesday, November 5, 1929.

Continued pursuant to adjournment.

Present: Counsel as before stated.

Mr. Fisch: If your Honor please, I have testimony of some witnesses with reference to the witnessing of these confessions. The testimony is merely cumulative, and I don't think it is essential, and we have taken so much time already that I feel that we can very well go on without that cumulative testimony. I therefore rest the State's case.

Mr. Becker opens in behalf of the defendant Arthur Cort.

Mr. McGeehan opens in behalf of the defendant Joseph Calabrese.

ARTHUR CORT, one of the defendants, sworn in his own behalf.

Direct examination by Mr. Becker.

Q Where do you live? A 318 Clinton street.
Q You live with whom? A My mother.
Q And father? A No, sir.
Q Where is your father? A My father is dead.
Q How long is he dead?

Mr. Fisch: I object to that. What difference does that make?

The Court: It is immaterial, but I will permit it.

A Fourteen years.

Q And do you remember the day of the 22nd of April of this year? A I do.

Q Did you have a car in your possession? A I did.

Q Where did you get it? A On Milford avenue.

Q What did you do with it after you got it? A I drove around the city for a while until seven o'clock.

Q What happened at seven o'clock? A I drove to the home of Calabrese on Eighth avenue.

Q Did you meet Calabrese there? A I did.

Q What happened after that? A We drove over to Jay and Orange streets.

The Court: When was this, seven o'clock in the morning?

The Witness: Yes, sir.

Q Jay and Orange streets, and what did you do there? A We met William Raymondo.

Q And what did William Raymondo do? A Got in the car with us.

Q Where did you go? A As we were driving away, we picked up Simione.

Q And with the four of you in the car, what did you do then? A We drove to Orange.

Q And from Orange where did you go? A Drove over to Sanford avenue in Irvington.

Q Sanford avenue in where? A In Newark, rather.

Q What time did you arrive there? A About nine o'clock.

Q And what happened when you got in the vicinity of Sanford avenue—do you remember the cross street there? A Lenox street.

Q Lenox street, and what happened when you got there at nine o'clock? A I drove around Lenox street and parked the car.

Q And what was done after you parked the car on Lenox street, if anything? A Calabrese got out of the car and he went around Sanford avenue to see if this drug store was open.

Q Speak up a little louder. A He went to see if the drug store was open and came back and said it was closed, and then we drove away.

Q And while riding up to Orange was anything said in the car, was anything said or done in the car while riding up to Orange? A Why, yes, Raymondo gave Calabrese a gun.

Q Raymondo gave Calabrese a gun? A Yes, sir.

Q And did you say anything when you arrived in the vicinity of Sanford avenue and Lenox street? A No, sir.

Q Did anybody in the car say anything when they arrived at the intersection of Sanford avenue and Lenox street at nine o'clock on the morning of the 22nd of April? A Raymondo said he wanted to look over this place and Calabrese said "I will look it over."

Q What do you mean by Raymondo saying he would look over the place? Did you know what he meant by that? A Well, he wanted to see if it was a suitable place to hold up.

Q And when Calabrese came back all four of you drove away? A Yes, sir.

Q Where did you go? A We drove up to Orange and Norfolk street where Raymondo left us.

Q Yes, and from there where did you go? A Then we drove Simione over to Bergen street and Warren where he got out of the car.

Q Now, before you left Lenox street was anything said in the car by either one of you four? A I don't remember.

Q Did you say anything? A I don't remember whether I said anything or not.

Q What? A I don't know if I said anything or not at the time.

Q And what did you do after Simione got out of the car? A I then drove Calabrese home, to his home.

Q To his home? A Yes.

Q What time did you arrive at Calabrese's home? A About ten o'clock in the morning.

Q Where did Calabrese live at that time? A Eighth avenue.

Q What did you do after you left Calabrese's home? A I drove the car down, I parked it somewhere, I don't remember, and I walked over to Park Place.

Q Did you eventually get back into the car that day? A Yes, in the afternoon.

Q About what time? A Well, I met Calabrese downtown and we went over and got the car and we drove around for a while.

Q And where did you drive to? A I don't remember where we drove at that time.

Q What happened, if anything, in the evening? A Calabrese told me to meet him that night at six o'clock by the D. L. & W. station on Broad street and said that Bruno and Lamilino were coming over from New York and that I should meet him there at that time.

Q And did you meet them? A I did.

Q And what did you do after you met them, if anything? A Those three got in the car.

Q Referring to? A Lamilino, Bruno and Calabrese.

Q Yes, got into the car? A And we drove around for a while until we happened to pass this drug store again on Sanford avenue.

Q What time did you arrive there? A About seven o'clock.

Q What happened? A Then Calabrese pointed out the place and said that was the place that Raymondo was referring to in the morning; then Bruno said to drive around the corner of Lenox street. I drove around Lenox street and parked the car a little ways from the corner.

Q Yes, go on. A And the other three got out of the car and went around to the drug store and a few moments later I heard shots fired and I started the motor, and when I saw the three come around the corner I opened the door of the car and they got in the car and I drove away.

Q When they got into the car did you notice anything? A Lamilino seemed to be hurt in some way, he seemed to be, he could not breathe right, like as if he was crushed. Then we drove down to 70 Plane street.

Q Before you drove down, did you make any comments to the three before they got into the car? A Why, I wanted to know what happened and Bruno said "I had to shoot him." Then, I said, "But there were two shots," and Calabrese said, "Well, I shot him in the arm."

Q And where did that conversation take place? A While we were starting away from the store.

Q Now, before you arrived at the intersection of Sanford avenue and Lenox street, did you know or have any knowledge as to how many guns? A I only knew there was one.

Q You only knew of the one? A Yes, sir.

Q And that was in the possession of whom? A Of Calabrese.

Q Now, you drove away from Sanford avenue and Lenox street, and where did you drive to? A We then drove down to Mead street, which is a block down at the bottom of the hill.

Q Well, after you drove through the streets, where did you arrive? A At 70 Plane street.

Q And what took place there at 70 Plane street? A Why, Calabrese, Lamilino and Bruno got out of the car and told me to come back after I had put the car a few blocks away from the house, and I did.

Q Did you go back to the house? A I did.

Q And you went into the house? A Why, Calabrese threw the key down from the window and I went up in the house.

Q And you four were then in that room? A Yes, four.

Q Did anybody come in after that? A Raymondo.

Q Raymondo came in about what time? A A few minutes after I had arrived.

Q And did you then subsequently leave the room? A Yes, sir.

Q Who lived in that room? A Calabrese.

Q Did you live there? A No, I used to play cards up there with him.

Q And what did you do after you left the room? A Went over Broad street to Park Place, and I just stayed around there for a while.

Q And what happened to the car? A Why, I left the car over around the corner, I don't know the name of the street, Eagle street, I think it is.

Q And you subsequently got the car? A I did.

Q And were you in the vicinity of 241 Bank street Thursday? A I was.

Q And were you in that car? A I was.

Q Who was with you? A Raymondo.

Q And you could not start the car, and you left it there, is that right? A Yes.

Q And what happened after that? A We just went away from there that's all.

Q When did you see Calabrese again and the rest of these—that is Raymondo and Lamilino and Bruno if at all? A I did not see them until I got to Police Headquarters.

Q Now, you were arrested? A I was.

Q Where? A At the Terminal on Park Place.

Q When? A May 2nd.

Q What happened then? Were you taken to Headquarters? A Yes, sir.

Q What happened then? A I was questioned in regard to this occurrence.

Q You were questioned by whom? A By Captain Brex.

Q Anybody else there in the presence of Captain Brex and yourself? A Why, there was Lieutenant—Detective Boland, Detective Kinney, and Sergeant Moffett.

Q Did you sign a statement? A I did.

Q How long did it take to compose this statement, if you remember? A I don't know.

Q In hours, can you recall? A I don't know at all how long it took.

Q Now, did you read that statement? A I did not.

Q Why? A I was incapable of reading it at that time.

Q What do you mean you were incapable? A Why, I could not see, I could not think right.

Q Before you signed that statement, did you volunteer to sign a statement signed by or made by Calabrese? A Yes, I said I would sign anything.

Q What? A I said I would sign anything.

Q And did Captain Brex say anything to you about volunteering to sign Calabrese's statement? A Yes, he said that would not be fair to me if I signed it.

Q And you signed the statement and it was read out aloud to you? A It was read, but I don't remember what was in the statement.

Q Now, were you in any lineup? A Yes, sir.

Q When, what day, if you remember? A Why, the next day.

Q The next day? A Yes.

Q And did you see Miss McEvoy there? A I did not.

Cross examination by Mr. Fisch.

Q Now, Cort, this car that you say you got on Milford avenue, you got that about four or five o'clock in the morning, didn't you? A About that, some time early in the morning.

Q You mean you took it, you just stole it off the street, didn't you? A Yes, I did.

Q And these photographs, Exhibits S. 5 and S. 6, they are pictures of that car, aren't they? A Yes, sir.

Q And after you stole this car and you drove up to Orange, what did you drive up to Orange for? A There wasn't any particular reason at that time for driving up to Orange.

Q Well, when did the particular reason develop for driving up to Orange? A Why, there was a discussion on the way up.

Q What was the discussion? A The discussion was about ways of making money.

Q Ways of making money? A Yes, sir.

Q Yes, and what was that discussion about ways of making money? A There was talk about logical places for holdups.

Q And then was a place selected up in Orange? A Why, no. Raymondo said—saw this store and he said that he would like to look it over and so, the three got out and took a look at this store and they came back and said it was not a good place.

Q They said it was not a good place because there was three butchers in there. Is that right? A Well, I did not hear that statement.

Q And there was only one gun between you. Is that right? A I did not hear any part of that.

Q You knew there was one gun? A Yes, sir.

Q And you knew Calabrese had the gun? A I did.

Q And you say you did not hear anything about that it was not a good place? A That is what I heard after, it was not a good place.

Q Didn't Calabrese and Raymondo and Simione come back to the car and say to you that they did not want to take this place as they only had one gun? A I did not hear that at all.

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

Q You are sure about that? A I am sure.

Q You know that that is in the statement that you signed, don't you? A I do not.

Q I show you the statement, Exhibit S. 22, and ask you whether or not that does not appear

on the first page of the statement, "Raymondo and Simione got out of the car and they walked back to the butcher shop—" just reading back a little—"Calabrese, Raymondo, Simione and myself drove around until we reached Orange. I was driving the car when we passed a butcher shop in the colored section of Orange and we decided to hold the place up." That is correct, isn't it? A I don't know if it is correct.

Q That is what happened, isn't it, you drove around in the colored section of Orange and passed a butcher shop, and decided to hold it up. That is correct, isn't it? A No, that is not.

Q You did not decide to hold the butcher shop up? A No, Raymondo said he would like to look the place over.

Q Now, then, Calabrese, Simone and Raymondo got out of the car and they walked back to the butcher shop. That is correct, isn't it? That is what happened? A Yes, sir.

Q And then Calabrese and Raymondo—the statement says "Raymond" that is what you call him, but you know him by the name of Raymondo? A Yes.

Q Calabrese, Simione and Raymondo came back to the car and said they did not want to take the place. That is correct, isn't it? That is what happened? A I said before that was not right.

Q That they did not come back to the car? A They did come back to the car, but what they said I did not hear.

Q And they said they would not take the place? A They said it did not look good.

Q And isn't there contained in the statement they did not want to take the place because they

only had one gun? That is in the statement? A Yes.

Q And you signed the statement? A Yes.

Q And then the statement continues, "Joe Calabrese had the gun." A Yes.

Q And that is correct? A It is not, as far as I know.

Q It is not correct that Joe Calabrese had the gun? A I said anything contained in the statement is not anything I said.

Q Now, just let us see. Calabrese did have the gun? A Yes.

Q And the statement says Joe Calabrese had the gun?

Mr. McGeehan: I object. The statement speaks for itself.

The Court: Well, the witness just made the statement that the written statement is all wrong.

The Witness: I did not mean that, your Honor.

The Court: What did you mean?

The Witness: I mean there were certain parts of that statement that is the first time I seen that statement I can know how to read it.

Q Well, your counsel showed you a copy of it yesterday? A No.

Q You know that your counsel was furnished with a copy of it? A No.

Q Now, let us see. Getting back to after you left Orange, and they decided not to take the place, it did not look good, is that it? A Yes.

Q Then, what did you go down to Newark for? A I just drove around.

Q Well, you were still looking for some place to stick up, weren't you? A We weren't looking at any place at that time to stick up, no.

Q Well, you were talking on the way to Orange about getting some money by a stickup, weren't you? A Yes.

Q So that when you left Orange and came to Newark, you came down to Newark for the purpose of finding some safe place you could stick up, didn't you? A Not at that time, no.

Q Well, at what time did you do that? A We were riding around at this time without any idea of any place to hold up at that time.

Q Well, then, when you came over to Sanford avenue and you saw that drug store, that drug store appealed to you as a likely place to stick up, didn't it? A It did not appeal to me, because I did not see it until my attention was drawn to it.

Q Well, your attention was drawn to it by whom? A Raymondo.

Q Well, who was sitting alongside of you in the front seat? A Calabrese.

Q You say that Raymondo called your attention to it? A He did.

Q And when he did call your attention to it, it did appeal to you then, after he called your attention to it? A Well, he said to drive around the corner.

Q Won't you answer my question. After it was pointed out to you, irrespective of by whom it was pointed out, after it was pointed out to you as a likely place to stick up, then it appealed to you? A They did not consult me.

Q After it was pointed out to you as a likely place to stick up, then it did appeal to you as a likely place to stick up, isn't that so? A It did not have any appeal to me at all.

Q Why did you stop? A Because I was told to stop.

Q Nobody pointed any gun at you and told you to stop? A No.

Q You went out for the purpose of sticking up a place? A No.

Q Didn't you tell us just a few minutes ago that on the way up to Orange, that that was what you were discussing, the finding of a place you could stick up and get some easy money? A Well, the finding of it does not mean that you had to do it at that time.

Q Oh, you were just going to find it and then forget about it, were you? That is not what you mean, is it, Cort? A No.

Q You were going to find a place that could be stuck up and you were going to stick it up, is that right? A No.

Q Well, what were you going to do after you found a place? A I tried to explain it that we were going to look for a place, but that does not mean you had to look for it at that time.

Q Oh, you were going to look for a place and spot it and stick it up at a later time, is that it? Is that right?

The Court: Can't you answer that?

The Witness: At a later time, yes.

Q So you spotted out this drug store of Grossman in the morning, is that right? A Yes.

Q And you spotted it out for the purpose of sticking it up, didn't you? A Yes.

Q And for that purpose you drove the car around the corner of Lenox street? A Yes.

Q And then some of these fellows got out of the machine, Calabrese got out of the machine

the first time you parked your car and went around the corner of Sanford avenue and then came back to the machine, and then said the place was not open yet, is that right? A Yes.

Q And as long as the place was not open, you could not stick it up? A I could not look it over, either.

Q Well, all you could do was look through the door? A That is all.

Q So then you proceeded to drive around until the place was opened? A We did not, we drove away immediately from there.

Q You drove away and came back there? A We didn't come back there.

Q Listen, didn't you come back later that morning after the drug store was open, and didn't you then talk over the question of sticking this place up and isn't it then Simione and Raymondo got cold feet, uh? A I can't remember that part.

Q You would not say that that is not so, would you? A Well, we drove around there, but then there were arguments about something else. You see, it was raining and I was having trouble with the windshield wiper and the car was not running right and I could not hear what they were saying about some other argument.

Q Just a minute about these other arguments. After you had parked that car there the first time in the morning, and Calabrese came back the first time and reported the store was not open, then you drove away and came back to that spot sometime later that morning? A Yes.

Q And then when you came back to that spot the second time that morning, that was when Simione and Raymondo refused to go through with the job, wasn't it? A Well, that is the part where I am confused.

Q What are you confused about? A Well, they were arguing about something else at that time and the argument did not have anything to do with the affair there.

Q What were they arguing about? A I do not know what they were arguing about.

Q Well, how do you know it did not have anything to do with the affair? A Well, it did not sound that way.

Q Well, what did you hear? What did you hear, Cort? Uh? A I cannot remember now what I heard, but I knew at that time that there was something else besides that that they were—

Q Well, at any rate, you did not pull off the stick-up at that time, did you? A No.

Q And the reason you did not pull off the stick-up at that time was that Simione and Raymondo refused to go through with it, is that right? A Well, I do not know if the place was open.

Q I am not asking you about whether the place was open or not. Now, just answer my question. The reason you did not go through with the stick-up at that time was because Raymando and Simione refused to go through with it. That is correct? A No.

Q Why didn't you go through with it? A Because I told you before I didn't know why they didn't go through with it, but it was not on account of something else that was said or done. There was an argument. They said, "Oh, we will get out of here now."

Q Who said, "We will get out of here now"? A Some one of the three.

Q Who? A I don't know.

Q Now, wait a minute. You were driving the automobile, you had stolen that automobile and

you were participating in the conversation on the way to Orange, about finding a likely place to stick up and get some money, weren't you? A I was not doing any talking.

Q Well, you were one of the group, you were to share in the proceeds, weren't you? A Yes.

Q It was to be a fifty per cent. proposition, or a twenty-five per cent. proposition all around and each one of you were to get an equal share? A Yes.

Q Now, you were supposed to get an equal share under this stick-up? That is correct? A Yes.

Q Well, you were interested then whether there was to be a stick-up or not, weren't you? A I did not care whether there was or not.

Q Well, you were going to get a portion of the proceeds? A Well, I didn't care.

Q I did not ask you whether you cared or not. You were to get a proportion of the proceeds? A Yes.

Q Yes, you were going to get your equal share if the place was stuck up? A Yes.

Q And you needed money, didn't you? A Yes.

Q You did not have any money with you? A No.

Q Then you were interested whether or not the place was stuck up, so as to get some money, is that right? A Yes.

Q And do you mean to tell this Court and jury that you do not know the reason why that place was not stuck up in the morning, the second time when you and your friends placed your car around on Lenox street? A Yes.

Q You mean to tell us that? A Yes.

Q Don't you know as a matter of fact that the reason why it was not stuck up at that time was because Simione and Raymondo got cold feet?

Mr. Becker: The defendant answered that question several times and said no.

The Court: Well, he can answer it now. Can you answer that?

The Witness: You are asking me—I am trying to say just exactly as I know. I know now after hearing all the statements and everything why it did not happen, but I am telling what I knew at that time.

Q Well, didn't you know it at that time? A No, I didn't.

Q So that you were satisfied to drive away from the place? A Yes.

Q And forget about it? A Yes.

Q Now, then, after you drove away from this place and you left—before you left Raymondo and Simione, before they got out of the machine, you and Calabrese had a conversation together with Raymondo and Simione while they were present, didn't you? A There was a conversation about the gun.

Q What was the conversation about the gun? A Calabrese wanted to give it back to Raymondo and Raymondo said, "I don't want it."

Q Uh?

The Court: Talk out louder.

The Witness: So Raymondo said he did not want the gun.

Q Was that in the morning? A Yes.

Q You are sure that was the same morning? A That morning.

Q Why, wasn't there a conversation in which you and Calabrese said, "If you fellows won't go through with it, we will get somebody that will"? A No.

Q Didn't Calabrese say that? A No.

Q Well, you knew Calabrese was getting someone to come over? A Yes.

Q You knew Lamilino? A Yes.

Q And you knew Bruno? A Yes.

Q And you knew they were a couple of stick-up men? A No.

Q Well, you did not think they were just gentlemen that would not take part in a stick-up?

Mr. McGeehan: I object.

The Court: Sustained.

The Witness: I had never seen them before that on the street.

Q When did you first meet Bruno? A Down at Rahway.

Q In the Reformatory? A Yes.

Q And where did you first met Lamilino? A The same place.

Q Down at Rahway in the Reformatory? A Yes.

Q So that you had seen them before? A Yes, but not on the street.

Q And you had an arrangement with Calabrese whereby you were to meet Bruno and Lamilino, didn't you? A Calabrese told me that he was going to meet them at the D., L. & W. station.

Q He told you that he was going to meet them? A Yes.

Q And do you know when he told you who he was going to meet? A Yes.

Q And you knew the purpose of meeting them, didn't you? A Who, me? He received a call from Lamilino a week before that and said he was coming over to see him. So there was only —at that time I did not know what was supposed to come off.

Q Didn't you know that Calabrese had called Bruno up on the telephone—called Lamilino up on the telephone at Hoboken and asked him to come over? A He asked him if he was coming over.

Q He asked him if he was coming over, is that right? A Yes.

Q And he asked him that in the telephone conversation he had with him on that day, that is correct? A He said so.

Q And he asked him if he had a sweetheart, referring to a gun as a sweetheart? A I didn't hear that conversation.

Q Didn't he ask him that? A I don't know.

Q Didn't he tell you that he asked him that? A No.

Q Didn't he tell you that? A No.

Q Well, at any rate, you knew that he called him on the telephone at Hoboken? A Yes.

Q And you knew also that Lamilino and Bruno were coming over and you were to meet them with this stolen car at the D., L. & W. station, right? A Right.

Q And you knew that Calabrese had the gun? A Yes.

Q Now, did Bruno and Lamilino show you their guns? A Not when they came over.

Q When did they first show them to you? A I didn't know they had them until after we were up to the place.

Q You did not know it? A No.

Q Well, now, you went with Bruno and Lamilino to Billy Jinks' house, didn't you? A No.

Q That is Cardinale? A No.

Q Where did you go with them? A We drove around there.

Q Uh? A Just drove around the city.

Q Well, after you got in the car with them, they decided to drive around until it got dark, didn't they? A No.

Q Uh? A No.

Q What did you drive around for? A Just drove around, for no reason whatsoever.

Q What for? A For no reason.

Q No reason at all, just out for a ride to get the air, was that it? A Yes, sir.

Q That is it, is it? A Yes.

Q Now, isn't it a fact that you drove around, that you decided between you that you would drive around until it got dark? A No.

Q And while you were driving around, didn't Calabrese, in your presence, ask Wally and Bruno if they brought their guns with them? A I did not hear him ask that.

Q What is that? A I don't know.

Q Where was Calabrese sitting? A He sat in the seat with me.

Q And there wasn't anything the matter with your hearing, was there? A No.

Q And if he asked them you could have heard it, couldn't you? A Well, I didn't hear it.

Q I am asking you a question. If he asked them that you could have heard it, couldn't you? Couldn't you, Cort? A I don't know.

Q Don't you know whether you could have heard it or not?

Mr. McGeehan: Your Honor, I object to that. He has said it four or five times. He said he did not hear it.

Mr. Fisch: If the Court please, I don't know that Mr. McGeehan should object to my cross examination of this witness on his direct examination. He represents Calabrese—

The Court: Well, the witness said he did not know if he could have heard it or not.

Q There wasn't anything to prevent you from hearing it? A I said before the car was not working right, it was making noise, and I am driving a car and I got other things to think about besides conversations.

Q When was it that this car was not working right and was making noise? A It was not working right all day.

Q What was the matter with it when Bruno and Lamilino got into the car? A I don't know what was the matter with it.

Q What was the noise it was making? A I thought it was the shackles on the springs, they were making a sort of a loud noise all the time.

Q That did not interfere with your plans to meet Lamilino and Bruno at the station with that car, did it? A No.

Q And you don't mean to tell us that the noise of this, which you think was the noise of the shackle bolts, was sufficient to interfere with your hearing any conversation that was had in the automobile between Calabrese, who was sitting on the front seat with you, and Bruno and Lamilino who were sitting in the back seat? A I did not say the noise was sufficient to prevent me from hearing, but that I was not listening to it.

Q You were not listening to it? A No, sir.

Q You were not interested in it? A I would not say I was not interested.

Q Well, you were interested, weren't you? A I was interested, yes.

Q And being interested, you mean to tell us now that it is not the fact that in that car, after Wally and Bruno got into it, that Calabrese said to them, asked them if they had brought their guns with them? A I said I did not hear it.

Q You did not hear it? A No.

Q And didn't you hear both of them say yes? A No, sir.

Q And didn't you hear them ask Calabrese if he had a gun? A No.

Q Didn't you hear Calabrese tell them that he had a gun in his pocket? A No.

Q Well, you knew that he did have a gun in his pocket? A I knew that he did have a gun, yes.

Q Now, then, you say you were just driving around to get the air. That's right, is it?

Mr. Becker: Your Honor, he did not say they were riding around to get the air.

The Court: He said they were just riding around the city.

The Witness: That is all.

Mr. Fisch: I asked him if they were just riding around to get the air and he said, "That is it."

Q Now, that was it, wasn't it? A Why, yes, in a sense.

Q Well, now, in what sense, Cort? Let us get this thing down to a solid foundation. Let's

you and I understand one another. Was that the reason you were driving around? A Yes, sir.

Q And no other reason? A No.

Q Now, listen, you want to tell the truth? A I am telling it as I knew it at that time.

Q You want to tell the truth, don't you? A As I knew it at that time, yes, not what I know as the fact now.

Q You want to tell the truth about this thing, or don't you? A As I remember it, I do.

Q Answer my question yes or no. Do you want to tell the truth about this thing? A Yes, sir.

Q Now, isn't it a fact that you were driving around in this car until it got dark? A No.

Q You had left the D., L. & W. station? A Right.

Q And you know the City of Newark pretty well, don't you? A I do.

Q You know where Branch Brook Park is, don't you? A Yes, sir.

Q And you know where Forest Hill is, don't you? A Yes.

Q And you know there is a lot of good air up around there? A We were up around there.

Q You drove in through Branch Brook Park, did you? A Yes, sir.

Q And through Forest Hill? A Yes, sir.

Q And you know there is a lot of good air up there, don't you? A A lot of good air all over.

Q Well, now, having been over there at Branch Brook Park, and just being out for a ride, will you tell this Court and jury how it came that you drove all the way from Branch Brook Park, which is at the north end of the city, all the way over to Sanford avenue, or near

Irvington? A We drove all over the town, we were driving all over the town.

Q Tell us how you came to drive over Sanford avenue? A I don't know.

Q Who suggested it? A No one suggested it.

Q Nobody suggested it? A No, sir.

Q And you were at the wheel? A Yes, sir.

Q And you were the one who was going to share in the proceeds of a stick-up? A Right.

Q And you had been over to this place in the morning, hadn't you, at Grossman's? A Yes, sir.

Q And without anybody suggesting it you drove back to that same place that night when you had Lamilino and Bruno in the car with Calabrese alongside of you. Is that right? A I drove.

Q Answer that yes or no. Isn't that right? Yes or no. A Why, I drove past—

Q Will you answer my question? A No.

Mr. Becker: Your Honor, the witness is trying to answer.

The Court: What do you mean by saying "No," that you won't answer it or that your answer is "no."

The Witness: I did not just ride to the place the way the Prosecutor puts it and stop there and say, "This is the place." That is the inference that he has, but I was driving by the place, and I did not even see the place and Calabrese said, "There is the place that Raymondo wanted to look over in the morning," and so, Bruno said, "Well, let us see how it looks." So we drove around the corner, and you know the rest.

Q I know the rest.

Mr. McGeehan: I object to that. That is not a question.

Mr. Fisch: That is what he said, "You know the rest."

The Court: It is a comment.

Q You drove around the corner, then? A I did.

Q And when you drove around the corner that was when the conversation took place between Bruno and Calabrese and Lamilino with regard to how this stick-up was to be pulled off, wasn't it? A Yes, sir.

Q And that was the time when the arrangement was made that Bruno was to go in and ask for a 5-cent article, a pack of chewing gum. Right? A Yes, sir.

Q And that was the time when the arrangement was made that while the druggist was giving you, or was giving him his change, that Lamilino and Calabrese should walk into this store. Right? A Yes.

Q And that was when the arrangement was made that Calabrese should go into the back room and cover anybody that was in the back room with the gun. Right? A Yes, sir.

Q And that was when the arrangement was made that then they were to take the money out of the drawer and take any jewelry that the man had that could not be identified. Right? A I don't know. I did not hear anything about jewelry.

Q The money part—you remember that, don't you? A Yes, sir.

Q And you knew that was what they were going into the store for while you were seated at the wheel of the machine? A I do.

Q And you were waiting out there at the wheel of that machine while they went away to

carry out that plan. Is that right? A Yes, sir.

Q And you sat at the wheel of the machine so as to be able to quickly take them away from the scene of this hold-up. Is that right? A Yes.

Q And while you were seated at the wheel of the machine you heard a couple of shots fired? A Yes, sir.

Q And then you saw these three men, Lamilino and Bruno and Calabrese, come back to the machine with guns in their hands, didn't you? A I did not see them with the guns in their hands. I only saw—it was darker on the corner, and I could see the three shadows.

Q You could see what? A I could see the three forms, I knew who they were, but I could not see anything about them that—I could not see what they were carrying or anything like that.

Q You saw their guns subsequently, didn't you? A Subsequently I did.

Q And you said on your direct examination that you saw that Lamilino had blood on him, didn't you? A I did not say that on cross examination.

Q You did not say that? A I did not.

Q You did not say that Lamilino was hurt? A Why, from the way they were helping him to the car, I knew that he was hurt.

Q You knew that he was hurt? A I knew that it was Wally.

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

Q You call him Wally, don't you? A I do.

Q And didn't you say on your direct examination that Wally seemed to be hurt? A Yes, sir.

Q Well, what made it seem that he was hurt, was it that he had blood on his shirt? A I could not see his shirt, no.

Q Well, what made it seem that he was hurt? A Because they were helping him.

Q Who was helping him? A Bruno and Calabrese.

Q And when you heard those shots fired and saw these men coming, you opened the doors of the car, didn't you? A Yes.

Q So that they could get in quickly? A Yes, sir.

Q And you started the motor, didn't you? A Yes, sir.

Q So that you could get away quickly? A Yes, sir.

Q And then you wanted to know what the shooting was about? A Yes, sir.

Q And they told you that they had shot him? A Yes, sir.

Q And Bruno told you that he had fired a shot? A Yes, sir.

Q And Calabrese told you that he had fired a shot? A Yes, sir.

Q Is that right? A Yes, sir.

Q And you then said that you were glad because you were afraid that one of them was hurt. Didn't you? A I did not say the exact words.

Q Well, not in the exact words, but words to that effect? A I said I was sorry that there was a shooting. That's all.

Q Didn't you say that you were afraid that they had been shot? A No.

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

Q Sure about that? A Yes, sir.

Q And then after you were in the car, after they were in the car and you had started the motor up, that was when you drove down to 70 Plane street? A It is.

Q Whose room was that? A Calabrese.

Q And you spent several nights there, didn't you? A A few nights.

Q Well, how many? A Two.

Q Before this shooting? A After.

Q How many before the shooting? A Well, I was up there, but I did not stay there.

Q Well, you were up there very often, weren't you? A No.

Q Calabrese was a pretty good friend of yours, wasn't he? A Yes, sir.

Q You were pals, weren't you? A Yes, sir.

Q Now, then, when you went up there in the room you saw Wally there? A Oh, yes.

Q And you saw the blood on his shirt, didn't you? A I did.

Q And you saw blood on his collar? A I did.

Q And you heard Bruno describe what took place to Raymondo, didn't you? A I did.

Q And you heard Bruno say to Raymondo "If you ever say a word about what you have heard here, we will take you for a ride," didn't you? A I heard something to that effect.

Q Well, it may not be the exact words, but that was the purport of it, wasn't it? A Yes, sir.

Q And you heard Bruno and Lamilino make the arrangement that they were to be notified over the telephone about this man's condition, as to whether he died or not? A Yes, sir.

Q Who did he make that arrangement with? A Calabrese.

Q And Calabrese was to notify them and let them know? A Yes.

Q And did you see Wally take his shirt off? A Yes.

Q And give it to Calabrese? A Yes.

Q And Calabrese burned it up, didn't he? A He took it out of the room, he said he did.

Q He took it out of the room in a garbage pail, didn't he? A Yes, sir.

Q Some kind of a pail? A Yes, sir.

Q And then he came back and said he had burned the shirt up. Right? A Yes.

Q And he gave Wally another shirt, didn't he? A Yes.

Q And then Wally and Bruno went off, back to Hoboken and to New York? A Yes, sir.

Q You know that Wally lives in Hoboken? A Yes.

Q And you knew that Bruno lived in New York, didn't you? A Yes.

Q Now, when you left that room you still used that same stolen automobile, didn't you? A Yes, sir.

Q And it was on a Thursday, the 25th of April, three days after this stick-up, that you abandoned the automobile in front of 241 Bank street, wasn't it? A Yes, sir.

Q And that was the time when that colored man who came here to testify, Mr. White is his name, spoke to you about the machine? A He did.

Q You saw him there, didn't you? A I did.

Q And there isn't any question about the fact that that was on a Thursday? A No.

Q There isn't any question about the fact that that was the 25th of April, is it? A No.

Q Now, subsequently you were arrested, weren't you, down at the terminal? A I was.

Q And you were brought into police headquarters and you were questioned about this

thing and you were faced with Calabrese and faced with Lamilino, and you said you did not know them, didn't you? A No.

Q You said you did not know them? A No, I did not.

Q What did you say? A I said I did know them.

Q And did you immediately admit your part in this thing? A No, I did not.

Q You denied having any part in it, didn't you? A I did.

Q You denied any knowledge of it at all, didn't you? A I did.

Q And you kept on denying all knowledge of it until you were faced with the fact that Raymondo had told a story about being in a machine in the morning? Right? A No.

Q And until you were faced with Calabrese and Calabrese said to you, "They got everything, they know all about it"? A Yes.

Q And when Calabrese told you "They got everything and they know all about it" and Calabrese said to you "That Punk upstairs told them everything," didn't he? A Well, I don't remember any words he used at that time.

Q What? A I don't remember what Calabrese said at that time.

Q You remember that he did say "They got everything, they know everything." You remember that, don't you? A Something like it.

Q And you remember him referring to Raymondo there, don't you, Raymond, as you call him? A Yes, he said something about Raymond.

Q What did he say about Raymond? A I don't know.

Q Now, you said that he said something. What was it that he said? A He said that Raymondo gave everything away.

Q And didn't he also say "They are going to testify against us at the trial"? A No.

Q When he said "they have got everything, they know everything, they will testify against us at the trial"—he said that, didn't he? A No, he did not.

Q What? A I don't remember what he said about anything at that time. I said in the beginning that I don't remember what I said or what Calabrese said or anything after that.

Q Well, you don't deny that he said it? A I don't deny it because I don't know.

Q And wasn't it then that you said to Calabrese, in the presence of Deputy Chief Brex, "You damn fool, they haven't testified yet, have they"? A I don't remember it.

Q You won't deny that you said that? A I won't deny it, no, because I don't remember.

Q Didn't you then offer to sign the statement which Calabrese had signed? A Yes.

Q You remember that, don't you? A I remember saying that I would sign anything.

Q You offered then to sign the statement that Calabrese had made, didn't you? A Yes.

Q You remember that, don't you? A Well, yes, because that was the thing that stuck in my mind because later on I had a talk with Captain Brex to that effect.

Q And that is why you do remember that. Is that it? A Why, after a while Captain Brex told me not to sign that statement.

Q He told you it would not be fair to you. Is that right? A Yes.

Q You remember that, don't you? A Yes.

Q And then Detective Boland sat down with you and asked you questions and you answered the questions and you told him about this occurrence, didn't you? A No.

Q You did not tell him anything? A No, I only said yes and no.

Q You answered the questions then? A Yes and no, I answered the questions.

Q Did you answer the questions that he put to you? A Yes or no.

Q That is all that you said during the whole conversation with Detective Boland? A That is all I could say.

Q Why, what was the matter with you? A I was sick.

Q What was the matter with you? A I was exhausted.

Q What were you exhausted from? A From the grilling.

Q What grilling? A Well, I was arrested at four o'clock in the afternoon and the statement was not taken until late at night.

Q What time did they start to take your statement? A I don't know, but it was dark.

Q You don't know what time it was? A No, sir.

Q What time did you go to bed the night before? A I don't know.

Q Well, you were arrested around half-past four, and they did not begin to question you as soon as you were brought in, did they? A The minute I was brought in.

Q And for how long a period of time did you continue to deny that you knew anything about this affair? A I don't know how long.

Q What? A I don't know the exact time.

Q Well, what time was it when you finally said "All right, I will sign the statement that Calabrese made."

Mr. McGeehan: I object to that. The testimony is he said he would sign anything.

The Court: The witness also says that he told Brex he would sign Calabrese's statement.

Mr. McGeehan: Yes, as part of that statement "I will sign anything."

Q Now, at that time, was it they said that? A I did not know anything what the time was at all.

Q Were you any more excited then than you are now? A I was.

Q Uh? A Yes.

Q You were, uh? A Yes.

Q And you mean to tell this Court and jury that the only thing you said to Boland was yes and no? A Well, Calabrese was seated alongside of me when they found out I could not write a statement—Calabrese was in the next room and they brought him into the room where I was and one of the detectives said, "Joe, tell him what it was," and so Joe started telling it to me.

Q Joe started telling them? A Yes.

Q And whatever Joe said, they asked you whether it was right or wrong? A I said yes or no.

Q When it was right you said yes, and when it was not right you said no, is that right? A Yes.

Q Well, the answers you gave to detective Boland, whether you answered the questions yes, or whether you answered them no, whatever man-

ner you answered them in, those answers were correct, weren't they? A I do not know, because I do not know what the questions and answers were.

Q Well, you told us just a few minutes ago, didn't you, Cort, that when the question merited an answer of no, you said no, and when the question merited an answer of yes, you said yes. Is that right? A Yes.

Q And you told them the truth down there, didn't you? A As much as I could I did.

Q What do you mean by that as much as you could, you did; what do you mean by that? A As much as I could gather my thoughts. At that time I helped them with the statement as much as I could.

Q What you told them was the truth, was it? A Well, as much as I told them, yes.

Q Did you tell them anything that was not true? A No.

Q And then the statement was written out, wasn't it? A Yes.

Q And it was read to you, wasn't it? A It was.

Q And did you go to school? A I did.

Q And what school did you go to? A 14th avenue.

Q How long did you go to 14th avenue? A Graduated.

Q And after you graduated from 14th Avenue School, where did you go? A Went to work.

Q Did you go to school after that? A No.

Q But you graduated from the public schools of this city, didn't you? A Yes.

Q You are able to read, aren't you? A I am.

Q And you are able to write? A I am.

Q And this statement after it was read to you, was handed to you and you read it out loud? A I did.

Q Did you read it out loud in the presence of Detective Boland here? A No.

Q You say that is not true? A That is not true.

Q You are sure about that? A Absolutely.

Q Now, I show you Exhibit S. 22, and ask you to look over each sheet of that and see whether that shows your signature or not? A May I show these signatures to the Court, please?

The Court: He can answer that question —can't you? Does it contain your signature or not on each sheet?

The Witness: It does.

Q You were not too fatigued or exhausted to sign your name to these sheets? A I want to show the signatures to the Judge.

Q Well, you can show the signatures to the Judge, if you want to, certainly.

The Witness: See how they are written?

The Court: What?

The Witness: I show you the way they were written. I did not even know I was writing my name at that time.

Q You did not know you were writing your name? A I could not collect any of my faculties.

Q Well, you did write your name? A I did, yes.

Q And that is your regular signature, isn't it? A That is right.

Q You can write better than that? You were nervous, weren't you? A Yes.

Q You knew that you had been arrested in connection with a hold-up where a man had been shot and killed, didn't you? A Yes.

Q And you were nervous on that account?

Mr. Becker: The witness testified he was excited.

Q That is so, isn't it? A I do not know the question.

Q (Question read.) A Not on that account.

Q What was the answer? A I say I was not nervous on that account.

Q Well, that did not unnerve you at all? A That was not the direct cause of my nervousness. It was the physical exhaustion and the grilling, how it affected me mentally.

Q Oh, the grilling affected you mentally? A It did.

Q More so than your having been arrested and charged in a case as the defendant, where a man had been shot and killed? A It was the whole affair.

Q What is that? A It was the whole affair.

Q It was the whole affair? A Yes.

Q Now, the police did not beat you, did they? A Yes.

Q Well, how is it that you did not tell us that before? A It was not necessary.

Q I didn't ask you if it was not necessary. A You asked me why I did not and I said it was not necessary.

Q Did you tell your counsel that the police had beaten you? A I did.

Q When did you tell counsel that? A Oh, several months ago.

Q What is that? A Several months ago.

Q Now, which of the police beat you? A Sergeant Moffett.

Q Now, keep your voice up. These jurors say they cannot hear what you are saying. What did you say? A I said Sergeant Moffett.

Q Is Sergeant Moffett in court? Is that the man that beat you? A Yes.

Q Who was present? A Just he and I.

Q Just you and him alone? A He took me into a little room.

Q When was that? A That was when I first went down.

Q What is that? A That is when I denied implication.

Q When you were first arrested? A Yes.

Q The first day you were arrested? A Yes.

Q What time of the day? A Four o'clock in the afternoon.

Q What did he beat you with? A With his fist.

Q Whereabouts? A All over.

Q All over your body? A Yes.

Q Your face and head? A Yes.

Q He beat you up pretty badly? A Yes.

Q I suppose you were black and blue? A Some places I was.

Q Did he give you a black eye? A No, he knocked out my tooth.

Q He knocked out one of your teeth? A Yes.

Q And you were bleeding, I suppose? A No, I was not bleeding.

Q He punched you in the jaw? A Yes.

Q He punched you in the nose? A Yes.

Q Your nose did not bleed? A No.

Q He punched you in the eye? A No.

Q In the face? A In the jaw; in the mouth.

Q In the jaw and mouth, and all around your body? A Yes.

Q And you did not get black and blue?

Mr. McGeehan: I object to that, he did not say he did.

The Court: He said he was black and blue in some places.

Q You did get black and blue? A Yes.

Q Did you get black and blue in the face? A No, sir.

Q Where did you get black and blue? A In the body.

Q Whereabouts? A My back and stomach.

Q Did you complain to anybody about it? A I did.

Q Who? A Detective Kenny. Detective Kenny asked me what was the matter.

Q When? A When he came in he said, "Are you sick?" and I said I was.

Q And what did you tell him? A I told him that my head was not working right.

Q What else did you tell him? A I just tried to explain to him as best I could what was the matter with me, but I did not know what was the matter with me myself.

Q You did not tell him you had been beaten? A Yes, I did.

Q Didn't you just tell me a minute ago that Detective Kenny asked you what was the matter with you and you said you were sick and your mind was not working right? A I did.

Q And you did not know at that time? A I did not know at that time.

Mr. Becker: I object to the statement unless the Prosecutor brings in the entire

statement that Cort told Detective Kenny about what the sergeant told Kenny or happened.

The Court: I will permit it.

Q Didn't you tell us that a few minutes ago? A I did.

Q You did not tell us then about having said anything to Kenny about your having been beaten by Sergeant Moffett? A I was not asked.

Q Oh, you were not asked? A No.

Q Is Detective Kenny in court, is that the man you refer to? A Yes, it is.

Q And you say that you told him on the same day that you allege that Sergeant Moffett beat you, you told Detective Kenny that Sergeant Moffett beat you? A I did not say that. I said he knew it and everyone knew it.

Q Just a minute. I want to get this thing clear. Did you tell Detective Kenny that you had been beaten by Moffett? A No.

The Court: What's the answer?

The Witness: No.

Q Didn't you tell us a few minutes ago that you did tell that to Detective Kenny?

Mr. McGeehan: I object on the ground it is a misstatement of the evidence of the witness. He said everybody there knew it.

The Court: I understood him to say that he told it to Kenny.

Mr. McGeehan: I would like to have the record read.

(Record read.)

Q Didn't you tell us just a few minutes ago, as shown by the record as read by the stenographer, that you did tell that to Detective Kenny? A I did not tell him that, because he did not have to be told.

Q Didn't you tell us that a few minutes ago in this court? A I did.

Mr. Fisch: I move the rest of the answer be stricken out as not responsive.

Mr. McGeehan: I object.

The Court: I will let it stand.

Q Then you did not tell Detective Kenny that you had been beaten? A It was not necessary.

Q I did not ask you that.

Mr. Fisch: And I ask that that be stricken out.

The Court: Answer it yes or no.

A No.

Q Were there marks visible on your face? A Yes.

Q Sure about that? A Yes.

Q And were those marks visible when Deputy Chief Brex was talking to you? A I don't know.

Q Well, you said there were marks visible on your face. Were they visible? A I do not mean they were visible, but I could feel them.

Q Well, now, you just said a minute ago that they were visible. A I beg your pardon. I did not say it.

Q You did not mean that? A No.

Q Well, were there marks visible? A I could feel marks.

Mr. Fisch: I ask that that answer be stricken out as not responsive.

The Court: Strike it out.

Q Were there any marks visible on your face? A Only that my tooth was out in front.

Q Did you show that to anybody? A Captain Brex was there.

Q Did you show it to him? A Yes.

Q You showed that to Captain Brex? A I showed him the tooth.

Q Where was the tooth? A The tooth was on the desk.

Q You showed him the tooth? A Yes.

Q What did you say to him about the tooth? A I did not say anything.

Q You just showed him your tooth and said, "Here, look at my tooth"? A It was on the desk.

Q Well, did you lay it on the desk? A Yes.

Q What did you say to him about it? A I did not say anything.

Q Why not? A It was not necessary to say anything.

Q Why did you lay it on the desk? A So he could see it.

Q Did he ask you about it? A He threw it in the waste basket.

Q Who threw it in the waste basket? A Why, Moffett saw it on the desk and he put it in the waste basket.

Q Who put it in the waste basket? A Moffett.

Q Nothing was said about it? A No.

Q You put it on the desk yourself? A Yes.

Q Your mouth was not bleeding? A No.

Q And you made no mention about the tooth excepting to lay it on the desk in the presence of Deputy Chief Brex? A Yes.

Q And Moffett? A Yes.

Q And Moffett took the tooth and put it in the waste basket? A Yes.

Q And nothing else happened? A No.

Q Who else was present when you did that? A Brex and Moffett.

Q Didn't you just say a few minutes ago on cross examination that you showed the tooth to Deputy Chief Brex? A Well, I indicated it on the desk.

Q How did you indicate it? A With my finger.

Q Just show us how you did it. A Like that. (Illustrating.)

Q Where did you take it from? A I took it from my mouth.

Q So that you took the tooth out of your mouth in the presence of Deputy Chief Brex? A Yes.

Q It was full of blood? A No. It was a tooth on bridge work, it was a false tooth.

Q And you took it right out of your mouth and showed it to Deputy Chief Brex by indicating it with your finger and he threw it in the waste basket and nothing was said about it? A No.

Q And you were pretty shaky when the statement was taken? A Yes.

Q You showed the Court a few minutes ago that you could not write? A Yes.

Q Now, I show you the last paragraph on that statement and ask you whether or not that is in your handwriting? A Yes.

Q Now, can you point out anything to the jury what was the matter with that handwriting?

A I had to stop and think on every word before I could think how to spell it.

Q Nobody spelled any of these words for you, did they? A No.

Q And can you show me any word in those last two paragraphs written by you which you say nobody told you how to spell which are misspelled? A I can spell.

Q Of course you can spell. Can you show me any words in those two paragraphs which are misspelled?

Mr. Becker: The witness says he can spell. There is nothing to show it was misspelled.

A No, I said I had to stop and think every word.

Q Yes, you had to stop and think because you were excited and you were nervous, because you were arrested in this murder? A That was a contributing cause.

Q That is your answer? A Yes.

Q But this grilling you say you underwent and this beating you say you underwent, that did not interfere with your writing these two paragraphs in the fashion they appear to be written on this sheet without the misspelling of any one word in it, did they? A No.

Q Now, you have been convicted of crime, haven't you? A I have.

Q How many times? A Once.

Q Once? A Yes.

Q And on how many indictments? A I do not remember.

Q Eh? A I do not remember.

Q Well, now, it was ten, wasn't it, ten indictments, wasn't it? A I do not know.

Q Well, now, didn't you plead non vult?

Mr. McGeehan: What date?

Mr. Fisch: On September 30, 1926, to ten indictments.

The Witness: I do not know how many. There were several, but I do not know just that there were ten or not.

Q And weren't those indictments, four of them for larceny of automobiles and six of them for assault and battery and robbery? A I do not remember just what the different numbers of each charge were.

Q Well, can't you answer that? Didn't that make enough difference in your life, Cort, what you were convicted of? A Not the amount.

Q Didn't that make enough difference in your life, Cort, to remember what you were convicted of? A Not the counts.

Q Well, these were each separate charges, weren't they, each separate crimes, weren't they? A Yes, sir.

Q And weren't you convicted of six separate crimes of assault and battery and robbery?

Mr. McGeehan: When was it, Mr. Fisch?

Mr. Fisch: In September, 1926.

Mr. Becker: The witness testified that he did not know, that he was convicted of one crime, but he did not know how many counts there were. There were several counts but he did not know what they were.

Mr. Fisch: I am entitled to have the record, and if this man cannot give be answers I am entitled to put the records in.

The Court: Go ahead. I haven't heard any objection.

Q Answer the question. A What is the question?

Q (Question read as follows: "Q And weren't you convicted of six separate crimes of assault and battery and robbery in September, 1926?") A It must be, if the record is so. I have no doubt it is true.

Q Never mind about what the record shows. It is so or isn't it? A It is so.

Q Then, you remember that, don't you? A I don't remember the number of counts.

Q You don't remember how many crimes you committed that you were convicted of? A No, sir.

Q And don't you remember that in addition to these six crimes of assault and battery and robbery, for which you were convicted, that you were also convicted of four different, separate and distinct crimes of stealing automobiles in September, 1926?

Mr. Becker: Your Honor, I understood the Prosecutor to say there was an attempted robbery and not a robbery. I would like to have that cleared up, whether it was an attempted robbery or whether an actual robbery was committed.

Mr. Fisch: I did not say anything about any attempt.

The Court: I don't know how I can clear it up. You can re-direct on it afterwards, if you want to.

Q Answer my question. Is that right? A What is it, please?

Q (Question read as follows:) "And don't you remember that in addition to these six crimes of assault and battery and robbery, for which you were convicted, that you were also convicted of four different, separate and distinct crimes of stealing automobiles in September, 1926?") A Yes, sir.

Q You remember that, don't you? A Yes.

Q Why did you tell us then that you did not remember? A I did not remember the number of counts. That is all I said I don't remember.

Re-direct examination by Mr. Becker.

Q Mr. Cort, why did you drive away from the scene of that vicinity of Sanford avenue and Lenox street?

Mr. Fisch: I object to that unless the time is fixed.

Q On the 22nd day of April, 1929, the second time.

Mr. Fisch: I submit, if your Honor please, that we have been all over that. There is nothing re-direct about that.

The Court: I think there was considerable time spent on cross examination, to get the witness to admit that he drove away because these other two fellows got cold feet, which the witness either did not admit, or admitted after considerable examination—I have forgotten just which, and I suppose it is a proper subject now for re-direct.

Q Will you answer that? A I don't know just what you mean in the morning.

Q (Question read: "Mr. Cort, why did you drive away from the scene of that vicinity of Sanford avenue and Lenox street on the 22nd day of April, 1929, the second time?") When you arrived there. A As I said before, there was an argument and they told me to drive downtown again, so I just drove away.

Q Is it a matter of fact that Raymondo and Simione said they would not go through with it? A Something about that, some kind of an argument.

Q And did Raymondo ask Calabrese for the gun at that time? A No, not until later, until we got down to Jay and Orange streets.

Q Did you say anything about wanting to retract and refuse to go on with this hold-up?

Mr. Fisch: I object to that.

The Court: Sustained.

Q Now did you drive that car around all afternoon after you left Sanford avenue and Lenox street the second time, until nightfall?

Mr. Fisch: I object to that, if the Court please, as being immaterial, and not being re-direct examination. The testimony elicited from this witness on his direct examination covered all of that situation. And there has been nothing brought out on the cross examination with regard to the driving around of the car in the afternoon which would warrant a question on re-direct examination on that subject.

Mr. Becker: The Prosecutor brought out the fact that this witness did not have any money at all. Now, this witness had charge

of the automobile and I would like to know whether or not Cort, at the time he left the scene the second time, had enough gas in that car to continue to drive around from morning until late that evening of the day of the 22nd of April, 1929.

The Court: If you want to show that somebody bought gas for the car during that day, ask the question, get to the point.

The Witness: Raymondo bought gas.

Q Raymondo bought gas? A Yes, sir.

Q How much gas did he buy? A About five gallons.

Q Who was with you? You testified on the direct that Raymondo was with you in the vicinity of 241 Bank street when White saw you there. Is that right? A Yes, sir.

Q Now, you arrived at police headquarters at four o'clock that afternoon? A About that time.

Q And you testified that you were there until late at night? A Yes, sir.

Mr. Fisch: He was there longer than that.

Mr. Becker: Yes, from Sebold's testimony he was there until daybreak.

Q And did it take the officers all that time to get that ten page statement from you?

Mr. Fisch: I object to that, if your Honor please.

The Court: I will permit it.

A Yes, sir.

Q Now, you heard the testimony that you were in Chief Brex' room? A Yes, sir.

Q And who told you about this little room that you speak about under cross examination by the Prosecutor? A The room is across the hall from Captain Brex' office, as I remember.

Q It is a little room, isn't it? A Yes, sir.

Q Right off from the detective's room?

Mr. Fisch: I object to that, if your Honor please, to any leading questions by Mr. Becker.

The Court: Well, it is all immaterial.

Q And how long were you in that little room? A I don't know.

Q Describe that little room, will you?

The Court: How is that material?

Mr. Becker: It was brought out by the Prosecutor, your Honor, that the entire transaction, the statement and the signing of the statement was made in Captain Brex' room. Through the Prosecutor, the witness testified that he was taken into a little room.

The Court: That is probably material, but what difference does it make whether there was one window in the little room or two windows?

Mr. Becker: There were no windows in the room.

The Court: All right, but is it material? I don't want to shut out any of your defense that is material.

Q Where did that tooth come from that was knocked out of your mouth when you were

punched by Sergeant Moffett? A Where did it come from?

Q Yes, which part of the mouth? A The front.

Q And Brex said nothing to you about that? A No, sir.

Q And are you sure that Sergeant Moffett threw it in the waste basket? A Yes, sir.

Q Now, when you pleaded non vult to an indictment on September 30, 1926, did you have counsel with you at that time?

Mr. Fisch: I object to that, if your Honor please, it is immaterial.

The Court: Sustained.

Q Did you know what you were pleading to?

Mr. Fisch: I object to that, if your Honor please.

The Court: Sustained.

Q Did you actually participate in a robbery?

Mr. Fisch: When?

Q According to the indictment which Arthur Cort pleaded to on September 30, 1926?

Mr. Fisch: I object to that if your Honor please, we are not going to try those cases over again.

The Court: You may ask him what those indictments were.

Mr. Fisch: He is asking about an indictment on September 30, 1926.

Mr. Becker: I understood there was one indictment and ten counts.

Mr. Fisch: No, there were ten indictments.

The Court: The witness was the only one who said anything about counts. Have you the indictments there, Mr. Prosecutor?

Mr. Fisch: I have the indictments.

The Court: Let counsel for the defense see them. This is a matter that there ought not to be any controversy about. What do the records show, what were the indictments for?

(Counsel for the defendant Cort examines papers.)

Mr. Fisch: Now, counsel has examined the indictment, and I think it is only fair to the Court and the jury to have counsel, who examined the indictments, say what they are for.

Q Mr. Cort, did you enter a store in reference to one of these indictments presented to you on the 30th day of September, 1926?

Mr. Fisch: I object to that.

The Court: Sustained.

Mr. Fisch: He may have been the driver as he was in this case. I think it is only fair, if the Court please, to the Court and the jury, to have counsel specify the indictments which he has examined so that they may appear in the record, he has called for them, and I have produced them.

Mr. Becker: I did not call for them, your Honor. In fact, there was a question

brought up as to whether it was an attempted robbery or a robbery and I have asked the witness whether he entered any one of these stores, and he claims he did not know what he pleaded to.

Mr. Fisch: I object, he does not claim any thing of the kind.

The Court: I have not heard any such testimony, counsellor.

Mr. Becker: It is my understanding that he testified that on one day he pleaded to an indictment of ten counts, and there is produced ten indictments.

The Court: The thing that brought up the question was that you asked him whether or not it was a fact that what he pleaded to was an attempted robbery and not a robbery. Now, you do not press that question, is that right?

Mr. Becker: Yes.

Re-cross examination by Mr. Fisch.

Q It is a fact, isn't it, Cort, that you pleaded non vult you were convicted, by being convicted under Indictment 209 of the September Term of 1926, charging you with the larceny and receiving and an automobile in the City of Newark, that is right, isn't it? A Yes, sir.

Q And it is a fact, isn't it, that you were also convicted under Indictment No. 210 of the September Term of 1926, charging you with the larceny and receiving of an automobile in the City of Newark, and operating it without the permission of the owner, Alfred DeCozen, that is right, isn't it?

Mr. Becker: May I interrupt the Prosecutor at this time. The Prosecutor is reading indictments which have been presented by the Grand Jury and there is nothing here —the question of a conviction—in fact the defendant Arthur Cort was indicted, but that does not mean to say that he was convicted.

The Court: The Prosecutor is asking the defendant if he pleaded guilty to a certain indictment and is reading enough of the indictment to identify it so the defendant can intelligently answer his question. I think it is quite proper. He answered yes to the DeCozen indictment.

Q Now, isn't it a fact also, that you were convicted under Indictment 211 of the September Term of 1926, charging you with the larceny and receiving of an automobile, the property of Arthur D. Woolf, and driving it without his permission in the City of Newark? A Yes, sir.

Q And isn't it a fact that you were also convicted under Indictment 212 of the September Term of 1926, charging you with the larceny and receiving of an automobile and driving it without the permission of the owner, J. D. Mockridge, Inc., in the City of Newark? A Yes, sir.

Q And isn't it a fact that you were also convicted under Indictment 213 of the September 1926, Term charging you with entering and robbery in the City of East Orange on the 9th of July, 1926? A Yes, sir.

Q And isn't it a fact that you were convicted under Indictment No. 217 of the September Term, 1926, charging you with assault and battery with

intent to rob one Louis Severn in the Town of Irvington on the 7th of July, 1926? A Yes.

Q And isn't it a fact that you were convicted under Indictment 218 of the September Term, 1926, charging that you, with others, did commit a robbery on Louis Lemberg of money of the value of $85 and a watch and other articles therein mentioned? A Yes.

Q And isn't it a fact that you were convicted under Indictment 219 of the September Term, 1926, charging that you, together with others, did commit the crime of robbery on the 15th of August, 1926, upon one Max Perlmutter, by taking money of the value of $331 and postage stamps from him? A Yes, sir.

Q And isn't it a fact that you were convicted under Indictment 221 of the September Term of 1926, charging you, together with others, of entry and robbery on the 6th of July, 1926, in the Town of Belleville, entering a store building and robbing Frank Schwiekert of cigars, two boxes of cigars? A Yes, sir.

Q Now, you said you lived up there on Clinton avenue, didn't you? A Yes, sir.

Q At the time of this hold-up of Grossman's store you were on parole from the New Jersey Reformatory, weren't you? A Yes, sir.

Q And you had been given some money by your mother to see the parole officer, weren't you? A I was not.

Q You never went near the parole officer? A I don't know anything about that at all.

Q You never went home from that day until the present time, did you? A I don't know what you are talking about.

RECESS UNTIL TWO P. M.

After Recess

Defendant Cort Rests

JOSEPH CALABRESE, one of the defendants, sworn in his own behalf.

Direct examination by Mr. McGeehan.

Q Calabrese, you are one of the defendants in this case? A Yes.

Q And your full name is Joseph Calabrese? A Yes.

Q How old are you? A Twenty-one.

Q And where did you live at the time you were arrested? A 243 Eighth avenue.

Q With whom did you live there? A My people.

Q And who are your people? A Father and mother.

Q And are they here?

Mr. McGeehan: Stand up.

Mr. Fisch: I object. What is the necessity for that?

The Court: No necessity for it.

Q How long did you live with them? A Since September 13th.

Q Uh? A Since I came out of the Reformatory.

Q Calabrese, were you born in this city? A No, sir.

Q Where were you born? A Raritan, New Jersey.

Q And when did you come to live in Newark?

Mr. Fisch: How important is that?

The Court: I do not think it is important, but in a case of this kind, or a charge of this kind, I think it is fair to allow these facts to go in.

A About thirteen years ago.

Q Where were you educated? Did you go to school here? A Part of it.

Q Up to what grade did you go to the public school? A Fifth grade.

Q Then where were you sent? A The ungraded school.

Q Now, what is your occupation? A Mason.

Q That was your trade? A Yes.

Q Calabrese, on the 22nd of April, 1929, did you in the company with Lamilino, Bruno and Cort, go to the vicinity of Sanford avenue and Lenox street for the purpose of committing a robbery there? A Yes.

Q Previously to that, on that morning you had been in that vicinity with Simione and Raymondo and Cort, had you not? A Yes.

Q When you returned there on the night of the 22nd, just where was the car parked that you rode in? A You mean when I returned to Sanford?

Q On the occasion when the shooting occurred, where was your car? The car that you were riding in? A I do not quite get you.

Mr. McGeehan: I will withdraw that question.

Q You went there in a Chrysler car, didn't you, that car Cort was driving? A Yes.

Q And where did you sit in the car driving along Sanford avenue? A On the front seat.

Q And the other two men you have mentioned were in the back seat? A Yes.

Q And when you got to the vicinity of Lenox street and Sanford avenue, was your car stopped? A Yes.

Q Where did it stop and where did you get out of it? A On Lenox street.

Q That is the street that runs in an easterly direction from Sanford avenue, is it, that is, it runs down the hill toward Stuyvesant from Sanford avenue? A It runs down a hill, I do not know just where it ends.

Q All right, when you got to that point, about how far from the corner on Lenox street was this car parked? A About twenty-five feet.

Q And about how far from the corner was the drug store? A About thirty-five or forty feet.

Q That is just your guess or estimate of it? A Just a guess.

Q Now, is that thirty-five or forty feet that is your estimate, the distance from the entrance of the drug store to the corner? A Approximately, yes.

Q You mean to the street or the corner of the building? A To the corner of the building.

Q And is there one store between the drug store and the corner of the building, that is, was there a store at the corner of the building and a drug store right next to it? A Yes, sir.

Q All in the same building? A I did not pay much attention to it by the looks of it.

Q All right. Now, when the car came to a standstill, did all of you men get out of it? A No.

Q Who remained in it? A The driver of the car.

Q And did Cort at any time go in that store? A No, sir.

Q Who did go to the store? A I, myself.

Q Who else. A Victor Bruno and Dominick Lamilino.

Q Cort stayed in the car, Bruno and Lamilino went with you to the store, is that right? A Well, Bruno went first.

Q Did you say Bruno went first? A Yes.

Q And Bruno, how much did he precede you; did you wait any length of time before you started out after him? A A few seconds.

Q Then when you went in the store it was with Lamilino, is that right? A Yes.

Q Now, as you entered that store, you say Bruno had preceded you. Did you see him in it? A Yes.

Q And when you entered, with Lamilino, just where did you see Bruno and what was he doing at that time? A He was handing over a coin to Mr. Grossman.

Q And when you and Lamilino entered the store, where did you go? A We went to the back.

Q And was the back of that store separated by a partition with a swinging door in it? The door being on one side of that partition? A I know there was a door, but I do not know if it was a swinging door.

Q All right, did you go through that door and into the store proper and into the back room, a separate back room of the store, the prescription room? A Yes.

Q Now, did you go alone into that room or did anyone accompany you? A I went in alone.

Q And when you got in there, was there somebody there? A Yes.

Q That was a young lady? A Yes.

Q And was it Miss McEvoy who testified here in the court room? A Yes.

Q Now, when you went into that room, did you have a revolver? A Yes.

Q Whose revolver was that? A William Raymondo's.

Q And you had gotten it from him? A Yes.

Q And did you own any revolver at that time? A No.

Q And did you ever own a revolver? A No.

Q When you went into that room, what did you do with relation to the girl that you saw in there. A I told her to keep quiet and not move and no harm will happen to her.

Q You told her to keep quiet and no harm would happen to her? A Yes.

Q And did you have a revolver in your hand at that time? A Yes, but not with the finger on the trigger.

Q But you had a revolver in your hand? A Yes.

Q When you were in there, what did you see, if anything, taking place? A I heard a scuffling and shouting.

Q What did that sound like? Describe the noises that you heard? A There was a big commotion.

Q It was a big commotion? A Yes, sir.

Q And when you heard that, what did you do? A I went to the assistance.

Q You went to the assistance of whom? A Victor Bruno and Dominick Lamilino.

Q When you went out what did you see? A I seen a big fight going on.

Q Now, when you say a big fight, who was in that fight? A Maurice Grossman, Victor Bruno and Lamilino.

Q Now, when you speak of Maurice Grossman, did you know his name at that time? A No, sir.

Q What was Grossman doing? A He was swinging at them, trying to grab the gun.

Q Swinging at whom and trying to grab what gun? A Trying to get Dominick Lamilino's gun.

Q And who was he swinging at at that time? A Victor Bruno and Dominick Lamilino.

Q And when you came into the room what did he do, if anything, with regard to you? A Nothing, he just kept on fighting.

Q Now, at that point, or at any time, did Miss do you know? A She was at the door.

McEvoy come into the room from the back room,

Q That is at a point from which there was nothing to obstruct her view of the men who were there? Is that right? A I guess there was.

Q You guess there was what? A Obstructing her view.

Q What was that? A Obstructing her view from seeing just what was going on, although she seen the men.

Q But could she see the men from there? A Yes, sir

Q Of course, there were a number of persons in a rather crowded space there, wasn't there? A Yes, sir.

Q Now, Calabrese, did you then or at any time within the store at the cash register, or did anyone, fire any shots at that time? A No, sir.

Q You are sure of that? A Positively.

Q What did you do with regard to the fight that was going on? A I told him to let us go.

Q Who did you tell to let us go? A To Dominick Lamilino.

Q Did you try to go? A Yes, sir.

Q Did they try to go? A Yes, sir.

Q And what happened when you all tried to go? A Dominick Lamilino was in the front and Maurice Grossman was next, Victor Bruno followed and then I followed.

Q What was Mr. Grossman doing at that time? What was happening as you were trying to go out? A As they got to the door—

Q Well, before they got to the door, from the cash register throughout the length of the store, what was happening? A Maurice Grossman said "I will get you, I will kill you, I will kill you."

Q What was he doing besides that? A He was trying to get Dominick Lamilino's gun.

Q Well, what did he have hold of in trying to do that? A He had Dominick Lamilino's arm and his coat.

Q You say during this time you were all moving towards the door? A Yes, sir.

Q Now, from which direction did Grossman have Lamilino. From in front of Lamilino or behind him? A From behind him.

Q And before that happened and while the fighting was going on back of the cash register, what were you and Lamilino and Bruno doing with respect to Grossman, whom you say was hitting at you? A We were hitting at him.

Q Did you? A Well, I did a few times.

Q Did the others? A Yes, sir.

Q Did he let go? A No, sir.

Q When you got to the door or when Lamilino and Grossman got to the door, what happened then? A Well, Lamilino tried to open the door—

Q No, what happened to him? A As he opened the door Maurice Grossman was right on top of him and the commotion—in order not to get hit with the door, Grossman stepped on the radiator, threw himself on the radiator.

Q What happened to Lamilino? A And as the door opened Grossman jumped on him and tripped him, he tripped him and then jumped on him.

Q On whom? A On Lamilino.

Q And did that block your entrance to the door? A Yes, sir.

Q And where were you and Bruno at that time? Inside or outside that door? A Inside.

Q Did you get through the door with Bruno? A Yes, sir.

Q And how did you get past them, if they blocked up the door? What did you do to get through the door? A Took a running jump.

Q And did Bruno do the same thing? A Yes, sir.

Q Now, at that time Grossman and Lamilino were down on the floor? A Yes, sir.

Q And who was on top? A Mr. Grossman.

Q And did you do anything to help get Lamilino away from Grossman at that time? A Yes, sir.

Q What did you do? A Tried to break his grip.

Q And were you able to? A No, sir.

Q Well, how did Grossman and Lamilino get up, Calabrese? How did they get up from in the doorway? How did they get up from the

doorway? Did they get up from there? A We helped him to get up.

Q You helped them to get up? A Yes, sir.

Q And did they get up? A Yes, sir.

Q Now, after they got up, what did Grossman do with reference to continuing his tussle with Lamilino? Where did they go to from being in the doorway when they were helped up? A Off the step.

Q And that was on to the sidewalk? A Yes, sir.

Q When they got onto the sidewalk what happened with respect to Lamilino and Grossman at that time? Were they separated or together? A They were together.

Q In what position—which was the bigger man of the two, Grossman or Lamilino? A Grossman.

Q And were you able to get his grip off of Lamilino? A No, sir.

Q What did you do to try to get his grip off, as you were in the doorway and when you first got on the sidewalk? A Tried to pry them apart.

Q Were you able to do that? A No, sir.

Q Now, at that time did Grossman have Lamilino from in front of Lamilino or from behind him? A From behind him.

Q And what was the position of the two men with respect to Lamilino's gun at that time on the sidewalk? A Lamilino was standing up and Grossman was standing up. Lamilino's back was to Grossman's front, and Grossman was trying to tussle for the gun.

Q Did he have hold of the gun at any time? A Yes, sir.

Q Now, while that was happening on the sidewalk, where was Bruno and where were you? A A few feet away.

Q Where on the sidewalk did this action take place? Did you stay all in one spot or all around the sidewalk? A All around.

Q At that time did you have your gun in your hand? A Yes, sir.

Q Did Bruno? A Yes, sir.

Q And were you successful in trying to get Lamilino away from Grossman at that time through the efforts you have mentioned? A No, sir.

Q Now, when you were all on this sidewalk, Calabrese, did you say anything to Grossman? A Yes, sir.

Q Tell us what you said. A "Leave go, you damn fool, or you will be shot."

Q Did you say that? A Yes.

Q What happened after that? A That shot was fired.

Q Who fired that shot? A Victor Bruno.

Q And how far away from the two were you when that shot was fired? A Victor Bruno was about three or four feet away.

Q Did you know whether that shot struck him or not? A I cannot say.

Q Now, at that time, where were you aiming your gun? A I was aiming at nobody.

Q Calabrese, did you fire a shot on that sidewalk? A Yes.

Q What did you fire that shot at? A I fired at his arm.

Q At which arm? A His right arm.

Q Did you at any time intend to kill him or seriously wound him?

Mr. Fisch: I object to that.

Mr. McGeehan: I think it is a perfectly proper question. The indictment in this case is the statutory form of indictment. The facts as testified to by the State indicate that class of murder which we get within the provision of the statute as to a killing occurring in a hold-up. But the indictment itself is a first degree indictment upon which the defendant could be convicted upon one of several theories and therefore the defendant not yet having completed his testimony, it is perfectly proper for him to state what his purpose was in shooting, because the State is not naturally limited under its indictment to any specific course of proof, and in some courses of proof the question of intent enters very seriously and, therefore, I think it is perfectly proper to ask this question.

The Court: Does the indictment charge a robbery?

Mr. Fisch: No.

Mr. McGeehan: No.

Mr. Fisch: The State's case is already in and the State through me as Prosecutor has opened to the jury and has stated to the jury that the State would rely upon a conviction of murder in the first degree, because of the fact that this was a killing that took place in the perpetration of a robbery or attempted robbery. Under those circumstances, the intent plays no part and there is no intent by the defendant when he fired this shot, and makes no difference. It would be a different proposition if there was a premeditation, if there was a lying in wait, but

here the statute completely covers the proposition and the fact it says a killing took place and under those circumstances is murder in the first degree, the indictment being perfectly proper in the statutory form.

Mr. McGeehan: The theory of the State is no part of the record. In this case the indictment is a general indictment for murder. The defendant is upon the stand and is the first witness in his defense. Under your Honor's charge a definition of murder will naturally be given. The mere fact that the State pursues a certain theory in opening and pursues certain evidence up to the time this case goes up to the present time, there might be a denial there was an intent of a robbery.

The Court: The fact is that the defendant went there with the intention of committing a robbery.

Mr. McGeehan: That may be what the testimony is. It is not a question to be argued from the fact standpoint, but the legal standpoint. There was an attempted robbery. There was no actual robbery committed. At one point this witness testifies that the intent was given up. He said, "Let's beat it, let's go," and he said "Let's run," and thereafter in an effort at flight there was the occurrence that is being testified to. In the case of State *vs.* Turto, I believe, it is the Turto case the Supreme Court has ruled upon the question of a killing that took place after the commission of a hold-up and as held in that case where the loot or thing that was stolen was in the possession

of the defendant, and that the robbery is not completed, and the person killed, a distance from the hold-up would still come within the statute. I know that. The same question would apply where there was no loot. My judgment and opinion is that in this case it makes no difference whether anything was stolen or not, or whether it being so close to the scene of the attempted robbery, I do think until the entire case is closed that under an indictment that charges first degree, in such statutory language, that the question is proper to any defendant in any murder prosecution, may be put to the defendant and it is competent for us to show not only the alleged crime itself, but to give all of the circumstances to the jury, particularly in this case where the issue is limited in a narrow space to show the facts around it. I think the jury is entitled to know that.

The Court: Well, the jury are entitled to know the circumstances under which the shot was fired, but you are not attempting to show intent. Now, there is only one theory you can work out under the theory of the State that it is robbery or attempted robbery. Unless that theory holds, you cannot work out a conviction.

Mr. McGeehan: Why, certainly.

The Court: Not from the evidence that is now in.

Mr. McGeehan: In this case it would be entirely proper for your Honor to charge the standards or rules of law regarding the different degrees of murder and state to the

jury what is first degree murder, what a premeditation of first degree murder consisted of, and the shots having been fired, and by this defendant, I think he is entitled to show what he aimed at and what he intended to do.

The Court: I think he is entitled to show what he aimed at. Sustain the objection.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Q Did you at any time aim at his body in the shooting? A No.

Q Did you know whether or not—I will withdraw that. After Bruno had fired a shot and after you had fired a shot, was there any action on the part of Grossman that was different than just before it? A No.

Q Did you know whether he had been hit by either of the shots at that time? A No.

Q You thought you had hit him, didn't you? A Yes.

Q Where did you think you had hit him? A In the arm.

Q Well, after you had fired the shot that you testified to, was that fired on the sidewalk or in the street? A On the sidewalk.

Q What became of Lamilino and Grossman after that, what were they doing after that? A They struggled from there to the street.

Q And how far into the street did they get? A About three feet away from the curb.

Q And what happened then? A Maurice Grossman fell and Dominick Lamilino fell with him.

Q And did you get Lamilino up? A Yes, after a few seconds.

Q And then where did you go from there? A Picked Lamilino up and carried him to the car.

Q What do you mean by carrying him? You did not carry him with his feet off the ground or anything like that? A No, dragging him along.

Q Was he on his feet? A Part of the time.

Q And did you get into the car with him? A Yes.

Q And did Bruno get into the car? A Yes.

Q Did you drive away? A Yes.

Q Now, you signed—I will withdraw that. You were subsequently arrested, weren't you? A Yes.

Q And did you sign at Police Headquarters a statement regarding your connection with this affair? A Yes.

Q Now, when you signed that statement, Calabrese, or after you signed it, was that read to you? A It was read by Captain Sebold.

Q It was read by Captain Sebold? A Yes.

Q And was that statement substantially what you had said previously to them? A No, sir.

Q Do you understand the word "substantially," do you know what I mean by "substantially?" A You mean the words that I used.

Q No, I don't mean that. I don't mean using the very words that you used. Was it practically the same as you had said in general tone? A In general tone, yes.

Q Those are not your exact words, are they? A No, sir.

Q But what you said to them down there and what you later signed, the language in this, tells the story practically the same as you told it, doesn't it? A Yes, sir.

Q Now, you have heard this read in the court room here by Mr. Fisch? A Yes.

Q And when you say it is not exactly in the words that you used, did you notice that about some parts of it, as to the words that you used? A Some parts, yes, sir.

Q Now, when you were making this statement was anyone asking the questions? A Yes, sir.

Q That is one of the officers, one of the police officers? A Chief Brex himself.

Q And Captain Sebold was questioning you, too? A Yes, sir.

Q Now, did you show them substantially, as Captain Sebold and Chief Brex testified, where the arms of Grossman were and what was happening in the tussle there? A Yes, sir.

Q And what did you say and what did you show them? A I showed them the way the fight was, the way it occurred.

Q Now, did you show them what you aimed at when you fired your shot? A Yes, sir.

Q Did you tell them that you fired at the arm? A Yes, sir.

Q Did you discuss anything or say anything about you thought Grossman got it in the lung? Was that talked about? A Yes, sir.

Q How did that come about? What was said? A Chief Brex came over and said two bullets went in the body, one in the lung and one below the lung.

Q And what did he ask you? A He asked me if I fired a shot and I told him yes.

Q And what, if anything, did you say with regard to the lung after he told you that one was in the lung and one was lower in the body? A He said "Where do you think you hit him?"

Q He said that? A He said "Where do you think you hit him? Well, after that, those were the two bullets, I put it that I hit him in the lung.

Q That was your guess as to where you had hit him? A Yes, sir.

Q Did you know at that time whether or not a shot had hit him in the arm? A No, sir.

Q So at the time you told of your part in this tragedy, you lied about your gun, did you not, as to throwing it away from the bridge? A Yes, sir.

Q Did you later tell the truth about that? A Yes, sir.

Q And did you tell it to Lieutenant Linarducci? A Lieutenant Linarducci and Captain Sebold.

Q Both of them? A Yes, sir.

Q And this gun that is in evidence as Exhibit S. 16, does that look like the gun that you had? A Yes, sir.

Cross examination by Mr. Fisch.

Q Calabrese, this gun, Exhibit S. 16, not only looks like the gun, but it is the gun that you had, isn't it? A Yes, sir.

Q And you put a cross on that gun, didn't you, put a mark on it? A Yes, sir.

Q Where? A Right here (indicating).

Q On the black handle, put a cross on it. When did you put that mark on? A When it was shown by Linarducci and Captain Sebold.

Q And you put a cross on each handle, didn't you, on each side of the black handle? A Yes, sir.

Q And you know it was the same gun you used in the shooting because you looked on the inside of this cylinder and you saw "19" in two places. Isn't that right? A Yes, sir.

Q And that is why you identified the gun at that time? A Yes.

Q Why did you lie at that time in your statement and say that you had crossed the river and threw it off the bridge into the river? A When I was in my cell up to police headquarters, Captain Sebold sent for me and he said, "Now, Joe, tell us the truth about this gun. Is it the one you used or not?" And I said— He said to me, "You will be putting the State to a lot of trouble and spending a lot of money, so if this is the gun why don't you identify it?" So I said "If I am going to put the State to a lot of expense"—I said—"Yes." So he asked me why I told him I threw the gun in the Passaic—

Q You are telling me now about the time when you did identify this gun? A Yes, sir.

Q You are telling me about that, aren't you? A Yes, sir.

Q Well, I am not asking you about that. A I am coming to what you asked.

Q You just come to what I am asking you. Answer my question. Why did you, in the first instance, when you were making this statement which is in evidence, Exhibit S. 18, why did you then, when you were telling the story of this hold-up and this shooting, at that time say that you had gone over the river, over the bridge and thrown the gun into the river? Why did you say that? A If the man did me harm I did not want to make it no worse for him.

Q What is that? A I did not want to implicate anybody else.

Q Well, you knew it was Raymondo's gun, didn't you? A Yes.

Q And it was not a question of trying not to implicate him, was it? A Yes.

Q Well, you knew that Raymondo was under arrest at that time, didn't you? A Yes, sir.

Q And you knew that Raymondo had told the story about the attempted hold-up in the morning? A Yes, sir.

Q And you knew that he was the man, and you knew it was as the result of what he had told the police that the police knew all about this thing? A Yes, sir.

Q And you still say that that is the reason that you said you threw the gun into the river? A Yes.

Q You knew that he was the man who told the whole story to the police, didn't you?

Mr. McGeehan: I object. He has answered that several times and said yes.

The Court: I will permit it.

Q Didn't you know that? A Yes, sir.

Q Now, is that the only reason that you can give to this Court and jury for lying in the statement with regard to throwing the gun in the river? A I did not only tell it to the jury, but I told it to Lieutenant Linarducci and to Captain Sebold down to headquarters.

Q And that is the only reason that you can assign for having lied about the disposition of the gun? A I am not lying, I am telling the truth.

Mr. McGeehan: I think, your Honor, this is entirely a collateral matter in view of the admission of the defendant that that is not so and that later he told the truth. I don't think, except to harass the witness, there is any purpose in that examination as to why he told an untruth if he later told the truth and admitted it.

The Court: I think the Prosecutor is entitled to an answer to his question. I don't know that he is entitled to pursue it any further once he gets the answer.

Q (Read as follows): "Q And that is the only reason that you can assign for having lied about the disposition of the gun?" Is it? A It is the truth, that is no lie, it is the truth.

Q Now, won't you answer the question? Is that the only reason that you can give? A I am giving you the truth. I am not giving you any reason.

Q You say that that is the reason and the only reason. Is that it? A Well, if a man did you harm—

Mr. McGeehan: I object and I ask that that be stricken out. I think, your Honor, he has answered it a dozen times.

Mr. Fisch: He has assigned one reason, your Honor, and my question is whether that is the only reason.

The Court: My observation is that the witness persists in saying that that is the reason why.

Mr. Fisch: Well, if that is the only reason, that settles the matter.

The Court: Well, is there any other reason, Calabrese?

The Witness: No, sir, your Honor.

Q You did tell Deputy Chief Brex that you shot Grossman in the lungs, that you hit him in the lung, didn't you? A After he told me the bullets that went in his body.

Q And then you told him that you hit him in the lung? A After he told me where the bullets hit him I said "Yes, I hit him in the lung," but after Brex told me that the man had a bullet in the lung and a bullet in the right side I said "That must be the place I must have hit him."

Q What must be the place?

The Court: He said Captain Brex told him the man had a bullet in the lung and a bullet in the right side and he said "That must be the place where I hit him."

Q Didn't you tell Deputy Chief Brex what is contained in this statement Exhibit S. 18?

Mr. McGeehan: Now, I object. There are ten or fifteen pages there and I don't think the Prosecutor or myself or anyone can remember all this.

The Court: You already asked him, Mr. McGeehan, if it is substantially so, and he said yes.

Q Didn't you tell him what is contained in that statement? A Yes, I told him what is in that statement.

Q And after the statement was written out it was read to you? A Yes.

Q And not only was it read to you but you read it out loud, didn't you? A Sir?

Q Not only was it read to you but you read it out loud in the presence of Captain Sebold and Lieutenant Zeller and Detective Kenny and Detective Callahan, didn't you? A I don't think so, no, sir.

Q What is that? A I never read that statement, it was read to me.

Q You say you never read it out loud? A No, sir.

Q There is no mistake about that, is there, Calabrese? A No, sir.

Q Sure about that? A Positive.

Q That you never read it out loud in the presence of these men whom I have mentioned? A No, sir.

Q Were you looking at the statement while it was being read to you? A Was I looking at it?

Q Yes? A No, sir.

Q What were you doing while it was being read to you? A I was sick.

Q You were sick? A Yes.

Q What was the matter with you? A I suffer constipation for the last five years.

Q Oh, so, you were sick with constipation? A Yes.

Q And did that interfere with your hearing the statement being read to you? A Yes.

Q That affected your hearing, did it? A Yes, sir.

Q So you could not hear? A Not only could not hear, but I did not know what it was all about.

Q Well, did you tell that to Deputy Chief Brex? A No, sir.

Q What? A Yes, I told Captain Sebold.

Q You told Captain Sebold? A And Lieutenant Zeller.

Q You told Captain Sebold and Lieutenant Zeller that you did not know what it was all about? A I did not tell them what it was all about. I told them I was sick.

Q Did you tell them that you could not hear? A No, sir.

Q Well, could you hear? A I could hear, but my mind was not on that statement.

Q Your mind was not on the statement? A No, sir.

Q It was on your constipation, was it? A I was suffering.

Q What? A I told you I have been suffering for the last five years.

Q You told me that you have been suffering for the last five years from constipation and it was just at this particular moment that you were suffering so that your mind was not on the statement when it was being read to you. Is that right? A Captain Sebold can tell you that himself. He asked me what was the matter and I told him I was sick.

Q Told him you were sick? A Yes, sir.

Q Did you tell him that you could not understand what was in the statement? A I said, "Go ahead and write, I will sign anything."

Q What is that? A I said "Go ahead, I will sign anything, I will leave it to fate."

Q You told him to go ahead and write and you would sign anything? A Yes, sir.

Q Where did he get the information, then, that was put in the statement? A He got it from me.

Q So that you told him what to put in the statement, didn't you? A Yes, I told him, but not the exact words that is in the statement.

Q Now, did this trouble, this constipation that you had, did that interfere with your telling him what had taken place? A Yes, it did.

Q Well, did it interfere with your telling him what had taken place to such an extent that you did not tell him or you could not tell him the truth about it? A I told him the truth.

Q Well, then, it did not interfere with your telling the truth about it, did it? A I told him as much as I could tell him, as far as I could remember.

Q And this trouble of yours, that did not interfere with your telling him a lie about how you disposed of the gun for the reason that you have already stated? A I told him that from the last —the reason I told him I disposed of the gun in the Passaic River, I did not want to have no other person implicated.

Q Yes, you told me that was your reason. Now, I want to know whether this constipation trouble of yours interfered at all with your thinking up that story in order not to get somebody else in trouble? It didn't interfere, did it? A Yes, it did.

Q Well, in what way did it interfere?

Mr. McGeehan: I object to that, if your Honor please. I don't think the time consumed on the statement which has been admitted and consented to, is warranted.

The Court: I think we have covered pretty well the why with reference to the gun.

Mr. Fisch: Your Honor, this is on a different proposition. This witness has tes-

tified he was sick with constipation, and because of that constipation he was not able to concentrate on this statement. Now, there is one proposition in the statement and I want to know whether that sickness had anything to do with that proposition.

Mr. McGeehan: I have no objection to the cross examination, but I think this has been covered so long and by so many questions it will save time by getting to the heart of it.

The Court: Let us go on and see what it leads to.

Q (Question read.) A Well, it did not interfere with my telling the truth.

Q It did not? A No.

Q It did not interfere any with your going up there to pull off this hold-up, did it? A I do not get you—just what do you mean?

Q Well, this constipation trouble of yours did not interfere with your going up there to pull off this hold-up, did it? A No.

Q Now, let's see. Now, what did you say to Grossman while the struggle was going on in the street, was it, "You damn fool, let go, or I will shoot," is that right? A No, sir.

Q What? A No, sir.

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

Q That is what is in the statement, isn't it?

Mr. McGeehan: I object to that; the statement speaks for itself.

Q Well, I show you the statement. Now, is that in the statement?

Mr. McGeehan: I object to the question.

New Jersey State Library

The Court: I will permit it.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

A It is in the statement. I do not know how it got there.

Q You do not know how it got there? A No.

Q You heard about it before? A Yes. I said, "Let go, you damn fool, or you will get shot."

Q Oh, that is what you said? A Yes.

Q And you did not make any correction in the statement, did you, in that regard? A You mean what?

Q With regard to that? The fact that the statement contains the words, "I then said to Grossman, 'You damn fool, let go or I will shoot.'" A I said, "Let go, you damn fool, or you will get shot."

Q Yes, but you did not make any change in the statement with regard to that, did you?

Mr. McGeehan: I object. The statement speaks for itself.

The Court: I will permit it.

A I do not know what you mean.

Q You did not ask anybody to make any change in that statement in that regard? A I did not pay any attention.

Q Will you answer my question?

The Court: Well, did you ask anybody to change it or didn't you?

The Witness: No.

Q Now, you also told Captain Sebold, didn't you, that Bruno fired a shot into Grossman's right side? A I said he fired a shot, but I didn't say whether it was in the right side.

Q You did not say that he fired it in the right side? A No, sir.

Q Well, that is contained in the statement?

Mr. McGeehan: I object to that. The statement is the best evidence.

A I told him he fired a shot.

The Court: Go ahead.

Q And that is in the statement, isn't it? A It says he fired a shot, but where it hit, I didn't say where.

Q Now, this is in the statement, Bruno fired a shot into Grossman's right side. A It is in there, I do not know how it got there.

Q Didn't you say just a few minutes ago that the information which was contained in the statement was put down there by Captain Sebold was obtained from you; didn't you tell us that? A I did.

Q And that was true? A Yes.

Q And then, isn't the fact that it got there because that was the information you gave Captain Sebold?

Mr. McGeehan: I object to that, because that calls for a conclusion on the part of how it got there.

The Court: Objection sustained to that form.

Q Isn't it a fact that is how it got there, you told it to Captain Sebold? A No, sir.

Q And then you did not tell him that? A No.

Q Now, after Bruno had fired the shot, Grossman still held on to Wally, didn't he? A He did.

Q And it was then that you saw you could not do anything with Grossman around? A Yes.

Q What? A Yes.

Q And because you saw that you could not do anything with Grossman, that was when you raised your hand and fired a shot into Grossman's right side, wasn't it? A I fired at his arm to break his grip.

Q Well, after you saw you could not do anything with Grossman, that is when your raised your arm and fired a shot at him? A I fired a shot to break his grip.

Q That is when you fired a shot? A I fired a shot at his right arm to break his grip.

Q And didn't you tell Captain Sebold you fired a shot into his right side? A I told him I fired for his arm.

Q And didn't you tell Captain Sebold you fired a shot into Grossman's right side?A I told him I fired a shot at his right arm.

Q Now, will you answer my question. We will get along much better if you do not try to fence with me.

The Court: Now, if he asks you a question, tell him you don't know, if you don't know.

Q Did you tell Captain Sebold you fired a shot into Grossman's right side? A Yes, I did.

Q And did you tell Captain Sebold that you believed your shot just about hit him in the lung? A I didn't say so.

Q What is that? A I say I fired at his arm. Where the shot went, I don't know.

Q Now, it was just after you fired your shot, just a few moments after that Grossman relaxed his grip on your friend Wally? A No.

Q How long after? A I would say about thirty seconds.

Q About thirty seconds? A Yes.

Q That is more than a few moments? A Moments?

Q Yes. A I guess it is.

Q So that it was just about thirty seconds after you fired your shot that Grossman relaxed his grip on Lamilino? A He did not relax it, we had to pry his grip apart.

Q You pried his grip apart after two shots had been fired? A Yes.

Q And then you helped Lamilino into the automobile which you knew was around the corner to take you away? A Yes.

Q Now, you had gotten that gun in the morning? A Yes.

Q And you got it from Raymondo? A Yes.

Q What did you get it for? A He just gave it to me, that is all.

Q What for? A He said he wanted to let me see it.

Q What is that? A He told me he wanted to let me see it.

Q He wanted to let you see it? A Yes.

Q You saw it all day long? A Yes.

Q And were you just looking at it all day long? A Yes.

Q Well, what did you get the gun for? A I had it in my pocket.

Q Yes. What did you get it for and what did you have it in your pocket for? A In the morning as we were riding around, Simioni, Raymondo, myself and Arthur Cort and Raymondo said, "There is a gun there," he said, "Let's take a look at it," and I went to take a look. Before I went there, he gave me the gun.

Q But you got the gun on your way up to Orange, didn't you? A Well, that is the way up in Orange.

Q What? A That is the way up in Orange.

Q Now, just a minute. You had gotten into this automobile in the morning and Cort was at the wheel and you were sitting alongside of him, right? A Yes.

Q And Raymondo and Simioni were in the back seat? A Yes.

Q And you drove up to Orange, didn't you? A Drove all around.

Q Well, now, you drove up to Orange, didn't you? A I am not sure whether it was Orange or not.

Q Well, you drove into a colored section where there was a butcher shop? A I do not know whether it was a colored section.

Q Well, you knew it was a butcher shop? Oh, you didn't even know that? How long have you been living in this county? A About fifteen years.

Q And you did not know where Orange is? A I didn't say so.

Q Well, where did you drive when you got into that machine in the morning? A All around.

Q Did you drive to Elizabeth? A No.

Q Did you drive to Nutley? A No.

Q You drove to Orange? A I did not say so.

Q Well, where did you drive to? A All around the city.

Q Whereabouts? A All around the city.

Q No, whereabouts in the city? You went outside of the city. A I do not know whether we did or not.

Q Where did you go in the morning? A I said we drove around.

Q Whereabouts? A I told you we drove around.

Q Where to? A Sanford avenue.

Q Before you went to Sanford avenue, where did you go? A In the neighborhood up around there.

Q What neighborhood? A I do not know.

Q Well, you know the county of Essex pretty well in fifteen years? A Well, I know it, yes.

Q And you know where Orange is, too? A If I get a bus to go up there, yes.

Q That is the only way you know where Orange is? A Yes.

Mr. McGeehan: I object on the ground it is immaterial whether he knows where Orange is when the witness admits he went to this place.

The Court: It has been answered.

Q And you got the gun when you got into the car in the morning? A No.

Q Well, how long was it when you were in the car you got the gun? A About fifteen minutes or twenty minutes.

Q What did you get the gun for? A He just handed it to me, that is all.

Q What? A He just handed it to me.

Q What for? A He just told me to hold it.

Q He told you to hold it for him? A Yes.

Q And did you keep on holding it for him? A Yes.

Q Uh? A Yes.

Q And when you got out of the machine, did you give it back to him? A I did hand it to him and he said, "Hold it."

Q He still wanted you to hold it, even though he was not in the machine? A Yes.

Q And you were just holding it? A Yes.

Q Now, isn't it a fact, Calabrese, that the reason you got that gun was because you were going on a stick up, isn't it? A What stick up?

Q What stick up? Well, you know what we are talking about here, don't you, you know what this case is about? A You are talking about the morning or the afternoon.

Q Both. A If it is in the afternoon it would be different.

Q I am not talking about the afternoon or morning. I am talking about both, and I want to know whether it is not a fact that you got this gun because you were going on a stick up? A No.

Q What? A No.

Q You did not get the gun because you were going on a stick up? A No.

Q You are sure about that? A Positively.

Q Isn't it a fact that when you were in the County of Essex in the morning that you and Lamilino, Simioni got out of the machine to look at some other place in another part of the county?

Mr. McGeehan: I object to this on the ground it is immaterial to this issue whether

another crime was contemplated on the morning of the day of the crime charged in this indictment. The defendant has admitted he was at the place this shooting occurred and his testimony as to any other occurrence is to try a collateral issue entirely.

Mr. Fisch: I will withdraw this question and frame another question.

Q Isn't it a fact that morning when you went to Sanford avenue with Simioni and Cort and Raymondo, that you went to Grossman's drug store, stopped there around the corner on Lenox street and that you got out of the car to look the place over and that the place was closed? A I did.

Q And that you went there for the purpose of sticking it up at that time? A No.

Q What is that? A No.

Q What did you go to look it over for? A To buy a pack of cigarettes.

Q To buy a pack of cirgarettes. I see. And then after the place was closed you drove around Sanford avenue, didn't you? You drove away from there through some different streets and came back again? A No, sir.

Q You did not drive around and come back the same morning and park on Lenox street with Cort at the wheel and Simioni and Raymondo in the back seat? A No, sir.

Q And didn't you talk then in the morning about sticking the place up? A No.

Q Didn't you talk about sticking it up at all? A Raymondo said he wanted to stick it up.

Q And you engaged in that conversation, didn't you? A I did.

Q And when was it that Raymondo said he wanted to stick it up, the first time you stopped

around there and found that place closed? A Yes.

Q Is that yes or no? A Yes.

Q And then you drove around and came back again, didn't you? A No.

Q Well, when Raymondo said that he wanted to stick that place up, that was when you stopped the machine and you got out to see whether the place was opened or not, wasn't it? A Yes.

Q So you did not go around to see if the place was opened, because you wanted to buy a pack of cigarettes? A I did.

Q And didn't you go around there to see whether the place was open because somebody in that machine, whether it was Raymondo or anybody else, wanted to stick up the druggist? A Yes.

Q And that was the reason you went there? A I only stopped there once.

Mr. Fisch: I ask it be stricken out as not responsive.

The Court: Strike it out.

Q That is the reason you went there to see whether the store was open or not? A No, not as you say.

Q Not as I say, well, how do you say? A I went there to buy a pack of cigarettes.

Q What? A I went there to buy a pack of cigarettes and Raymondo said he wanted to stick the place up.

Q So you went there for a double purpose? A And Arthur Cort said, "No, we will not stick the place up."

Mr. Fisch: I ask that that be stricken out as not responsive.

Mr. McGeehan: I object to that.

The Court: I will let it stand.

Q You went there for a double purpose, did you? A I did.

Q You particularly went there for the purpose of looking the place over to stick it up? There is no question about that, is there? A No.

Q When did this idea come into your mind about having gone to the place in the morning to buy a pack of cigarettes and finding it closed, when did you get that idea?

Mr. McGeehan: I object. It makes no difference when a man gets an idea.

The Court: Sustained.

Q You told Captain Sebold that you had gone there in the morning for the purpose of getting a pack of cigarettes? A I did not.

Q Why not? A I could not remember it.

Q But you remember it now, do you? A Yes.

Q You saw Captain Sebold only a few days after this stick up and shooting, didn't you? A No, sir.

Q Uh? A About ten days later.

Q But you did not remember—and you did not remember about the cigarettes at that time, right? A Because I can remember one day. I cannot remember all days.

Q But you did not remember about the cigarettes on that day you were talking to Captain Sebold? A No.

Q But you remember it now? A Yes.

Q What makes you remember it now, when you did not remember it then? A It just came to my mind.

Q When did it come to your mind, on the witness stand here? A Yes.

Q That is the first intimation you had of it, when you were on the witness stand? A It was in my mind before. The morning I wanted to buy the cigarettes.

Q Oh, but since that time and since the time you spoke to Captain Sebold, didn't you just tell me it came to your mind when you were on the witness stand? A Yes.

Q Now, you have been in jail all of the time since you were arrested, awaiting trial on this charge? A Yes.

Q And you have consulted counsel about the case? A No.

Q What? A No, sir.

Q You have not talked to your counsel about the case? You did speak to your counsel, Mr. McGeehan, about this case, didn't you? A No, sir.

Q Never spoke to him about it? A No, sir.

Q He did not come up to the jail to see you and talk to you about the case? A He came up to see me and told me to just go on the stand and tell the truth.

Q And you told him what your story was, didn't you? A No, sir.

Q Haven't you ever told him anything about what part you played in this case? A No, sir.

Q And all the while, up to the time you took this stand, you never spoke to Mr. McGeehan with reference to this case, except for him to come up to see you and tell you to go and tell the truth? A Yes.

Q You never told him what your story was? A No, sir.

Q And all the while you have been in jail awaiting trial of this case you never thought of that cigarette business until you got on the stand, did you? A On the morning of the 22d I did.

Q I mean since then you have never thought of it again until you got on this witness stand, have you? A No, sir.

Q Now, you say that you did not go back the second time that morning? A Yes.

Q You heard Cort's testimony, didn't you? A I did.

Q And in spite of that you still say that you did not go back that morning? A No, sir.

Q Now, Simione and Raymondo, they got cold feet on this hold-up, didn't they? A I don't know.

Q You don't know? A They said they did not want to do it.

Q Well, they did not go through with it, did they? A Is that what you mean, cold feet?

Q Is that what I mean, cold feet? Isn't that what you mean, cold feet? A No, sir.

Q Isn't that what you mean, Calabrese? A I don't know.

Q You don't know what cold feet means? A No, sir.

Q But Simione and Raymondo, they did not go through with the stick up, did they? A No, sir.

Q And when they did not go through with the stick up you drove to Norfolk and Orange streets, didn't you? A Yes.

Q And that is where Raymondo and Simione got out of the car, didn't they? A No, sir.

Q What? A No, sir.

Q Well, one of them got out there, didn't he? A Yes.

Q Where did the other one get out? A Warren and Bergen street.

Q And after they had gotten out of the car, then you and Cort talked over the stick up that failed, didn't you, at Grossman's drug store? A No, sir.

Q Didn't talk it over? A No, sir.

Q Didn't you tell that to Captain Sebold? A No, sir.

Q Didn't tell that to the captain, did you? A No, sir.

Q And didn't you say to Cort that Victor Bruno and Dominick Lamilino had called up your home on Sunday the 21st of April and told you they were coming over to see you Monday night? A Yes, sir.

Q You told that to Cort, didn't you? A Yes.

Q And didn't you then suggest to Cort that you would take Wally and Bruno with you to stick up Grossman's drug store, because Simione and Raymondo got cold feet and did not want to go through with it? A No, sir.

Q Didn't you tell Cort that you would take Wally and Bruno with you to stick up the drug store? A No, sir.

Q Didn't you tell that to Captain Sebold? A I told him, but not at that time, though, not in the morning, in the night.

Q I am not talking about the morning now. I am talking now about the afternoon, towards night, that was when you told Cort, wasn't it? You told Cort that Lamilino had called you up and that he was coming over to see you? A You are talking about the morning?

Q No, I am not talking about that. I am talking about the night now, the afternoon—didn't you tell that to Cort some time during the day of April 22? Didn't you tell Cort that Wally and Bruno were coming over to see you? A Yes.

Q And some time during that day when you told Cort that, didn't you also suggest to Cort that you would take Wally and Bruno with you to stick up Grossman's drug store? A There was never a thought of sticking up anyone.

Q Didn't you tell that to Cort? A No, sir.

Q What did you tell Cort about Wally and Bruno coming over to see you for, then? What did you tell him about that for? A Just like I would tell you some one was going to come to see me.

Q That was the only reason, just a casual remark? A Yes.

Q Just a remark? A Yes, sir.

Q Well, didn't you tell Captain Sebold that you had told Cort that Wally had called you on the telephone and that Wally and Bruno were coming over to see you and that you had suggested to Cort that you would take Wally and Bruno with you to the Grossman stick up? A I never suggested that to Cort but Bruno and Lamilino when they were in Newark while they were riding around.

Q Didn't you tell that to Captain Sebold? A No, sir.

Q Didn't tell that to him? A No, sir.

Q And didn't you tell Captain Sebold that the reason that you suggested that to Cort was because Simione and Raymondo had got cold feet and did not want to go, did not want to go with you?

Mr. McGeehan: I object to that. That question has been asked at least a half a dozen times and answered that many times.

The Court: I don't think he asked him whether he told that to Captain Sebold. Did you tell that to the Captain?

The Witness: No, sir.

Q Now, I call your attention to the fact that that is in the statement and I show you the statement. A I told you that I know nothing about the statement.

Q Do you know how it got in the statement if you did not tell that to Captain Sebold?

Mr. McGeehan: I object to that.

The Court: Sustained.

Q You say you did not tell that to Captain Sebold?

Mr. McGeehan: I object to that. He has answered that seven times.

Mr. Fisch: It is part of the question.

Q You say you did not tell it to Captain Sebold and it is in the statement— A He asked me a question and I answered.

The Court: Calabrese, wait until the question is finished.

Q You say you did not tell it to Captain Sebold and it is in the statement. Now, do you mean by that that he asked you whether Raymondo and Simione had gotten cold feet and that you answered him yes? Is that what you mean? A Yes, sir.

Q So he did ask you, did he—Captain Sebold asked you whether Raymondo and Simione had gotten cold feet with reference to this stick up and you told him yes? A Yes, sir.

Q Was that true? A Yes, sir.

Q I thought you told us a few moments ago that you did not know what I meant by cold feet? A If that is what you mean by cold feet, it is.

Q I want to know what you mean, not what I mean. That doesn't count. A (There was no answer.)

Q And did you also tell Captain Sebold, or did the captain ask you, if you had suggested to Cort that you take Wally and Bruno with you to the Grossman drug store stick up? A That was after they came to Newark.

Q Did Captain Sebold ask you that question? A I did not get the question.

Q (Question read). A What question?

Q Well, the question of whether you suggested to Cort that you and Cort take Wally and Bruno up to Grossman's drug store to stick it up? A That was after they came to Newark, yes.

Q Well, did you suggest it to Cort after they came to Newark? A Yes, sir.

Q So that you were the one that suggested to Cort that you take Bruno and Lamilino up to Grossman's drug store to stick it up. Is that right? A Yes, sir.

Q That is correct, now? A Yes.

Q And what did Cort say about that when you suggested that to him? A He did not answer.

Q He did not answer but drove up there. Is that right? A Drove up where?

Q Up to Sanford avenue, to Grossman's drug store after Bruno and Wally got into the car. A No, we drove all around the city first.

Q You drove around the city until it got dark, didn't you, Calabrese? A We drove around the city and hour or an hour and a half, something like that.

Q What is that? A We drove around the city for a while.

Q And the purpose in driving around the city for a while was to wait until it got dark, wasn't it? A No, just kept on driving, that's all.

Q Well, what was the purpose of driving around the city if it was not to wait until it got dark?

Mr. McGeehan: I object to that. It would be a proper question on cross examination if the witness denied that he intended to commit a hold-up. It is an entire waste of time and not cross examination in this case. The witness has not testified he did not go there to commit a hold-up, so what difference does it make if he drove around to wait until it got dark or not.

The Court: I think it is permissible, Mr. McGeehan. I don't know that it is necessary but I think it is permissible.

Q Will you answer the question, please? A You will have to say it over again.

Q (Read as follows: "Well, what was the purpose of driving around the city if it was not to wait until it got dark?") A Just kept on driving around, that's all.

Q Didn't you tell Captain Sebold that you drove around the city until it got dark? A I don't remember.

Q Well, you won't say that you did not tell him that, will you?

Mr. McGeehan: I object. He said he does not remember and I think that is as complete an answer as a person can give.

The Court: Overruled.

Q Answer my question. A I told you I don't remember.

Q So, you won't say that you did not tell that to Captain Sebold, will you? A I said I don't remember. Do you want me to perjure myself?

Q Answer my question. A I said I don't remember.

Q Will you say that you did not tell that to Captain Sebold?

Mr. McGeehan: I object, your Honor. How can he say that if he has no memory on it?

The Court: Is that the best answer you can give, that you don't remember?

The Witness: Yes.

Q Well, didn't you tell Captain Sebold that when you suggested to Cort that you take Wally and Bruno up to Grossman's drug store to stick it up that Cort said to you that he was satisfied to take Wally and Bruno with you because Cort knew these two fellows, because you all served time together at the Rahway Reformatory? A I don't remember.

Q You don't remember telling that to Captain Sebold? A No, sir.

Q Do you think it will refresh your memory any if I showed you the statement? A No, sir.

Q That would not refresh your memory? A No, sir.

Q It would not make any difference to you if I showed you that that is contained in the statement which you signed? A No, sir.

Q You met Bruno and Wally down at the D. L. & W. station, didn't you? A Yes.

Q Did you tell that to Captain Sebold? A I think I did.

Q Well, did you or didn't you? A I think I did.

Q You have some memory about it, haven't you? A I think I did.

Q What time did you meet Bruno and Wally at the D. L. & W. Railroad? A I don't recall the hour.

Q Did you tell Captain Sebold that you met them between six and seven o'clock?

Mr. McGeehan: I object to that. I think that the testimony of the witness as to what he did, if asked on cross examination cannot be attacked except by asking him a specific question whether he said something to the contrary on that. In other words, a witness can be cross examined on something he said differently in the past, but if he says a positive thing he cannot be asked whether he said that to John Jones or not—

The Court: I think it is proper.

Mr. McGeehan: It is not contradictory of his present memory of it.

The Court: I will permit it.

Q Will you answer that question? A I told you I don't remember.

Q You don't remember whether you told that to Captain Sebold or not? A This is several months ago, Mr. Fisch.

Q And the cigarette was several months ago, too, wasn't it? A It was.

Q You did not forget about that, did you? A I forgot all about it until I got on the stand.

Q Now, do you think by showing you the statement which you signed, it would refresh your recollection as to whether or not you told Captain Sebold that you met Wally and Bruno at the D. L. & W. Railroad between 6 and 7 o'clock? A No, sir.

Q That would not refresh your memory? A I know I met Bruno and Wally at the D. L. & W. Station.

Q What time? A I told you I don't remember.

Q You don't remember whether it was five o'clock or nine o'clock? A I told you I don't remember.

Q Don't you remember whether it was five o'clock or nine o'clock? A I told you I don't remember.

Q Do you remember whether it was two o'clock in the afternoon or not? A Mr. Fisch, I told you I don't remember.

Q You don't remember, and that is the best answer you are going to give me, is that it? A I am telling you the truth, I don't remember.

Q Don't you know, as a matter of fact, that it was not two o'clock in the afternoon? A I don't remember, I had no watch with me.

Q Don't you know as a matter of fact it was not eleven o'clock in the morning when you met them at the D. L. & W. station? A I told you, Mr. Fisch, I don't remember.

Q And that is the only answer you are going to give me to that question, is it? A I will give you my honest answer.

Q That is your honest answer? A Yes, sir.

Q You don't remember whether it was eleven o'clock in the morning or not? A I told you I don't remember.

Q Do you remember whether it was eight o'clock in the morning or not? A I told you I don't remember.

Q So, you won't say it was not eight o'clock in the morning? A It could not be eight o'clock in the morning if I was riding around the city.

Q Will you say it was ten o'clock in the morning? A I said I don't remember.

Q Then, you won't say it was not ten o'clock in the morning that you met them at the D. L. & W. station. Is that right? A I told you I don't remember the hour I met them.

Q Well, now, didn't you tell Captain Sebold that after you had gotten into the car with Cort and Bruno and Wally that you decided to drive around until it got dark? A I don't recall it.

Q You don't recall saying that to Captain Sebold? A No, sir.

Q Do you think my showing you the statement will refresh your recollection about that? A I told you, no, sir.

Q And didn't you tell the captain that while you were driving around you asked Wally and Bruno if they brought their guns with them? A I don't remember.

Q You mean you don't remember whether you told that to the captain or not? A I told you I don't remember it, no, sir, I don't remember making a statement like that.

Q Well, didn't you ask Wally and Bruno if they brought their guns with them? A No, sir.

Q You did not ask them that? A No, sir.

Q Do you remember that Bruno and Wally both answered you yes and that they asked you if you had a gun? A I don't recall it.

Q And that you told them that you had a gun in your pocket? A I don't remember.

Q Well, did you tell that to Captain Sebold? A I don't remember.

Q So you don't remember anything that is in this statement, do you? A I remember some.

Q What do you remember that is in the statement?

Mr. McGeehan: Oh, I object to that question. Here is a 20 page statement—

The Court: I think that is hardly a fair question.

Q Well, do you remember anything about what took place in the automobile that night before you went to stick up Grossman's drug store? A Meaning what?

Q Do you remember anything about what took place in that automobile between you and Cort and Lamilino and Bruno before you went up to the stick-up? A We were riding around the city.

Q While you were riding around the city, what was the conversation you had in the automobile? A Anything in general.

Q What? A Anything in general.

Q Talk about the stock market? A We might have been.

Q You were talking about guns, weren't you? A I don't remember.

Q Well, you were interested in knowing whether or not Bruno and Lamilino had guns with them, weren't you? A I don't remember.

Q You don't remember whether you were interested in that or not? A I don't recall it.

Q Well, you knew that you were going to a stick-up with them, didn't you? A Not at that time, no.

Q Well, after they came to Newark you knew it, didn't you? A No.

Q Didn't you tell us just a few minutes ago that after they came to Newark you suggested to Cort that you take Lamilino and Bruno up to this Grossman stick-up? A No, I said while we were riding around that night.

Q While you were riding around that night, while you were riding around, that was when you suggested it to Cort, was it? A That is while we were riding around, yes.

Q And at that time you were interested in knowing whether or not they had guns with them, weren't you? A I don't remember, I told you.

Q You don't remember that? A No, sir.

Q You knew they had guns with them, didn't you? A I told you I don't remember, Mr. Fisch.

Mr. McGeehan: When, Mr. Fisch?

Q You knew at some time that night that they had guns with them, didn't you? A I knew when we got up to Sanford avenue they had guns.

Q Did you know they had guns with them before you got to Sanford avenue? Didn't you? A No, sir.

Q Well, how did you find out they had guns with them? A Because we told them about the drug store that William Raymondo suggested to stick up.

Q Well, how did you find out they had guns with them? A I did not even know until after the stick-up.

Q Oh, you just told me you knew when they got up to Sanford avenue that they had guns, didn't you? A Yes, sir.

Q And you asked them whether they had guns with them? A No, sir.

Q Oh, you did not ask them that? A No, sir.

Q You did not tell that to Captain Sebold? A No, sir. I don't remember.

Q Now, were you sick when you signed your name to the statement? A Yes.

Q That is your signature on each sheet, isn't it? A Yes, sir.

Q And each signature is practically the same with no difference between the signatures, are there? A No, sir.

Q And were you sick when you wrote the last two paragraphs of the statement? A I was sick, yes.

Q You wrote those two paragraphs, didn't you? A Yes, sir.

Q And nobody helped you to write them, did they? A Somebody put it on a piece of paper and dictated it.

Q And when they dictated it you wrote it down, didn't you? A Yes, sir.

Q And said that this was in your own handwriting? A That is what they put down on the paper.

Q Yes, and you put it down on the paper, didn't you? A Yes, sir.

Q And you signed it? A Yes, sir.

Q How many times have you been convicted of crime? A Twice.

Q You were convicted in 1924, were you not, in July, 1924? A Yes, sir.

Q Of burglary? A I don't know what it was.

Q Well, in Union County, wasn't it? A Taking ice cream and chewing gum.

Q What? A I don't know what it was, but it was taking ice cream and chewing gum and candy.

Mr. McGeehan: What year is that?

Mr. Fisch: 1924.

Q In 1924, weren't you convicted of burglary in Union County and turned over to the Chief of Police of Summit, N. J. and sentenced to serve an indeterminate term in the New Jersey Reformatory?

Mr. McGeehan: Now, your Honor, I think we ought to have the date of that.

Mr. Fisch: July 30, 1924.

Mr. McGeehan: He is 21, he must have been 16 years old at that time.

Q July 30, 1924?

Mr. McGeehan: This is twenty-one, he must have been sixteen or under at that time.

Q July 30, 1924, weren't you? A I was not, I was put on probation.

Q Weren't you sentenced by Judge Stein of Elizabeth, in Union County, to serve an indeterminate term in the New Jersey Reformatory? A That was about seven months after.

Q Oh, that was about seven months after the time you are telling me, is that it? A You mean what?

Q Well, I asked you whether you were not sentenced to serve an indeterminate term in Rahway on that date, and for that crime, and you said that was about seven months after. What did you mean by that? A That was 1925, April 11th.

Mr. McGeehan: What was?

The Witness: The 11th of April.

Mr. McGeehan: Ask him what?

Q What? A What I told you.

The Court: When you were sent to Rahway?

A Yes.

Q And what were you sent to Rahway for? A I told you I do not know what it was. It was probably candy, chewing gum, cigars or whatever it was on a road stand.

Q Well, now, what was it? Withdraw it. You were again convicted of crime in October, 1926, weren't you? A Yes.

Q And at that time you were convicted in this County for possessing burglar's tools, weren't you? A Yes.

Q And sentenced to the New Jersey State Reformatory?

Mr. McGeehan: I object.

Mr. Fisch: Is there an objection to that?

Mr. McGeehan: You have the record there. I think I know what the witness is trying to state about April, 1925.

(Counsel confer in whisper.)

Mr. McGeehan: Withdraw the objection.

Q Answer that question. A When?

Q In October, 1926, on this conviction for the possession of burglar's tools. A Yes. That was sentence for violation of parole.

Q Wasn't it your conviction for burglar's tools? A Yes, found guilty of burglar's tools.

Re-direct examination by Mr. McGeehan.

Q In the first conviction that you spoke of for robbing a road stand of ice cream and cigars, how old were you then? A Sixteen.

Q And were you sent away at that time, Calabrese? A No.

Q When were you sent away on that? A In April, 1925.

Q In April, that is when you were sent away on the previous one? Then you were eighteen years of age in 1926? A Yes.

Q Now, tell us what you have in mind regarding those cigarettes. Were you going in to see if it was a good place to hold up?

Mr. Fisch: I object to counsel leading the witness.

The Court: Yes.

Q But you were going into Grossman's store that morning?

Mr. Fisch: I object to that as leading.

The Court: Go ahead.

Q What was your purpose in going into Grossman's store, what did you have in mind? A To look over the place.

Q What were you going to do in looking over it? In looking over the place, what were you going to do? A Stick them up if the other fellows had come.

Q But when you went in the place alone, were you going to hold it up, alone? A No.

Q What were you going to do? A Look over the place.

Q Yes, but what were you going to do? A Look at the man.

Q What? A Look at the proprietor.

Q Now, what about the cigarettes you were speaking of? A I told him I went there to buy a pack of cigarettes.

Q Who were you going to tell that to? A Mr. Fisch.

Q Yes, but Mr. Fisch was not in the store that morning. What were you trying to tell Mr. Fisch about the cigarettes? Will you tell me again? A I did not have no cigarettes, so I was going to buy some.

Q For the purpose of holding it up?

Mr. Fisch: I object. We have been over it.

The Court: It is leading, but it is so apparent to every one, I do not think any harm is done.

Q Now, when you were going to get the cigarettes with relation to the time you were going to look at it to see if the place was a good place to hold up? A In the morning.

Q Now, I have talked to you about this case, haven't I in the pen here in the Court House and at the jail? A Yes.

Q I asked you what the facts were. A Yes.

Philip Sebold, in rebuttal, direct.

Q Did you understand Mr. Fisch when you said I had not gotten the story? A I thought he said to give him the story.

Q I did question you about the facts in this case? A Yes.

Re-cross examination by Mr. Fisch.

Q And when Mr. McGeehan questioned you about the facts in the case and you told him your story, you never told him anything about this cigarette business? A No.

Q Did you? A No.

DEFENDANT CALABRESE RESTS.

PHILIP SEBOLD, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Fisch.

Q Referring to Exhibit S. 18, the statement of Joseph Calabrese, was this statement read out loud by him in your presence? A It was.

Q Before it was signed?

Mr. McGeehan: I object to this as not proper rebuttal.

Q Captain Sebold, did Calabrese tell you at any time that he had said to Grossman, "Let him go, you damn fool, or you will be shot?"

Mr. McGeehan: I object to that, the Captain testified to that on direct examination and it is not proper rebuttal.

The Court: I do not think he was asked with reference to this particular wording of the statement.

Mr. McGeehan: I am not sure of that.

The Court: My recollection is what he said on direct examination was, "Let go or I will shoot you." Now, I do not know whether you asked him whether Calabrese said, "You will be shot." I will permit that question.

A No. He said, "Let go, you damn fool, or I will shoot."

Q Did Calabrese tell you at any time that he had fired a shot at Grossman's arm? A No.

Q Did Calabrese tell you at any time that Grossman had said, "I will get you, I will kill you?" A No.

Q Did Calabrese tell you at any time that he had said to his companion at the cash register in the store, "Let's go." A No.

Q Did he tell you at any time that he was just holding the gun for Raymondo? A No.

Q Did he tell you at any time that he was holding the gun? A No.

Mr. McGeehan: I object to that as immaterial.

Q Did Calabrese ever tell you that Grossman had a hold of Lamilino's head? A No, not that I recall.

Q Did he explain to you that he was sick and suffering from constipation and didn't know what was in the statement?

Mr. McGeehan: Divide the question.

Philip Sebold, in rebuttal, cross.

Q Did he complain to you he was suffering from constipation? A He did not say constipation. He said he did not feel well.

Q Did he tell you what was the matter with him? A No.

Q Did he say to you he did not know what was in the statement? A No. To the contrary, he said he knew what was in the statement. He read it.

Cross examination by Mr. McGeehan.

Q You know that he said that Lamilino was grabbing after the gun?

Mr. Fisch: I object to that. That is not what Captain Sebold said.

The Court: He can examine about that.

Q He told you Lamilino's gun was being grabbed for by Grossman? A No I do not recall. I recall he said he was holding Lamilino.

Q Well, now, didn't he tell you that Grossman tripped Wally and he fell on the floor on his knees, Grossman jumped on the top of Wally and tried to get his gun away from him. This happened just outside the door on the concrete step?

Mr. Fisch: I object. The same objection Mr. McGeehan raised. The statement speaks for itself.

The Court: I will allow it. Go ahead.

A Well, I really do not recall that part of it. I do recall the scuffle and about Lamilino going down and Grossman on top of him.

Q But you do not remember anything being said about a struggle for the gun or grasping for

the gun? A No, I could not truthfully say I do recall that.

Q You do not recall this whole statement? A No.

Q This would refresh your recollection? A Yes.

Q I call your attention to a portion of this statement. A Yes.

Q I call your attention to this portion of the statement which says, "Wally opened the door. The druggist who I know now to be Morris Grossman, tripped Wally who fell to the floor on his knees. Grossman jumped on the top of Wally and tried to get his gun away from him. This happened just outside the door on the concrete steps." A Just since seeing that statement, I will say now that he did say that.

Q Well, now, then, not having in your memory anything about what was said about the grabbing for the gun by Grossman, or anything about the gun, excepting as your recollection is refreshed by the statement, you cannot be sure then of the exact words that were used by the defendant Calabrese regarding that gun or whether in grabbing for it, Grossman had gotten a hold of it? A Well, just what he told me at that time was put down.

Q You do not remember whether you asked him the specific question whether when Grossman jumped on top of Wally and tried to get his gun away from him, you do not recall whether you asked whether Grossman succeeded in so doing, or got his gun? A No, I do not remember that, but what is in that statement is Calabrese's words.

Q Well, you have said previously that this is not written in the exact words of the defendant. A No. I said that.

Q You mean this is the effect of what he told you? A Yes.

Q And there is nothing in this that he specifically said that Grossman did get a hold of the gun, is there? A No.

Q Now, did you ask Calabrese if Grossman said anything, Captain; did you ask him that specific question? A I think I did.

Q When did you ask him it—I mean with regard to what time in the train of events that took place there? A I asked him what did Grossman say when they asked him to hand over the money and he told me that Grossman said, "No, no."

Q Or I won't, or something to that effect? Is that right? A Yes.

Q Well, did you ask him whether Grossman was saying anything at the time the struggle was going on? A I asked him, but he did not reply whether Grossman said anything at that time. There was a struggle.

Q Do you remember asking him that? A I asked him that.

Q You have that in your memory now? A Yes.

Q Well, if you did, why didn't you put down in the statement that Grossman said nothing at the time the struggle was going on? A I did not think that it was of any importance.

Q Well, you have a distinct recollection of asking him that? A Yes, which would be natural.

Q Well, why didn't you, if Calabrese said Grossman said something, at that time put that in the statement? A Because it was of no importance.

Q So there were certain things and answers he gave you you thought them not important?

A When he said that he did not say nothing, I did not put it in.

Q Well, that was something, wasn't it, the fact that Grossman was saying nothing at this time? A I did not consider it so.

Q That is what I am getting at, you need your judgment as to what you would leave out? A That particular thing, I did.

WARREN T. MOFFETT, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Fisch:

Q Sergeant Moffett, you are connected with the Newark Police Department and have been for how many years? A Going on thirteen years.

Q And were you one of the arresting officers of the defendant Cort? A I was.

Q And you brought him to police headquarters, did you? A Yes.

Q Did you strike him with your fist or any other object? A No, sir.

Q At any time? A No, sir.

Q Did you strike him in the nose and in the jaw and about his body? A No, sir.

Q Did you knock any of his teeth out—whether they were false or natural teeth? A No, sir.

Q Now, were you in Deputy Chief Brex's office while the defendant Cort was there? A Yes, sir.

Q Did you see him put a tooth on Deputy Chief Brex's desk? A I did not.

Q And did you see him indicate that tooth by pushing it with his finger? A No, sir.

Q And did you then pick up the tooth from the deputy chief's desk and throw it in the wastebasket? A I did not.

Q Where was Cort sitting in Deputy Chief Brex's office? A Why, Cort was sitting at the left hand side of the deputy chief's desk and the chief was behind the desk and I sat at the window about six or eight feet away.

Q That is a flat top desk, is it? A Yes. sir.

Q And is it open underneath so the deputy chief can put his knees under it? A On the inside it is.

Q How about the front of it? A It is closed.

Q And where is the waste basket? A As far as I know the waste basket is under the desk.

Q So that in order to reach that waste basket, if the deputy chief was there, a person, to reach the waste basket would have to reach in front of the deputy chief, is that right? A Yes, sir.

Q And underneath the desk where he is sitting? A Yes, sir.

Q You were a witness to this statement of Cort's, weren't you? A Yes, sir.

Q Now, while this statement was being taken from Cort, did he at any time before, or during or after the statement, say that Raymondo pointed out the drug store? A No, sir.

Q Did Cort read this statement out loud in your presence? A Yes, sir.

Q Before he signed it? A Yes, sir.

Q Did he say anything to you about being sick? A No, sir.

Q Or not knowing what was going in the statement? A No, sir.

Q And did he in your presence give the facts that are contained in the statement, or did he

merely answered yes or no to questions? A He gave the facts.

Mr. McGeehan: No cross examination.

Cross examination by Mr. Becker.

Q Sergeant Moffett, when did you bring Cort into police headquarters? A On the afternoon of May 2, 1929, about 3:45.

Q Wasn't he brought in after four o'clock? A No.

Q Were you with him all the time that he was in police headquarters? A What is that?

Q Were you with him all the time while he was in police headquarters? A Yes.

Q That afternoon? A Yes, sir.

Q Do you know when they started to take the statement from Cort? A The time?

Q Yes. A Well, it was about eight o'clock or shortly after.

Q And did it take up until daybreak? A No, but pretty late in the night, I know.

Q How late? A I will say shortly after midnight.

Q And did you immediately take Cort into Chief Brex's office? A No, sir.

Q Where did you take him? A Into what is known as the prisoner's room on the third floor.

Q That is that little room off of the detectives' room? A Yes.

Q And who went in there with Cort besides yourself? A Why, I was in there with Cort for about ten minutes with Detective Morley and Debbs.

Q Morley and Debbs? A Yes.

Q What took place in there? A Why, I was questioning him relative to this case and while

questioning him Morley and Debbs went out and Detective Kenney came in the room.

Q All within the ten minutes? A Yes.

Q And you did not lay a hand on Cort at all? A No, sir.

Q You did not punch him in the mouth? A No, sir.

Q And you did not knock out that tooth of his, the false one? A No, sir.

Q And after the ten minutes had elapsed, where did you take him, back into Brex' room? A I took him into Captain Sebold's office.

Q And that is on the same floor with the detectives' room? A Yes.

Q And at no time did you lay your hands or use any force whatsoever? A None at all.

Q You are sure that Arthur Cort did not tell you that Raymondo pointed out the drug store? A Yes.

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

HARRY T. MORLEY, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Fisch.

Q Detective Morley, you are connected with the Newark Police Department and are attached to the Detective Bureau at headquarters. Is that correct? A Yes, sir.

Q Do you remember the day when the defendant Cort was arrested? A Yes, sir, I do.

Q And were you present in the room with Sergeant Moffet and Detective Debbs and Cort? A I was.

Harry T. Morley, in rebuttal, re-direct—re-cross.

Q And did Sergeant Moffet strike the defendant Cort? A No, sir.

Q Did anybody strike him? A No, sir.

Q And when you and Debbs went out of the room, who came into the room? A Detective Kenney came in.

Cross examination by Mr. Becker.

Q Detective Morley, did you bring Cort into police headquarters? A I did.

Q And he was immediately taken to this little room off the detectives' room? A Yes, sir.

Q And Sergeant Moffet, Morley and Debbs, including Cort, were taken into this little room? A Yes.

Q Now, are you sure that Detective Kenney immediately came in after you and Detective Debbs walked out? A Yes, sir.

Q And you did not see Sergeant Moffet strike Cort at all? A No, sir.

Q And there was no intervening time from the time you left the room and Kenney took your place? A No, sir.

Q None at all? A No, sir.

Re-direct examination by Mr. Fisch.

Q Did you see any marks or bruises on Cort? A I did not.

Q Did he complain of anybody striking him? A No, sir, not to me.

Re-cross examination by Mr. Becker.

Q You seemed to smile when that question was asked about striking Cort. Do you think that is possible?

Mr. Fisch: I object to that.

The Court: I don't understand the question.

Q You seemed to smile when you were asked the question about Sergeant Moffet striking Cort. Is it because you happen to be good natured about it that you smile at the question? A I have never seen Moffett strike anybody, and that is the reason I smiled.

Q Oh, you never saw Moffet strike anybody? A No, sir.

JOSEPH J. KENNEY, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Fisch.

Q Detective Kenney, you are connected with the Police Department and attached to the Detective Bureau at headquarters? A I am.

Q How long have you been connected with the Police Department? A 19 years.

Q Did you enter this room where Detective Moffett was with defendant Cort on the day Cort was arrested? A I did.

Q And as you were entering the room, who was coming out of the room? A Morley and Debbs.

Q And did you see Moffett strike Cort? A I did not.

Q Did Cort complain to you about having been struck? A He did not.

Q Did you ever hear of his having been struck? A No, sir.

Q From any source? A No.

Q Did you see any marks or bruises on him? On his face or any part of his body? A He had none that I could see, because I looked at him. It was the first time I saw him. I came into the building and I heard of his arrest, that Cort had been arrested by Morley and Moffett and Debbs at the Public Service Terminal, and I said I was very anxious, I wanted to get a look at him, and I went towards the room, and as I was going towards the room Morley and Debbs came out, and there was a long table in the room and the sergeant was on one side and the defendant on the other, and that was the first time I saw him.

Q Now, I notice that your signature appears to be appended to this statement, Exhibit S. 22, Cort's statement, is that correct? A Yes, sir.

Q You witnessed it, didn't you? A I surely did.

Q Were you present while the statement was being taken? A All the time.

Q And was this statement made up by questions being asked Cort and Cort merely saying yes or no, or was the statement made up from information which was given by Cort to Detective Boland?

Mr. Becker: I object. That is not rebuttal, your Honor.

Mr. Fisch: I think it is rebuttal in this sense, if your Honor please. The defendant Cort said that the statement was made up by his merely saying yes or no to questions which were put to him.

The Court: But that was not injected in the case as new evidence by the defence, It was already testified to by Captain Sebold.

Mr. Fisch: Oh, no, if your Honor please, Captain Sebold had nothing to do with the taking of this statement.

The Court: Who took this statement?

Mr. Fisch: This statement was taken by Detective Boland and there was nothing in the case with regard to that at all.

The Court: Wasn't Boland questioned as to the manner in which the statement was given, I mean how he took it down?

Mr. Fisch: He was not asked, if your Honor please, on cross examination, whether it was not a fact that this statement was made up by questions being asked of the defendant and merely answers being given of yes or no; that was matter which was brought out on examination of the defendant himself, and for that reason it is my contention that the State is entitled to rebut that evidence.

Mr. Becker: Now, your Honor, the statement was made by Boland telling just how it was taken. Now, Detective Kenney was brought here to corroborate the testimony of the previous officers as to whether or not Sergeant Moffet struck Cort.

The Court: Well, it can be used for other testimony.

Mr. Becker: But it is not rebuttal in this issue.

The Court: I am taking the Prosecutor's assertion that his recollection is correct as to the testimony. I had another recollection, but the Prosecutor seems to be so confident of it that I am perfectly willing to take his recollection of that testimony and I will permit it.

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

WALTER D. VAN RIPER,
Judge.

(Last question read.)

Mr. Becker: I object to the last part of that question.

Mr. Fisch: I will strike out the last part and reframe the question so it will be clear.

Q Was that statement made up by Detective Boland or anyone merely asking questions to which he answered yes or no? A Every word of that statement was spoken by—

Mr. McGeehan: I object. That question calls for a yes or no answer.

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

A No, it was not.

Q Did Cort say anything to Detective Boland in your presence or to anyone else in your presence to the effect that Raymondo was the one that pointed out the drug store? A No, I cannot recall that.

Q Did Cort say anything to you, or to anyone in your presence about his being sick at the time this statement was taken from him? A No, he didn't complain to me.

Q Did he complain to anyone in your presence? A Not while we were taking that statement, and I was with him until very late.

Cross examination waived.

Frank Brex, in rebuttal, direct.

FRANK BREX, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Fisch.

Q Deputy Chief Brex, did the defendant Cort put on your desk in your office in police headquarters a tooth of any kind? A He did not.

Q Or any other object? A He did not.

Q And did Sergeant Moffet pick up a tooth or any other object from your desk and put it in the waste basket? A No.

Q What kind of a desk have you down there? A A flat top desk about six feet long not quite four feet wide, with an opening in the center for a waste basket, but it is closed on the other side.

Q That is closed like the Judge's bench here on the other side? A Yes, and the part that faces me has three drawers on each side and there is an opening, but the back is all closed. You cannot throw anything in the back.

Q Where was the waste basket? A In the opening.

Q Where were you seated? A At the opening.

Q So that in order to reach that waste basket, would it be necessary to put you out of the way? A I would have to get up and get back.

Q And did the defendant Cort indicate anything on your desk pointing his finger at it, or pushing it? A No, he did not.

Q Did you see any marks on Cort? A No.

Q Of any kind? A No.

Q Did he ever complain to you about being struck? A No.

Frank Brex, in rebuttal, cross.

Q Did you ever hear until in the court room here he had been struck? A This was the first time I heard of it during the last hour or so.

Q Now, in Calabrese's demonstration of this thing, did Calabrese say anything to you or in your presence to the effect that Grossman had said, "I will get you, I will kill you, I will kill you." A No, he didn't.

Q Did he say to you or to anyone in your presence, that he had said to Grossman, "Let him go, you damn fool, or you will be shot?" A Part of that is right and part is wrong.

Q Which part is right? A The term is instead of shot, "Let him go, you damn fool, or I will shoot."

Cross examination waived by counsel for defendant Cort.

Cross examination by Mr. McGeehan.

Q Chief, did you make any memorandum of this story from the statement that is in evidence?

Mr. Fisch: Pardon me. Just a minute. Just one more question.

Mr. McGeehan: Withdraw it.

Direct examination (continued) by Mr. Fisch.

Q Did Calabrese say to you that he had fired at Grossman's arm? A He did not.

Cross examination by Mr. McGeehan.

Q Did you make any memorandum, Chief, of the conversations, that is, outside of the statement that is in evidence? A Mental note.

Q I do not mean mental notes. I mean did you make any note, any memorandum of it? A No.

Q Now, this happened in April of 1929, is that right? A Yes, this year.

Q And you are at the head of the Detective Bureau? A Yes.

Q Handling a great many cases either directly or through your subordinates, are you not? A The major ones, mostly.

Q And in addition to the major ones, you handle the routine of your office? A Oh, yes.

Q And you have questioned a great many persons between April 29th and now, have you not? A I have.

Q And you have questioned a number of persons with respect to crimes charged against them or that they were suspected of? A None as brutal as this one.

Q I beg your pardon. A Not as brutal or as outstanding as this one.

Mr. McGeehan: Your Honor, I move that be stricken from the record, and the Chief be censured for doing such a thing as he knew to be such.

The Court: Strike it out.

Q Now, you heard my question? A I certainly did. I would be deaf if I did not.

Q Now, will you anwser the question whether or not you have questioned other persons charged with crimes since the 29th of April, 1929? A Yes, I have.

Q You have been on the stand a great deal? A Yes.

Q You are experienced in testifying? A Yes, I think I am.

Q I know that you are, too. You know that your duty there is to answer questions? A Yes.

Q And responsive answers. A I think that was a responsive answer.

Q When you said what you did, did you think that was a responsive answer? A Yes.

Q You thought that that characterizing this particular—your idea of this particular case was in answer to a question as to whether you had questioned other persons between April and now? A Repeat that.

Q Will the stenographer read it?

(Question read.)

A I was under the impression you meant why I could remember it.

Q You want to be fair in this. A I have been absolutely, and you know it and complimented me only ten minutes before for it.

Q I did until you made that statement on the stand.

The Court: Just a minute. Do not get into any controversy between the witness and counsel here.

Q Now, you have read the statement? A Yes.

Q You read it since this case has been going on? A Yes.

Q You read it over to refresh your recollection? A No, I didn't do that.

Q You did not read this statement? A No.

Q Never? A I read it once.

Q When? A The evening I was speaking to Cort in Calabrese's presence.

Q You have never seen it since? A I have seen a copy of it.

Q Well, have you read a copy of it? A Yes.

Q And that copy contained the same as the words that are in this? A I imagine so. I did not compare it.

Q And when did you read that copy? A About a week or so ago.

Q When this trial began? A Yes.

Q You read it in the Prosecutor's office? A No.

Q Well, you read it in your office? A Yes.

Q And when you gave your testimony you had refreshed your recollection of things from the statement that Captain Sebold made up? A No.

Q What did you read it for? A Well, it pertained to the case.

Q You read it so that your general story from memory would not conflict with the written story? A It was not necessary.

Q Well, why did you read it just as the case was beginning? A No special reason.

Q Just as a matter of custom? A Well, I brought a set up to the Prosecutor's office. They needed an extra set of the statements.

Q You read in this statement what Captain Sebold has written to the effect that the defendant Lamilino said—

Mr Fisch: Lamilino?

Q Or, I mean the defendant Calabrese said, "Let go, you damn fool, or I will shoot you." You read these words in this statement? A I will not say I read the whole statement through but what I testified to was what Calabrese had

told me in the demonstration. I did not need any refreshing on that at all.

Q No, I am asking you when you read it whether the statement not the original, but a copy, a week ago, when this trial was beginning, didn't you read the part that said that Captain Sebold had written up to the effect that Calabrese had said, "Let go, you damn fool, or I will shoot him." A No, that was from memory.

Q Purely from memory? A Purely from memory.

Q You say those words because you read that in the statement and had memorized them to conform with it? A No.

Q And out of your memory the words "Let go, you damn fool, or you will get shot," or "Let go, you damn fool, or I will shoot," would produce about the same impression upon you, wouldn't they? A No, there was a situation there of something he had told me which is inconsistent.

Q You have answered, you said no, they would not, is that right? A What?

Q You said no, they wouldn't produce the same general impression on you? A No. There was something in the description he gave me that is not in there. You do not want anything to come out except what pleases you.

Mr. McGeehan: May the Court again strike that out.

The Court: Do not argue with counsel.

Q Now, your recollection is not infallible of what was said, you may be mistaken? A No, that was a very impressive thing he told me.

Frank Brex, in rebuttal, cross.

Q Now, was it impressive to you as well as how the gun was being grabbed by Grossman?

Mr. Fisch: I object.

Mr. McGeehan: Withdraw that.

Q Captain Sebold was present and you were present at the time the demonstration was given by the defendant Calabrese, were you both not?
A Yes.

Q And during that demonstration and while both you and Captain Sebold were there, Calabrese told about the gun being reached for, or struggled for or grasped for?

Mr. Fisch: I object.

Mr. McGeehan: I have not finished the question.

(Question read.)

Q (Continuing) And in telling that that he told where it occurred, didn't he?

Mr. Fisch: I object to that. That is not cross examination.

Mr. McGeehan: I think it is testing the recollection of the witness.

Mr. Fisch: The Deputy Chief was not asked that question on his direct examination in rebuttal.

The Court: Sustain the objection.

Q Do you remember what Calabrese said as to where it was when the gun was being grasped for?

Mr. Fisch: I object on the same ground.

Mr. McGeehan: I think it is testing the recollection and credibility of the witness. He says he remembers certain specific words. Now, I want to ask him if he remembers other things said at the same time.

The Court: If that is permissible, it is permissible to take everything in this written statement and go over it.

Mr. McGeehan: I want to confine myself to one where there is a difference between this witness' testimony and the written statement.

The Court: If you are going to confine it to this one particular statement, I will permit you.

Mr. McGeehan: All right.

Q Now, does your memory serve you as to where he said that gun grasping situation took place? A Yes.

Q Where do you think Calabrese said that took place at the time the gun was being grasped for at the door of the store or out on the sidewalk?

Mr. Fisch: I object to that.

The Court: I think it is just what I permitted.

Mr. Fisch He asked the Deputy what he thinks.

The Court: Where does he recall, what he means. That is a question.

A Calabrese says that Grossman and Wally were in the doorway and Grossman was on top struggling to get the gun.

Q That was in the doorway? A In the doorway.

Q Isn't it a fact that what was actually said was Grossman jumped on top of Wally and tried to get his gun away from him? This happened just outside of the door on the concrete steps? A No, not as far as what he said to me. That was written after I left the office.

Q But the man that wrote this was present during his statement to you and Captain Sebold? A I am not respsonsible for two statements Calabrese may have made.

Q Well, wasn't this statement of Calabrese giving the facts, in the presence of both you and Captain Sebold with regard to this door? A The written statement or the physical demonstration?

Q The words of Calabrese that eminated from him stating what happened accompanying the demonstration? A No, they were not the exact words.

Q They were not? A No.

Q Your recollection is different? A It is not a recollection, it is what he told me at that period.

Q You are not infallible, are you? A No, I don't say I am infallible, but it was an impressive thing he told me, and it was indelibly printed on my mind.

Q You do not remember his saying that? A He did not use the word "concrete step." He said they were struggling in the door on the way out.

Q I understood you to say on direct examination, on rebuttal, that nothing was said by the defendant about shooting at the arm of Gross-

man, that is right, is it? A I won't say—I would say that I did not get that.

Q Do I understand you correctly to say, on the present question by the Prosecutor in rebuttal testimony now, that nothing was said by Calabrese about shooting in the arm? A That is right.

Q Did he demonstrate that he had shot at the arm? A He pointed toward the right armpit, to the right of my arm pit, and he put his finger there.

Q Your arm was moving then at the time of the demonstration, wasn't it? A It was not, I had my arms around Lieutenant Zellers and I asked him to step over and show me where he shot him and he said, "I clipped him in here" and I said, "You mean you shot him?" "Yes," and I said, "Put your finger in there," and he put his finger below my arm pit, two or three inches away, to the right of my arm.

Q You did not ask him a question did you, as to whether Lamilino got a hold of the gun?

Mr. Fisch: I object to that, if the Court please, on the ground that it is not cross examination.

The Court: Sustained.

Q Now, he indicated a position in which the gun was pointed, did he not? A Yes, sir.

Q And if he indicated the position in which the gun was held, wasn't it in the direction of the arm of Grossman that was around Lamilino?

Mr. Fisch: Now, if the Court please, I object to that.

Frank Brex, in rebuttal, cross.

Q You were representing Grossman in the demonstration?

Mr. Fisch: I object to that on the ground that it is not cross examination.

Mr. McGeehan: I think it is. The Chief has definitely said—

The Court: If you asked Chief Brex on direct, or in rebuttal, whether or not Calabrese said anything about shooting at Grossman's arm, it certainly is. Did you ask him anything about that?

Mr. Fisch: If your Honor please, the question was, did Calabrese tell you he had fired at Grossman's arm and he said no.

The Court: It is perfectly proper to cross examine as to whether or not Calabrese did say that.

Mr. Fisch: That is not the question on cross examination.

The Court: I will permit it.

(Question read as follow: "And if he indicated the position in which the gun was held, wasn't it in the direction of the arm of Grossman that was around Lamilino, you representing Grossman in the demonstration.")

A He explained that he shot him in the lung, down here, and he pointed to the spot—

Q Didn't you answer that very question on your cross examination by me yesterday, to this effect, didn't you say in your testimony on cross examination yesterday, or the day before, the day that you testified, weren't you asked these questions and didn't you give these answers,

"Didn't he say he shot at his arm? Answer: No, he did not."—

Mr. Fisch: I object to that if the Court please, that certainly is not cross examination, that is just exactly what the Chief said now.

The Court: I will permit it.

Q Now, that is to introduce the next question to you, Chief, "If he indicated the position in which the gun was held, wasn't it in the direction of the arm of Grossman that was around Lamilino?" Do you remember being asked that question? A I do.

Q What was your answer to that?

Mr. Fisch: I object to that, I think that is mighty unfair.

The Court: Sustained.

Mr. McGeehan: I think it tests the great memory of the Chief.

Q Well, did you say, "That would depend, counsellor, upon the grip Grossman had, as to whether it was a high grip like that, which would have permitted it, or probably a neutral one, which would have held that, or an extra low one," did you say that? A Yes, I said that.

Q "And of course, a demonstration did not show exactly where that point was?" and your answer, "No, we did not go into it in detail as you are going into it now" you said that, didn't you?

Mr. Fisch: "As you are going into it now."

Q You said that, didn't you, Chief? A Yes, sir.

Q Now, by those answers to these questions, you meant what you said, didn't you? A Yes, sir.

Q And when Grossman's position was taken by you and Calabrese was showing the direction in which he pointed, whether he pointed at the arm or not, depended on what position your arm was in, didn't it? A Yes, sir.

Q And you don't know exactly what position your arm was in, it might have been high, medium or low, might it not? A I can't recall it.

Q So, you don't recall, do you, whether the position that he pointed the gun at was toward your arm or not? A When I took my arm, and I said, "Where did you clip him—

Mr. McGeehan: I ask that that be stricken out.

Q (Question read as follows: "So, you don't recall, do you, whether the position that he pointed the gun at was toward your arm or not?") do you? A He indicated—

Q Do you understand the question? A He leveled the gun like that—

The Court: The question, Chief, is whether you recall.

Q Do you recall where your arm was when he showed you the position in which he had the gun when the shot was fired? A At that moment?

Q Yes. A When he fired the shot at Grossman?

Q Yes. A Where my arm was at that time?

Q Yes. A I think it was around Zellers.

Q You don't recall, though, do you? A I think it was around there.

Q You don't remember whether it was high or low, do you? A He placed my arm in a position, that he said Grossman had his arms, around Zellers.

Q Do you know whether it was high or low, will you tell us that? A I cannot recall.

Q And whether the gun was pointed at the arm or not would depend on the position where your arm was, high or low, wouldn't it? A Yes, sir.

JOSEPH ZELLER, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Fisch.

Q Lieutenant Zeller, you are connected with the Newark Police Department and attached to the Detective Bureau at Police Headquarters? A I am.

Q How long have you been connected with the department? A Twenty years.

Q And your name appears as a witness to the statement, Exhibit S. 18, the statement of Joseph Calabrese? A Yes, sir.

Q And were you present at the time the statement was signed, and while it was being taken? A I was.

Q And after the statement was taken and before it was signed, did Calabrese read it out loud in your presence?

Joseph Zeller, in rebuttal, cross.

Mr. McGeehan: I object to that as not rebuttal, it has been gone into on the direct case of the State.

The Court: Sustained.

Q Did Calabrese say, in your presence, to Captain Sebold or to anyone else, that Grossman said, "I'll get you, I'll kill you, I'll kill you." A No.

Q Did Calabrese say in your presence to Captain Sebold or anyone else that he had said to Grossman, "Let him go, you damn fool, or you will be shot." A No.

Q Did Calabrese say in your presence to Captain Sebold or anyone else, "I fired a shot at Grossman's arm." A No.

Q Did Calabrese say to Captain Sebold in your presence, or to anyone else in your presence that Raymondo had pointed out this drug store?

Mr. McGeehan: Calabrese, you mean?

Q Yes, did Calabrese say in your presence to Captain Sebold or anyone else that Raymondo had pointed out this drug store?

Mr. McGeehan: I object to that as not rebuttal.

The Witness: No.

The Court: I was just thinking whether Calabrese or Cort said that.

Mr. Fisch: Both of them said it.

Cross examination by Mr. McGeehan.

Q Lieutenant, were you there during the entire taking of the statement? A Mostly.

Q Not all of it? A I was called out of the room several times to the 'phone.

Q So that you don't know what might have been said while you were out of the room? A Well, there could not have been much said—

The Court: Now, Lieutenant, answer the question. You don't know what was said, do you?

The Witness: No, sir.

Mr. Fisch: The State rests, your Honor.

(Both sides rest.)

(An adjournment is then taken until tomorrow, Wednesday, November 6, 1929, at ten o'clock A. M.)

EIGHTH DAY.

Wednesday, November 6, 1929.

Continued pursuant to adjournement.

Present, counsel as before stated.

Mr. Becker sums up in behalf of the defendant Arthur Cort.

Mr. McGeehan sums up in behalf of the defendant Joseph Calabrese.

Mr. Fisch sums up in behalf of the State.

The Court thereupon charged the jury as follows:

VAN RIPER, *J.*

Gentlemen of the jury, we have now arrived at that stage of the proceeding, insofar as this trial is concerned, where the real work of the jury commences.

It is the duty of the Court to instruct the jury with reference to the principles of law governing the case. The principles of law as charged by the Court should be accepted by the jury as a correct statement of the law. Any statement of law, or any statement purporting to be the law, made by counsel either for the State or for the defendants, inconsistent with anything that the Court may say, must be disregarded by you. The jury, however, are the sole judges of the facts, the weight and the sufficiency of the testimony, the credibility of the witnesses and the inferences to be drawn from the evidence. The Court in referring to the testimony is not to be understood as finding any facts, but merely as illustrating or explaining the application of prin-

ciples of law. If the Court errs in its statements of any testimony, you are to rely upon your own recollection and not that of the Court. If the Court refers to certain parts of the evidence, seemingly giving them particular emphasis, you are not to disregard other evidence which you may deem of equal or greater importance. It is your duty to consider and weigh all the evidence and the pertinent proof bearing upon the question of the guilt of these defendants and the degree and character of their offense, not only the evidence that is mentioned by the Court but also all of the facts which may appear by the testimony. If it has been suggested or stated during the course of the trial that some facts have or may have occurred, or testimony has been offered or excluded, or if testimony has been presented and subsequently stricken out, you will disregard all such statements, offers and excluded testimony. The mere asking of a question conveying an inference, which question is not answered, is not evidence. Statements of counsel on either side or promises to connect evidence which are not fulfilled are not evidence in the case. Your verdict can, therefore, lawfully and properly only be based on the testimony in the case before you.

The law presumes that these defendants, like all defendants in criminal cases, are innocent. This presumption of innocence can only be overcome by evidence showing beyond a reasonable doubt the guilt of the defendants and the defendants are entitled to the benefit of the reasonable doubt not only as to the commission and the nature of the offense, but also the degree of the offense. The State must also show all of the essential elements of the crime and of the

grade of the crime of which they are charged. The burden of proving the guilt of the defendants beyond a reasonable doubt is upon the State, and does not shift from the shoulders of the State throughout the whole case. But, of course, all of the testimony may be considered by you in connection with the burden of proof that is on the State. In other words, the State has a perfect right to rely on evidence which it selects, if it desires, introduced by the defense, the same as if introduced by the State itself.

Reasonable doubt is a term often used and probably pretty well understood, but it is not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the 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 upon the prosecution. If upon such proof there be reasonable doubt remaining the accused are entitled to the benefit of it by an acquittal. The evidence must establish the truth of the facts to a reasonable and moral certainty. A certainty that convinces and directs the understanding and satisfies the reason and judgment of those bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt, because, if the law should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether.

These defendants are presented here upon an indictment returned by the Grand Jury of Essex

County charging that they, in connection with two others, did on the 22nd day of April, 1929, in the City of Newark, wilfully, feloniously and of their malice aforethought kill and murder Maurice Grossman.

The other two persons mentioned in the indictments, Lamilino and Bruno, are not before you, so that you are, therefore, not concerned in returning any verdict insofar as these men are concerned, but are occupied solely with the question of the guilt or innocence of the defendants Calabrese and Cort.

The fact that there is an indictment is no evidence against the defendants. It is simply a necessary step which must be taken before the defendants can be put on trial.

The section of the law which controls the crime stated in the indictment, in so far as it relates to this 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, or which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, robbery, rape or sodomy, shall be murder in the first degree."

The State contends that these two defendants, together with the others named in the indictment, on the day mentioned therein, went to the drug store of Grossman on Sanford avenue, in the City of Newark, for the purpose of robbing said Grossman, and that in attempting to perpetrate the robbery Grossman was shot and killed.

Our statute, as I have just read it to you, enacts that if any person perpetrating or attempting to perpetrate any robbery, shall murder

another, that such person so killing, shall be guilty of murder and it further enacts that murder, in attempting to perpetrate any robbery is murder in the first degree.

Robbery is the felonious taking or stealing of the property of another from the person or personal custody of another by violence or putting him in fear. It is not necessary, in order to constitute that crime, that is robbery, that the property shall be on the person of the owner or the owner's agent, but if it is in his presence and in his custody, it is, for the purposes of the definition of this crime, on his person.

Murder is the killing of a reasonable being with malice aforethought—that is, with an intent to do evil. A purpose to do great bodily harm is sufficient and malice may be presumed from the character of the killing. And it will be implied when a killing is perpetrated in an attempt to do serious bodily harm.

The Prosecutor relies upon that section of the above-mentioned statute which says that murder which shall be committed in the perpetrating or attempting to perpetrate any robbery shall be murder in the first degree.

The testimony in this case is that the defendant Calabrese, together with Bruno and Lamilino, went into the store and while Bruno and Lamilino covered the proprietor, Grossman, with revolvers, Calabrese went into the back room where he drew a revolver and pointed it at Miss McEvoy, cautioning her to keep still. Calabrese himself, on the witness stand, said that their purpose in going in there was to rob Grossman. From this state of facts, you are justified in finding, as a matter of fact, that the defendants went to the Grossman store for the purpose of

perpetrating a robbery and under the law, as I have just called it to your attention, a murder which results from the perpetration or attempted perpetration of a robbery, is murder in the first degree. If you find, therefore, as a matter of fact, that the deceased, Grossman, was murdered during the course of the perpetration of a robbery or the attempted perpetration of a robbery in his store, the person or persons who are responsible for his death, are guilty of murder in the first degree.

If you find, as a matter of fact, that these defendants, or either of them, together with others, went to the Grossman store on the day in question for the purpose of holding up and robbing Grossman of moneys or things then in his custody and that, in the course of the perpertration of such robbery, Grossman was shot and killed by any one of them, then they are all guilty of murder in the first degree.

I am mindful of the fact that the only testimony as to Cort's presence in the store was given by Miss McEvoy, and my recollection is that the State admits that Miss McEvoy was mistaken in this regard. The testimony, as it now stands, in so far as Cort is concerned, is to the effect that he was the driver of the car in which he and the other three men rode, and that while the attempted robbery and shooting was going on, he sat outside at the wheel of the car. Under the law, however, in order for you to return a verdict of guilty against these defendants, or either of them, it is not necessary for you to find, as a matter of fact, that either or both of them actually fired the shot or shots which caused the death of Grossman.

One who stands by aiding and abetting is guilty of murder, even if he did not himself fire the fatal shot, provided, of course, the other essentials, as I have defined them to you, were present.

If several persons are parties to one common design, be it murder or other felony, and each takes the part assigned to him, some to commit the fact, others to wait at a proper distance to prevent a surprise or to further the escape of those actually engaged, they are all, provided the fact be committed, present at it and equally guilty.

In other words, gentlemen, in so far as guilt under the law is concerned, Cort and Calabrese, if they are guilty at all in this case, are guilty of murder in the first degree, and the fact that the testimony is to the effect that Calabrese actually fired one or more shots which struck Grossman, while Cort did not fire any, does not in any way differentiate between them in so far as the degree of guilt is concerned.

So far as your duty in this case is concerned, while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:

First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then, the next question for you to decide is who were the men who participated

in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others, took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree.

Although there are two defendants on trial in this case, each defendant stands alone, by himself, so far as guilt or innocence is concerned, based, of course, upon whether or not he participated at all in the crime.

You have heard the testimony of both of these defendants in which they admit the part each played in the carrying out of this plan.

You may return a verdict of not guilty as to both, or you may return a verdict of guilty as to both, or you may acquit one and convict the other, or you may convict them both and fix one punishment for one and another punishment for the other. You must decide the guilt or innocence of each defendant solely upon the evidence as it relates to that defendant and the guilt or innocence of either does not affect the guilt or innocence of the other.

At this time let me call your attention to the fact that testimony has been adduced from the defendants on cross examination to the effect that they have previously been convicted of

crime. This evidence is admitted for the purpose of affecting the credibility of the witness and cannot be used to establish his or their guilt in this particular case. Likewise, also let me call your attention to the fact that evidence has been introduced with reference to other crimes which the defendants may have committed immediately prior to the crime charged in the indictment, such as the stealing of the automobile by Cort. You are to disregard entirely this testimony insofor as it has any effect whatsoever upon their guilt or innocence of the crime charged in this indictment.

I also call your attention to the fact that statements have been put in evidence, which amount to admissions or confessions by the defendants. These statements are separate insofar as each defendant is concerned, and can only be used against the man who made the statement. In other words, Cort's statement cannot be used as evidence against Calabrese and vice versa.

Under the law of this State, as it now is, the jury has the right, in cases where the defendant or defendants is found guilty of murder in the first degree, to fix one of two punishments, either death or life imprisonment. Under the law, any person who shall be convicted of murder in the first degree shall suffer one of these punishments but the jury has the power to say which.

If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be.

If your verdict is simply "guilty of murder in the first degree," then the punishment will be death. If, however, you convict of murder in

the first degree and wish the punishment to be life imprisonment at hard labor instead of death, then your verdict will be "guilty of murder in the first degree with a recommendation for life imprisonment," in which case this and no greater punishment can be imposed.

I will read you the law in that respect:

> "Every person convicted of murder in the first degree, his aiders, abetters, counselors and procurers, shall suffer death, unless the jury shall, by their verdict and as a part thereof, upon and after a consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."

So that the prerogative is yours, gentlemen of the jury, and the sole right is yours, upon and after a consideration of the evidence in the case, assuming you should find the defendants guilty of murder in the first degree, to fix the penalty, either life imprisonment or the penalty of death, and you will recall, as I have just read it to you, the statute says if they shall be convicted of murder in the first degree, they shall suffer the death penalty, unless the jury shall recommend imprisonment at hard labor for life.

As I said before, if you do convict them, that is the only thing you can convict them of, and that is the only crime you can convict them of, the crime charged in this indictment.

I need not call your attention to the fact that this is an important case. It is important to the State, as it represents organized society, because it strikes at the very right of human life. It is especially important to these defendants because their lives and their liberties are at stake. As I

stated at the outset, you are to decide the case entirely upon the evidence as it is in the case. You are not to be swayed by passion, prejudice or sympathy. You are to consider all of the evidence in the case and to weigh it carefully and to decide what is the truth and what is not the truth.

In determining what weight you shall give to the evidence of a witness, you may well take into consideration the interest which the witness has in the outcome of the case. This applies to the evidence of the defendants as well as to that of all other witnesses. The interest which the defendants have in this case is, of course, great. You may consider whether this interest affects the value of the testimony which they have given. On the other hand, the interest which a witness has in a case is not the only measure by which to weigh his testimony. His manner on the stand, his opportunity of seeing the things to which he testifies, the corroboration or lack of corroboration of other witnesses and all of the circumstances bearing on the matter may properly be considered by you in weighing the evidence.

I am asked by the defendants to charge you that under the law of this State a defendant convicted of murder in the first degree and sentenced to life imprisonment is thereby sentenced to be imprisoned for the rest of his natural life and is not subject to parole at the end of a certain number of years. I so charge you, but I call your attention to the fact, gentlemen, in connection with that instruction, that the constitution of our State provides that the Court of Pardons shall have the power to grant pardons, after conviction, in all cases, except impeachment. There is

a distinction there which I think I ought to explain for your benefit, between parole and pardon. A person who is granted a parole is released from custody after having served a certain number of years of his sentence, and he is granted a parole upon certain conditions, usually upon the condition of good behavior. A parole, as I have just charged the law to you, if these defendants are convicted of murder in the first degree, and sentenced to imprisonment for life at hard labor, they cannot be granted a parole. However, the Court of Pardons could grant them a pardon if they were sentenced to life imprisonment at hard labor, the Court of Pardons could, at any time during their confinement, grant them a pardon.

(The jury retires.)

The Court: The requests to charge are denied, except insofar as they are charged.

Mr. McGeehan: I ask an exception to the refusal of the Court to charge the third request to charge, as requested.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Counsel for the defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Exceptions to Charge.

Mr. McGeehan: And I ask an exception to that portion of the charge wherein the Court charged that it is not necessary for either of them to have fired the shot, if they were present aiding and abetting. The exact language of the Court I have not, but it is introduced by that phrase, the exception being based upon the statement which I hereby make, that this is erroneous law, in that third persons aiding and abetting would not be sufficient, unless they were participating in the commission of the robbery at the time.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Counsel for the defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Mr. McGeehan: Also that portion of the charge wherein the Court charged that if there were a robbery in which the defendants participated, as a result of which Grossman was killed—on the ground that there would have to be a robbery in commission, the actual commission of which, Grossman was killed, and as part thereof, or an attempt to rob, and if under the evidence in this case the defendants have not committed a robbery and have not stolen anything, and had terminated their attempt to rob and were outside

of the place and were seeking to leave it, that then that would not be a part of the robbery, although it would be a result of the attempt to rob.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Counsel for the defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Mr. McGeehan: And I ask a general exception.

Counsel for the defendant Calabrese prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

Counsel for the defendant Cort prays an exception to this ruling of the Court.

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

WALTER D. VAN RIPER,
Judge.

DEFENDANTS' REQUESTS TO CHARGE.

1. Under the law of this State, the statutory provision is made that "Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after a consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed." (Denied except as charged.)

2. The jury, upon and after a consideration of all the evidence in the case has the absolute right, if it find the defendants guilty of murder in the first degree, to recommend imprisonment at hard labor for life, and if it does so by its verdict and as a part thereof, this and no greater punishment shall be imposed upon the defendant. (Denied except as charged.)

3. The jury, under the statute, if it find the defendants guilty of murder in the first degree, cannot recommend life imprisonment except upon and after a consideration of all the evidence in the case, but upon and after a consideration of all the evidence in the case, the jury has the absolute right to recommend such life imprisonment, if, in its judgment for any reason it deems such recommendation proper, no matter what facts are proven by such evidence or the nature of the defendant's acts. (Denied except as charged.)

4. Under the existing law of this State, a defendant convicted of murder in the first degree and sentenced to life imprisonment is thereby sentenced to be imprisoned for the rest of his natural life and is not subject to parole at the end of a certain number of years. (Charged, as modified.)

Certificate of Court Stenographers.

ESSEX COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, *vs.* JOSEPH CALABRESE and ARTHUR CORT.	*On Indictment No. 132.* *Sep. T. 1929 for Murder.*

We, Joseph S. Fishkind and Harold T. Cook, 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 above-mentioned case, which trial was held before the Honorable Walter D. Van Riper, Presiding Judge of the Essex County Court of Oyer and Terminer in and for the County of Essex, and a jury, on Monday, October 28, 1929; Tuesday, October 29, 1929; Wednesday, October 30, 1929; Thursday, October 31, 1929; Friday, November 1, 1929; Monday, November 4, 1929; Tuesday, November 5, 1929, and Wednesday, November 6, 1929.

Dated Newark, N. J., January 8, 1930.

JOSEPH S. FISHKIND,
HAROLD T. COOK.

Certificate of Trial Judge.

ESSEX COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, *vs.* JOSEPH CALABRESE and ARTHUR CORT.	*On Indictment No. 132. Sep. T. 1929 for Murder.*

I, Walter D. Van Riper, Presiding Judge of the Essex County Court of Oyer and Terminer and the Judge who presided over the aforesaid cause, certify that the above-printed book contains the entire record of the proceedings had upon the trial of the said cause and that the same is returned by the plaintiff-in-error with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

Dated Newark, N. J., January 8, 1930.

WALTER D. VAN RIPER,

J.

Exhibit S. 13.

EXHIBIT S. 13.

(Do not fold) Registration number
(Print or Typewrite) (3E 4477)
To be filled in by agent
Name of Owner Morris W. Shapiro
Street Address 50 Milford Ave
City or Town Newark County Essex
STATE OF NEW JERSEY
Department of Motor Vehicles
Application for Registration of a Passenger Vehicle
Description of Vehicle
1928 Reg. No. 43904 If not previously registered in New Jersey, from whom did you purchase same
Date of Purchase 1927
Name of Car Chrysler
Serial No. PH. 3180 Year 1927
Engine No. 161405 Model 70
Body Type Sedan No. Cylinders 6
Body Color Blue Bore of Cylinders
Horse Power (S. A. E. Rating) 23
Is car equipped according to law in regard to brakes, signalling device, reflecting mirror and rear red light showing white light on number plate Yes
Are headlights properly equipped and focused Yes.
Name approved headlight device used
Issued at Louis Flink, Springfield Ave., Newark, N. J.
Date Dec 31 1928 Fee $9.20
Form A 21—7-1-28-M1500

Exhibit S. 13.

AFFIDAVIT

State of New Jersey,
County of Essex

Morris W Shapiro being duly sworn according
(name of owner)
to law says that....he is the within named applicant (or if a corporation the.....
(title of office)
of.....a corporation,
(name of corporation)
the within named applicant), that....he signed the application, knows the contents thereof, and hereby makes oath in due form of law that the statements and answers contained therein are true.

Subscribed and sworn to before me this 31st day of December, 1928

X Morris W Shapiro
(signature of applicant)

Harry Shapiro
(Notary Public)

Form C-535 8
10-16-28 M2½

Exhibit S. 13.

STATE OF NEW JERSEY

Department of Motor Vehicle
Registration and Regulation
335

I, William L. Dill, Commissioner of Motor Vehicles, of the State of New Jersey, do hereby certify that the annexed is a true copy of the application of Morris W. Shapiro, 50 Milford Avenue, Newark, New Jersey, to whom passenger registration number 3E-4477 was issued on the thirty-first day of December, 1928, for the year 1929, as the same has been taken from and compared with the original, now remaining on file and of record in this office.

IN TESTIMONY WHEREOF: I have hereunto set my hand and affixed
(SEAL) my Official Seal, at Trenton, this twenty-fourth day of October, A. D., 1929.

WM. L. DILL,
Commissioner of Motor Vehicles.

Exhibit S. 18.

EXHIBIT S. 18.

DEPARTMENT OF PUBLIC SAFETY
POLICE DIVISION

Newark N. J. May 1st 1929

VOLUNTARY STATEMENT OF Joseph Calabrese
RESIDENCE 243 Eight Ave.
OCCUPATION Mason.
Age 21

STATEMENT MADE TO: Captain Philip Sebold and Lieutenant Joseph Zeller Detective Joseph J. Kenney & Wm Callahan.

On Sunday night April 21st 1929 at about 8:00 P. M. I met Arthur Cort at the Public Service terminal at Park Place Newark N. J. We were talking about finding a way to get some money, and after talking a little while longer we hit upon the plan of sticking up some store that looked good.

Cort said he would go out and try to steal a car, and that if he could get a car he would call for me at my home the next morning, which would be Monday April 22nd 1929.

I then said allright I will go along and then I left Cort at the terminal and I went home arriving there about Midnight.

On Monday morning about 7:00 A M. April 22/29 I left my home and just as I was coming out of the house I met Art Cort who was in a Chrysler Sedan, blue body. I got in the car and Cort said, let's go over and pick up Billie (meaning William Raymondo) Cort and I then drove over to Raymondos house 18 Jay Street, where Cort sounded the auto horn, Raymondo

Exhibit S. 18.

came out of the house and said "Where are we going" I told him we were going around to see if we can find some places to stick up and make some money.

Raymondo agreed to come along and he got into the car, getting into the rear seat.

I had a 32 cal nickelplated revolver in my outside overcoat pocket, this revolver I bought about five years ago from a man whose name I do not remember and I have had this revolver hid in our garage in the rear of our house for the past five years. When I bought the revolver it was fully loaded with six cartridges and when I placed this revolver in my pocket it was fully loaded.

We then drove over Jay Street to Sussex Ave where we met Sam Simone who I know as "Simmie" he was waiting for William Raymondo as he and Raymondo had intended to go out looking for a job.

We then drove up Sussex Ave and some other streets into East Orange. We saw a butcher shop that looked good, we stopped the car and Raymondo, Simon myself got out about a half block from the butcher shop. Cort remained at the wheel, we agreed that all three go in and order the butcher to stick em up, get the money and then run for the car and make our getaway.

We walked to the butcher shop and when we looked in we saw three butchers in the shop and we thought it was too risky to stick the three men up because we only had one revolver, we then gave up the idea and went back to the car.

We then drove around to spot some other places and finaly we drove to Sanford Ave. where we spotted a drug store (which I have since learned was Grossmans drug store) we found

Exhibit S. 18.

this place was not open yet. We then drove to Norfolk and Orange Streets, where Raymondo and Simion got out of the car. Cort and I then drove to 70 Plane Street to where I had a furnished room on the third floor. I had engaged this room on April 18th 1929 paying $7.00 per week for same.

I told Cort to drive the car about two blocks from the house and park on Burnett St. I then went up stairs, and was latter joined by Cort.

Cort and I talked over the stick up that failed in Orange and at Grossmans drug store and I said to Cort that Victor Brumo and Domenick Lamalino whom I know as "Wallie" had called me up at my home on Sunday April 21st 1929 and had told me that they were coming over to see me Monday night. I then suggested to Cort that we take "Wallie" and Brumo with us to stick up Grossmans drug store, because Simione and Raymondo got cold feet and did not want to go with us, as they had told me so, after we found Grossmans drug store was closed.

Cort then said he was satisfied to take "Wallie" and Brumo with us, as Cort knew these two because we all served time together at the Rahway Reformatory.

"Wallie" and Brumo had told me over the Phone the day before that they would come over on the D. L. & W. Railroad from Hoboken between six and seven P. M.

So about 5:45 P. M. Cort, and I, walked to where the car was parked on Burnett Street and drove to the Broad Street depot of the D. L. & W. Railroad where we met "Wallie" and Bruno.

They got in the car with Cort and I and we decided to drive around until it got dark, while we were driving around the City I asked "Wallie"

Exhibit S. 18.

and Brumo if they brought their guns with them, they both said yes, and then they asked me if I had a gun. I told them that I had my gun in my pocket.

Cort and I then told "Wallie" and Brumo that we knew of a drug store on Sanford Ave which looked like an easy place for a stick-up we thought that a druggist as a rule is a smart fellow who would not put up any fight if he was stuck up, and would hand over his money rather than be shot.

"Wallie" and Brumo agreed to go in on the job and we also agreed to split fifty-fifty on the money that we would get.

We then drove to Lennox Street where we parked the car on the South side of Lennox Street where we all got out except Arthur Cort who remained at the wheel, while standing at the front of the auto I noticed that the left front head-light of the auto was not lit, the one on the right side however was lit.

"Wallie"—Brumo and I then agreed that Brumo was to go into Grossmans drug store and buy a package of chewing gum, in order to bring the druggist out from the prescription room to the store. "Wallie" and I were to follow him in after a minute or so and while I went to the rear in the prescription department to cover any one who might be in there, "Wallie" and Brumo were to hold up the druggist at the point of their revolvers and have him hand over what money he had and if he had a diamond ring or other jewelry that could not be easily identified they were to take that too.

So having made our plans, Bruno went into the store he had his revolver in his inside over-

Exhibit S. 18.

coat pocket, he wore a gray top coat and gray cap.

Shortly after Brumo went into the drug store "Wallie" and I entered. I wore a blue overcoat and a gray fedora hat and I had my revolver in my right hand concealed in my outside overcoat pocket. "Wallie wore a gray top coat, and light colored cap he had his revolver in his outside top coat pocket.

As I entered the drug store I saw Brumo receiving his change from the druggist who was standing behind the counter at the cash register. Brumo stood directly in front of the cash register.

"Wallie" and I closed the door behind us and walked a few feet toward the druggist, we both drew our revolvers and I said "Stick em up" the druggist appeared to be dumb struck, and I rushed by him behind the counter, and into the prescription room where I found a woman seated on a chair reading a news-paper. I pointed my revolver at her and put my finger to my lips saying "Be quiet" If you don't holler, I won't harm you" the woman said "Allright" She sat quiet for a moment, and then made a move to get up. I again pointed my gun at her and told her to sit down and not to holler and I won't harm her.

A moment latter I heard "Wallie" and Brumo scuffling with the druggist ordering him to put em up" and the druggist was saying "I won't" I won't"

I then went to the assistance of "Wallie" and Brumo" the woman followed me out of the prescription room. I then hit the druggist on the head with the butt end of my revolver and told him to hand over the money, he kept saying No. No. I won't, the woman then said, "for God's

Exhibit S. 18.

sake give them the money, the druggist again said, No, and made a run for the door. "Wallie" also made a run for the door he being a little in advance of the druggist, as "Wallie" opened the door the druggist (Who I know now to be Morris Grossman) tripped "Wallie" who fell to the floor on his knees. Grossman jumped on top of "Wallie" and tried to get his gun away from him, this happened just outside of the door on the concrete step, and Brumo and I in order to get out of the store had to jump over Grossman and "Wallie" we tried to pull Grossman off "Wallie" and in doing so helped both to their feet. Grossman held on to "Wallie" with a death like grip, they were struggling on the sidewalk by this time directly in front of the store. Brumo and I were trying to pull Grossman's right arm from "Wallie" but he was too strong for us. I then said to Grossman "You dam fool" let go or I'll shoot. Grossman still held on and then Brunno fired a shot into Grossmans right side. Grossman still held on to "Wallie" we were then about five feet in front of the show window, the struggle continued until we were about three feet from the curb. I saw that we couldn't do anything with Grossman so I raised my gun and fired a shot into Grossman's right side. I was then about three feet to the right of Grossman and I believe by shot just about hit him in the lung.

A moment latter Grossman still holding "Wallie" struggled off the sidewalk to the street and as they reached a point about four feet from the curb, both "Wallie" and Grossman fell to the pavement. "Wallie" falling on top of Grossman. Brumo and I then tried to lift "Wallie" up but Grossman still held on, a

Exhibit S. 18.

moment or so latter Grossman relaxed and let go, we picked up "Wallie" leaving Grossman laying in the street, we walked a few feet then ran toward the Auto on Lennox Street.

The three of us got into the car, Arthur Cort was behind the wheel, we drove straight down Lennox Street, I was holding my revolver in my right hand, and after we rode about five blocks, I put the revolver back in my pocket, when I saw nobody was following us.

We then drove to my room at 70 Plane Street, where Brumo—Wallie and I got out. I told Cort to drive the car about five blocks away and then come back to the room.

While we were driving from the scene of the hold-up to 70 Plane Street we told Cort all that happened at Grossmans drug store We told him that we had to plug a guy. Cort told us that he heard the shots and that he was worried. He thought that one of us was shot and was glad to see us running for the car, and that we were all-right.

Cort returned to the room at 70 Plane Street after he parked the car and while we were waiting for him Brumo and Wallie washed the blood from their top coat sleeves.

"Wallies" white linen shirt and collar were blood stained from the struggle with Grossman, so Wallie took off his shirt and I gave him one of my shirts to wear.

While "Wallie" and Brumo were washing their sleeves William Raymondo came up to the room and we told him all that had happened and I also warned Raymondo that if he told any body what he saw or heard I would take him for a ride.

Exhibit S. 18.

So about 8:30 P. M. "Wallie" and Brumo left the room saying that they were going back to Hoboken and that I should let them know by phone whether the guy died or not.

After they were gone I tore "Wallies" shirt into small pieces and burned it in a garbage pail.

About 9:15 P. M. Cort went out saying that he was going to the Turkish baths.

Raymondo and I talked for a while and then both of us went to bed.

The next morning we awoke about 10:00 A. M. and I sent Raymondo out for a newspaper. I wanted to see if Grossman was dead. About 11:30 A. M. Tuesday April 23rd 1929 I left the house at 70 Plane Street. I took my revolver with me and walked to the Clay Street bridge over the Passaic River. I went to the middle of the bridge and looked around, seeing no one I threw the revolver into the river from the south side of the bridge.

I then walked to the Harrison side, strolled around for a while, and then recrossed the bridge on the North side and returned to my room.

On Wednesday morning I called "Wallie" on the phone. "Hoboken 2205" the man that answered called "Wallie" to the phone. I told "Wallie" that the man was allright, he wasn't dead yet. "Wallie" said he read the New York papers and knows all about it. he also said, if the man dies, we will be charged with manslaughter. I have not seen or heard from "Wallie" or Brumo since then.

The last time I saw Cort was about an hour before I was arrested on Monday April 29th, 1929, at about 1:00 P. M.

I am shown a picture by Captain Sebold bearing the number 8973. Eight-nine-seven-three.

Exhibit S. 18.

on the reverse side and I identify the photograph as the likeness of Domenick Lamolino whom I have refered to as "Wallie" who served a sentence of about fourteen months with me at the New Jersey State Reformatory at Rahway, N. J. during the years of 1927 and 1928 and who was one of my companions in the stick-up of Grossmans drug store on Sanford Ave on April 22nd, 1929.

Captain Sebold also shows me a photograph bearing the number 9352 nine-three-five-two. on the reverse side, and I identify the photograph as the likeness of Victor Bruno who served a sentence of about fifteen months with me at the New Jersey State Reformatory at Rahway N. J. during the years of 1927 and 1928 and who was one of my companions in the stick up of Grossmans drug store on Sanford Ave on April 22nd 1929. He is the man that fired a shot from a revolver into Grossmans right side while he was struggling with "Wallie"

Captain Sebold also shows me a photograph bearing the number 9694 nine-six-nine-four. on both sides and I identify the photograph as the likeness of Arthur Cort who served a sentence of about 18 months, with me at the New Jersey Reformatory at Rahway N. J. during the year of 1927 and 1928 and who was one of my companions in the stick-up of Grossmans drug store Sanford Ave Newark N. J. on April 22/29. He is the man that stole the Chrysler Sedan on April 21st 1929 and who drove the stolen auto to and from the scene of the hold up.

I have signed my name and date on the photographs as a mark of identification.

I am shown a three button, double breasted blue Chinchella overcoat, bearing the label of

Exhibit S. 18.

Bell System clothes New York. I identify this coat shown to me by Prosecutor's detective Calahan as my overcoat and the one worn by me while committing the hold up of Grossmans drug store Sanford Ave on the night of April 22/29.

I am shown a two button double breasted fawn colored overcoat bearing the label of Moe Rich 216 Market St Newark. I identify this coat shown to me by Detective Joseph J. Kenney as the property of Arthur Cort and worn by him on April 22nd 1929, during the hold up of Grossmans drug store Sanford Ave.

This statement consisting of nine pages has been read to me by Captain Sebold and has been read aloud by me.

It is the truth and given by me on my own free will without any threats or promises being made, and realizing that this statement can be used at my trial. this is in my own handwriting.

Joseph Calabrese

Philip Sebold Captain Detective Bureau.
Joseph Zeller.

Witnesses. Det William J. Callahan, Prosecutors Office

Witnesses. Det Joseph M. Rodgers
" " Joseph J. Kenny

EXHIBIT S. 19.

DEPARTMENT OF PUBLIC SAFETY
POLICE DIVISION

Newark N. J. May 6 1929

VOLUNTARY STATEMENT OF Joseph Calabrese
RESIDENCE 243—8th Av.
OCCUPATION MASON
AGE 21

STATEMENT MADE TO Lieut. Linarducci, Dets Jos. Kenny, T Boland and W. Callahan

The gun I used in the Grossman stick-up and shooting was given to me by Billie Raymond on the morning of that day in the Chrysler Sedan on our way to stick up the butcher shop in Orange. I sat in the front seat of the car with Cort and Raymond and Simeone sat in the rear seat when Raymond handed me the gun. I kept it all that day. In the afternoon in my room I broke the gun and looked it over. It was loaded with five metal-jacket bullets and one lead bullet. I took the same gun with me when Art Cort, Bruno and Wallie went with me to stick up Grossman in his drug store on Sanford Av.

That is the gun I used to shoot Grossman during the stick-up when he held on to Wallie. When we got away from Sanford Av. I carried the same gun with me and in my room at 70 Plane St. after all the boys had gone I offered to return this gun to Raymond. He took it in his hands and gave it back to me saying "What is the use of giving it to me, you're in a jam, you need it if you are stopped you can have it out with them." I took the gun back and kept it in my possession

Exhibit S. 19.

until the Saturday of the same week on April 27th. at about 9:30 that night I gave the gun back to Raymond in the hall of his home.

The following day on Sunday, Apr. 28th Raymond came to my room and told me that he had given the gun to Simeone that morning.

I saw the gun again the following morning Monday April 29th in Simeone's possession. I did not see it again until this evening because I was arrested that day.

I recognize the gun because I remember the number 19 stamped twice on the inside of the cylinder. This gun has been shown to me by Capt. Sebold and is now being shown to me by Lieut Linarducci and I have filed a cross on both sides of its handle. This is the particular gun I mention throughout this statement. It is the same gun given to me by Billie Raymond, the same gun I shot Grossman with and the same gun I returned to Billie Raymond, the Saturday night following the Grossman stick-up.

Joseph Calabrese

Philip Sebold
Jos Linarducci

Jos. Kenny
William J. Callahan,
Pros. office.

Exhibit S. 22.

EXHIBIT S. 22.

DEPARTMENT OF PUBLIC SAFETY
POLICE DIVISION

Newark N. J. May 2nd 1929

VOLUNTARY STATEMENT OF Arthur Cort
RESIDENCE #318 Clinton Ave. Newark N. J.
OCCUPATION Electrician
Age 22

STATEMENT MADE TO Detectives Kenny-Boland at Police Headquarters May 2nd 1929

About four Oclock Monday the day of the Grossman Hold-up I stole a Chrysler Sedan that was parked on the west side of Milford Ave. about half block south of Clinton Ave. The color of the Sedan was blue.

I drove the sedan that I stole around until daylight, about seven Oclock I drove to Joe Calabreses house at 243 8th Ave. and got Calabrese. Calabrese and I then drove the Sedan to Billy Raymonds house at 18 Jay St. and picked Billy Raymond up. Calabrese Raymond and I then drove to Sussex Ave and Jay St. where we picked up Sam Simione.

Calabrese, Raymond-Simione and myself drove around until we reached Orange. I was driving the car, we passed a butcher shop in the colored section of Orange and we decided to hold the place up. Calabrese-Raymond and Simione got out of the car and they walked back to the Butcher shop. Calabrese Raymond and Simione came back to the car and said they did not want to take the place as they only had one gun. Joe Calabrese had the gun.

We drove over to Newark and spotted the Drug store on Sanford Ave. Calabrese and I

Exhibit S. 22.

thought that this Drug store would be a good place to hold-up. When we first looked at the Drug store it was closed so we drove around for a while and when we came back it was open. I parked the car on Lenox St. near the corner of Sanford Ave. on a hill then Raymond and Simione refused to take part in the hold-up of the Drug store. We left Sanford Ave. and Lennox St and I drove to Orange St. and Clifton Ave. where Raymond left us. Then I drove to Warren and Bergen Sts. where Simione left Calabrese and I.

Calabrese and I rode around for a while and then I took Calabrese home and drove down town and parked the car on New near Halsey Sts. left the car and went over to The Public Service Terminal. This was about nine oclock in the morning.

When I left Calabrese house Calabrese told me to meet him at the D. L. & W. station Broad St at six oclock.

I hung around down town until six oclock went back to New St and got the car and went to the D. L & W. station on Broad St where I met Calabrese Bruno and Wally. We Calabrese-Bruno-Wally and myself drove around for about three quarters of an hour.

Looking for a place to Hold-up we did not find a suitable place to hold-up so we drove to the Drug-store on Sanford Ave. near Lenox St. I parked the car on Lenox St near Sanford Ave on the hill, this was about ten minuets after seven in the evening. I shut the Motor off and Wally-Calabrese-Bruno and myself talked for a few minuets, our conversation was regarding holding up the man in the Drug store on Sanford Ave near Lenox St.

Exhibit S. 22.

Bruno, calabrese and Wally got out of the car to go around the corner and hold-up the man in the Drug-store, I started the Motor and stayed in the car behind the wheel, a few minuets after Wally, Calabrese and Wally left the car I heard two shots. I opened the doors of the car and put the car in Gear. Wally, Calabrese and Bruno came running around the corner and got into the car. Calabrese sat with me and Bruno and Wally sat in the back of the car.

We drove down Lenox St to Meade St and turned left on Meade St useing other streets until we reached Central Ave. We drove down Central Ave. to Plane St and over Plane St to #70 Plane St. Calabrese, Bruno and Wally got out of the car and went upstairs to Calabreses room. I drove the car around the corner and left it on Eagle St. I went back to 70 Plane St and Calabrese who was watching for me to come back threw the key of the front door down to me.

I went upstairs. Bruno, Wally and Calabrese were in the room. Bruno and Wally were washing the blood from their coats. I layed on the bed. Bruno and Wally said they wanted to get out of Newark quick. Wally got a shirt from Calabrese and put it on. the shirt that Wally took off had blood on it. Calabrese took Wallys shirt out of the room. Wally and Bruno left the room saying they were going to the station and go home. Before Bruno and Wally left Billy Raymond came up to the room and we told him all about what happened. Calabrese told Raymond not to speak of anything he Raymond saw or knew. I left Calabrese and Raymond in the room and walked down to the Public Service Terminal and hung around for a couple of hours, then I went up to The Charlton Baths on Charlton St. and stayed there all night. About

noon the next day I left the Charlton Baths and came down town and met Calabrese in Military Park.

Calabrese and I talked about the hold-up as I read about it in the Paper before I met Calabrese. We did not know what to do. I left Calabrese in Military Park and went to Eagle St and got the car. I drove up to Raymonds house and saw him. Raymond and I drove around to Calabreses house but could not see him. Raymond and I drove the car around the rear of the car was going bad. I took Raymond home and drove the car down to High St near Central Ave. where I parked it. I waled down town and hung around the Terminal until about eleven oclock and went to The Charlton Baths and stayed there all night. About ten oclock the next day I left the Charlton Baths and went to Raymonds house and saw Raymond. Raymond and I went to High St near Central Ave to see if the car was there yet. The car was still there we deceided to see if it would run. I started the Motor and the car ran all right while it was running straight but kept getting worse when I made turns with it. I took Raymond home and drove the car down and parked it on New St, near Halsey St. I left the car and went looking for Calabrese.

About three oclock in the afternoon Wednesday I met Calabrese. Calabrese and I got the car and drove it around until about ten oclock at night when we left the car on South St near the Pullman Hotel. Calabrese gave me one dollar and I went to The Charlton Baths.

About nine thirty in the morning I left the Charlton Baths. I went to South St and got the car. I drove to Raymonds house and got

Exhibit S. 22.

Raymond. Raymond and I rode around for a while, and when we reached Howard and Bank Sts. the car stopped we pushed it across the street and tried to fix it but I knew we could not fix it, so we left the car on Bank St near Wickeliffe St. Raymond and I went Calabreses room at 70 Plane St and met Calabrese who bought some food which we cooked in Calabreses room. This was Thursday.

Raymond, Calabrese and I stayed in Calabreses room and about 5:30 P. M. Raymond went home. Calabrese and I stayed in the room all night.

The next day Friday Calabrese and I went out and hung around the Terminal and Military Park until late at night. then we went back to Calabreses room and went to bed.

The next day Saturday Calabrese and I left Calabreses room about noon. we went down town and walked around and stayed out until late at night when we went back to Calabreses room and went to bed.

Sunday Calabrese and I got up but we stayed in the room all day and all night. Monday morning Calabrese and I went out and Calabrese left me. I did not see him any more until I saw in Police Headquarters on May 2nd 1929.

I went to Calabreses room at six thirty on Monday night to see Calabrese but he did not show up. I stayed in Calabreses room Monday night. Tuesday I left the room about noon and left my overcoat and Gray soft hat in Calabreses room. I looked around down town for Raymond or Calabrese but could not find them. late at night I went back to Calabreses room but could not get in so I came down to the Terminal and hung around there all night.

Exhibit S. 22.

Wednesday I went back to Calabreses room to get my coat and hat but could not get in, so I hung around Military Park all day. About 5.30 PM I met my Mother and went home with her and had supper. I came down town again, and about 3.00 AM Thursday I went back to my Mothers house and stayed there until about 7.00 A. M. When I came down town and hung around Military Park and the Terminal about two oclock in the afternoon Detectives Moffatt and Morley arrested me in the Terminal.

I am shown a double breasted two button Fawn color Overcoat label on inside Moe Rich 216 Market St Newark N. J. I indentify this coat shown to me by Detective Joseph Kenny as my coat worn by me on the night of April 22nd 1929 at the hold-up of Grossmans Drug store and also one Gray soft hat white lining label on inside Nelsons Hats 254 Market St Newark N J as my hat worn by me on the night of April 22nd at the Grossman hold-up. I am also shown a three button double breasted blue Chinchilla overcoat bearing label Bell System Clothes New York this coat I indentify as the coat worn by Joseph Calabrese on the night of April 22nd at the Grossman hold-up on Sandford Ave.

I am shown a picture by Detective Kenny #8973 on reverse side which I indentify as the likeness of Dominick Lamalino who I refered to in my statement as Wally. Who was an inmate at the Rahway Reformatory while I was there in 1927 and 1928 and who was one of my companions in the Grossman hold-up on Sanford Ave. April 22nd 1929.

This statement of 10 pages has been read to me by Detectives Boland & Kenny and has been read aloud by me. It is the truth given by me on my

Exhibit S. 22.

own free will without any threats or promises being made and realizing that this statement can be used at my trial. This is in my own hand writing. Arthur Cort

Witnesses
Thomas J. Boland
Warren T. Moffatt
Joseph J. Kenny

ASSIGNMENT OF ERRORS.
(Joseph Calabrese.)

Filed January 7, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOSEPH CALABRESE and ARTHUR CORT, *Plaintiffs-in-Error.*	*On Indictment for Murder.* *On Writ of Error to Essex Oyer and Terminer.* *Assignment of Errors.*

Afterwards, to wit, on the return day of said writ of error, before our Judges of our Court of Errors and Appeals in the last resort at Trenton, comes the said Joseph Calabrese, the plaintiff-in-error, by John W. McGeehan, Jr., his attorney, and says, that in the record and proceedings aforesaid, and also in the giving of judgment as aforesaid there is manifest error in this, to wit:

1. Because the Court erroneously overruled the challenge to the array of the panel of jurors interposed by the defendants, which challenge was based upon the ground that all of the names of the general panel of jurors were not in the box from which they were drawn at the time the drawing began and during the drawing of the jury.

2. Because the Court, over the objection of the defendants, erroneously permitted the drawing of the names of jurors from a box that did not contain the names of all the members of the general panel at the time of such drawing.

3. Because the Court erroneously permitted the Prosecutor, over the objections of the defendants, to question the prospective jurors on their *voir dire*, without any challenge for cause having been interposed.

4. Because the Court erroneously sustained the objection to the following question put to prospective juror, George C. Braumuller, when sworn on his *voir dire,* said question being asked by counsel for the defense: "Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case?"

5. Because the Court, over the objection of the defendants, erroneously sustained the challenge for cause interposed by the State against Harry E. Bataille, when sworn on his *voir dire,* and excused said juror for cause, over the objection of the defendants.

6. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Harold J. Butts, over the objection of the defendants, and excused said juror upon such challenge.

7. Because the Court erroneously sustained the challenge for cause interposed by the State against Henry W. Adams, a prospective juror, and excused said juror from service upon such challenge, over the objection of the defendants.

8. Because the Court erroneously overruled the objection of the defendants to the following question put by the State to the prospective juror, Louis C. Bassini, when sworn on his *voir dire:* "Q So that this opposition that you have to capital punishment would interfere with the proper performance of your duties in a murder case where the death penalty is involved?"

9. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Louis C. Bassini, over the objection of the defendants.

10. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Henry Cahill, over the objection of the defendants.

11. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Emil E. Argast, Jr., over the objection of the defendants.

12. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Ames S. Borst, over the objection of the defendants.

13. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, William Bal, over the objection of the defendants.

14. Because the Court erroneously sustained the challenge for cause interposed by the State

New Jersey State Library

against the prospective juror, Terence P. Butler, over the objection of the defendants.

15. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, John J. Daley, over the objection of the defendants.

16. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Robert T. Burns, over the objection of the defendants.

17. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, David Dalrymple, over the objection of the defendants.

18. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles H. Adams, over the objection of the defendants.

19. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Michael J. Ryan, over the objection of the defendants.

20. Because the Court erroneously overruled the challenge for cause interposed by the defendants to prospective juror, William F. Dick.

21. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles R. Arndt, over the objections of the defendants.

22. Because the Court erroneously excused numerous jurors upon the challenge of the State upon grounds not constituting grounds for challenge for cause, beyond the number of peremptory challenges allowed by law to the State.

23. Because the Court erroneously sustained the objection of the State to the following question put to the witness Brex by counsel for the defendants: "Mr. McGeehan: I would like to ask one question of the Chief—Were his statements later reduced to writing?"

24. Because the Court erroneously overruled the objection of the defendants to the following question put to the witness Brex: "Q Did you have a conversation with him?"

25. Because the Court erroneously permitted the State to introduce in evidence the verbal statements of the defendant Calabrese, which statements had been reduced to writing, over the objection of the defendants that said verbal statements did not constitute the best evidence of the admissions of the said defendant, in view of the fact that the same had been reduced to writing, and that the said writing was the best evidence of such statements.

26. Because the Court erroneously admitted in evidence the alleged written confession of the defendant Calabrese over the objection of the defendant.

27. Because the Court erroneously admitted in evidence, over the objection of the defendants, during the testimony of Lieutenant Linarducci, the additional written statement or confession of the defendant Calabrese.

28. Because the Court erroneously sustained the objection of the State to the following question put by the attorney for the defendants to the witness Calabrese: "Q Did you at any time intend to kill him or seriously wound him?"

29. Because the Court erroneously overruled the objection of the defendants to the following question put to the defendant and witness Calabrese on cross examination by the State: "Q Well, I show you the statement. Now, is that in the statement?"

30. Because the Court erroneously charged the jury in part as follows: "Murder is the killing of a reasonable being with malice aforethought—that is, with an intent to do evil. A purpose to do great bodily harm is sufficient and malice may be presumed from the character of the killing. And it will be implied when a killing is perpetrated in an attempt to do serious bodily harm."

31. Because the Court erroneously charged the jury in part as follows: "So far as your duty in this case is concerned, while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:

First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then, the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others, took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree."

32. Because the Court erroneously charged the jury in part as follows: "If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be."

33. Because the Court erroneously charged the jury in part as follows: "However, the Court of Pardons could grant them a pardon if they were sentenced to life imprisonment at hard labor, the Court of Pardons could, at any time during their confinement, grant them a pardon."

34. Because the Court erroneously refused to charge the third request to charge of the defendants, which read as follows: "3. The jury, under the statute, if it find the defendant guilty of murder in the first degree, cannot recommend life imprisonment except upon and after a consideration of all the evidence in the case, but upon and after a consideration of all the evidence in the case, the jury has the absolute right to recommend such life imprisonment, if, in its judgment, it deems such recommendation proper, no matter what facts

are proven by such evidence or the nature of the defendant's acts."

JOHN W. McGEEHAN, JR.,
Attorney for and of Counsel
with Plaintiff-in-Error.

Service of the within assignment of errors is hereby acknowledged this 6th day of January, 1930.

JOSEPH L. SMITH,
Prosecutor of the Pleas,
Attorney of D. in E.

SPECIFICATION OF CAUSES.

(Joseph Calabrese.)

Filed January 7, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOSEPH CALABRESE and ARTHUR CORT, *Plaintiffs-in-Error.*	*On Indictment for Murder.* *On Writ of Error to Essex Oyer and Terminer.* *Specification of Causes.*

And the said plaintiff-in-error, Joseph Calabrese, by John W. McGeehan, Jr., his attorney, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

1. Because the Court erroneously overruled the challenge to the array of the panel of jurors interposed by the defendants, which challenge was based upon the ground that all of the names of the general panel of jurors were not in the box from which they were drawn at the time the drawing began and during the drawing of the jury.

2. Because the Court, over the objection of the defendants, erroneously permitted the drawing of the names of jurors from a box that did not

contain the names of all the members of the general panel at the time of such drawing.

3. Because the Court erroneously permitted the Prosecutor, over the objections of the defendants, to question the prospective jurors on their *voir dire,* without any challenge for cause having been interposed.

4. Because the Court erroneously sustained the objection to the following question put to prospective juror, George C. Braumuller, when sworn on his *voir dire,* said question being asked by counsel for the defense: "Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case?"

5. Because the Court, over the objection of the defendants, erroneously sustained the challenge for cause interposed by the State against Harry E. Bataille, when sworn on his *voir dire,* and excused said juror for cause, over the objection of the defendants.

6. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Harold J. Butts, over the objection of the defendants, and excused said juror upon such challenge.

7. Because the Court erroneously sustained the challenge for cause interposed by the State against Henry W. Adams, a prospective juror,

and excused said juror from service upon such challenge, over the objection of the defendants.

8. Because the Court erroneously overruled the objection of the defendants to the following question put by the State to the prospective juror, Louis C. Bassini, when sworn on his *voir dire:* "Q So that this opposition that you have to capital punishment would interfere with the proper performance of your duties in a murder case where the death penalty is involved?"

9. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Louis C. Bassini, over the objection of the defendants.

10. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Henry Cahill, over the objection of the defendants.

11. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Emil E. Argast, Jr., over the objection of the defendants.

12. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Ames S. Borst, over the objection of the defendants.

13. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, William Bal, over the objection of the defendants.

14. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Terence P. Butler, over the objection of the defendants.

15. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, John J. Daley, over the objection of the defendants.

16. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Robert T. Burns, over the objection of the defendants.

17. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, David Dalrymple, over the objection of the defendants.

18. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles H. Adams, over the objection of the defendants.

19. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Michael J. Ryan, over the objection of the defendants.

20. Because the Court erroneously overruled the challenge for cause interposed by the defendants to prospective juror, William F. Dick.

21. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles R. Arndt, over the objections of the defendants.

22. Because the Court erroneously excused numerous jurors upon the challenge of the State upon grounds not constituting grounds for challenge for cause, beyond the number of peremptory challenges allowed by law to the State.

23. Because the Court erroneously sustained the objection of the State to the following ques-

tion put to the witness Brex by counsel for the defendants: "Mr. McGeehan: I would like to ask one question of the Chief—were his statements later reduced to writing?"

24. Because the Court erroneously overruled the objection of the defendants to the following question put to the witness Brex: "Q Did you have a conversation with him?"

25. Because the Court erroneously permitted the State to introduce in evidence the verbal statements of the defendant, Calabrese, which statements had been reduced to writing, over the objection of the defendants that said verbal statements did not constitute the best evidence of the admissions of the said defendant, in view of the fact that the same had been reduced to writing, and that the said writing was the best evidence of such statements.

26. Because the Court erroneously admitted in evidence the alleged written confession of the defendant, Calabrese, over the objection of the defendant.

27. Because the Court erroneously admitted in evidence, over the objection of the defendants, during the testimony of Lieutenant Linarducci, the additional written statement or confession of the defendant, Calabrese.

28. Because the Court erroneously sustained the objection of the State to the following question put by the attorney for the defendants to the witness, Calabrese: "Q Did you at any time intend to kill him or seriously wound him?"

29. Because the Court erroneously overruled the objection of the defendants to the following question put to the defendant and witness, Cala-

brese, on cross examination by the State: "Q Well, I show you the statement. Now, is that in the statement?"

30. Because the Court erroneously charged the jury in part as follows: "Murder is the killing of a reasonable being with malice aforethought—that is, with an intent to do evil. A purpose to do great bodily harm is sufficient and malice may be presumed from the character of the killing. And it will be implied when a killing is perpetrated in an attempt to do serious bodily harm."

31. Because the Court erroneously charged the jury in part as follows: "So far as your duty in this case is concerned, while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:

First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then, the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others, took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree."

32. Because the Court erroneously charged the jury in part as follows: "If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be."

33. Because the Court erroneously charged the jury in part as follows: "However, the Court of Pardons could grant them a pardon if they were sentenced to life imprisonment at hard labor, the Court of Pardons could, at any time during their confinement, grant them a pardon."

34. Because the Court erroneously refused to charge the third request to charge of the defendants, which read as follows: "3. The jury, under the Statute, if it find the defendant guilty of murder in the first degree, cannot recommend life imprisonment except upon and after a consideration of all the evidence in the case, but upon and after a consideration of all the evidence in the case, the jury has the absolute right to recommend such life imprisonment, if, in its judgment, it deems such recommendation proper, no matter

what facts are proven by such evidence or the nature of the defendant's acts."

JOHN W. McGEEHAN, JR.,
Attorney for and of Counsel with
Plaintiff-in-Error.

Service of the within specification of causes is hereby acknowledged this 6th day of January, 1930.

JOSEPH L. SMITH,
Per D. C. F.

ASSIGNMENT OF ERRORS.

(Arthur Cort.)

Filed January 7, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOSEPH CALABRESE and ARTHUR CORT, *Plaintiffs-in-Error.*	*On Indictment for Murder.* *On Writ of Error to Essex Oyer and Terminer.* *Assignment of Errors.*

Afterwards, to wit, on the return day of said writ of error, before our Judges of our Court of Errors and Appeals in the last resort at Trenton, comes the said Arthur Cort, the plaintiff-in-error, by Charles Becker, his attorney, and says, that in the record and proceedings aforesaid, and also in the giving of judgment as aforesaid there is manifest error in this, to wit:

1. Because the Court erroneously overruled the challenge to the array of the panel of jurors interposed by the defendants, which challenge was based upon the ground that all of the names of the general panel of jurors were not in the box from which they were drawn at the time the drawing began and during the drawing of the jury.

2. Because the Court, over the objection of the defendants, erroneously permitted the draw-

ing of the names of jurors from a box that did not contain the names of all the members of the general panel at the time of such drawing.

3. Because the Court erroneously permitted the Prosecutor, over the objection of the defendants, to question the prospective jurors on their *voir dire,* without any challenge for cause having been interposed.

4. Because the Court erroneously sustained the objection to the following question put to prospective juror, George C. Braumuller, when sworn on his *voir dire,* said question being asked by counsel for the defense: "Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case?"

5. Because the Court, over the objection of the defendants, erroneously sustained the challenge for cause interposed by the State against Harry E. Bataille, when sworn on his *voir dire,* and excused said juror for cause, over the objection of the defendants.

6. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Harold J. Butts, over the objection of the defendants, and excused said juror upon such challenge.

7. Because the Court erroneously sustained the challenge for cause interposed by the State

against Henry W. Adams, a prospective juror, and excused said juror from service upon such challenge, over the objection of the defendants.

8. Because the Court erroneously overruled the objection of the defendants to the following question put by the State to the prospective juror, Louis C. Bassini, when sworn on his *voir dire:* "Q So that this opposition that you have to capital punishment would interfere with the proper performance of your duties in a murder case where the death penalty is involved?"

9. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Louis C. Bassini, over the objection of the defendants.

10. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Henry Cahill, over the objection of the defendants.

11. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Emil E. Argast, Jr., over the objection of the defendants.

12. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Ames S. Borst, over the objection of the defendants.

13. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, William Bal, over the objection of the defendants.

14. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Terence P. Butler, over the objection of the defendants.

15. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, John J. Daley, over the objection of the defendants.

16. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Robert T. Burns, over the objection of the defendants.

17. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, David Dalrymple, over the objection of the defendants.

18. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles H. Adams, over the objection of the defendants.

19. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Michael J. Ryan, over the objection of the defendants.

20. Because the Court erroneously overruled the challenge for cause interposed by the defendants to prospective juror, William F. Dick.

21. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles R. Arndt, over the objections of the defendants.

22. Because the Court erroneously excused numerous jurors upon the challenge of the State upon grounds not constituting grounds for challenge for cause, beyond the number of peremptory challenges allowed by law to the State.

23. Because the Court erroneously sustained the objection of the State to the following ques-

tion put to the witness Brex by counsel for the defendants: "Mr. McGeehan: I would like to ask one question of the Chief—Were his statements later reduced to writing?"

24. Because the Court erroneously overruled the objection of the defendants to the following question put to the witness Brex: "Q Did you have a conversation with him?"

25. Because the Court erroneously permitted the State to introduce in evidence the verbal statements of the defendant, Calabrese, which statements had been reduced to writing, over the objection of the defendants that said verbal statements did not constitute the best evidence of the admissions of the said defendant, in view of the fact that the same had been reduced to writing, and that the said writing was the best evidence of such statements.

26. Because the Court erroneously admitted in evidence the alleged written confession of the defendant, Calabrese, over the objection of the defendant.

27. Because the Court erroneously admitted in evidence, over the objection of the defendants, during the testimony of Lieutenant Linarducci, the additional written statement or confession of the defendant, Calabrese.

28. Because the Court erroneously sustained the objection of the State to the following question put by the attorney for the defendants to the witness, Calabrese: "Q Did you at any time intend to kill him or seriously wound him?"

29. Because the Court erroneously overruled the objection of the defendants to the following question put to the defendant and witness, Cala-

brese, on cross examination by the State: "Q Well, I show you the statement. Now, is that in the statement?"

30. Because the Court erroneously charged the jury in part as follows: "Murder is the killing of a reasonable being with malice aforethought—that is, with an intent to do evil. A purpose to do great bodily harm is sufficient and malice may be presumed from the character of the killing. And it will be implied when a killing is perpetrated in an attempt to do serious bodily harm."

31. Because the Court erroneously charged the jury in part as follows: "So far as your duty in this case is concerned, while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:

First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others,

took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree."

32. Because the Court erroneously charged the jury in part as follows: "If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be."

33. Because the Court erroneously charged the jury in part as follows: "However, the Court of Pardons could grant them a pardon if they were sentenced to life imprisonment at hard labor, the Court of Pardons could, at any time during their confinement, grant them a pardon."

34. Because the Court erroneously refused to charge the third request to charge of the defendants, which read as follows: "3. The jury, under the Statute, if it find the defendant guilty of murder in the first degree, cannot recommend life imprisonment except upon and after a consideration of all the evidence in the case, but upon and after a consideration of all the evidence in the case, the jury has the absolute right to recommend such life imprisonment, if, in its judgment, it deems such recommendation proper no matter what facts are proven by such evidence or the nature of the defendant's acts."

CHARLES BECKER,
Attorney for and of Counsel
with Plaintiff-in-Error.

Assignment of Errors (Arthur Cort.)

Service of the within assignment of errors is hereby acknowledged this 6th day of January, 1930.

JOSEPH L. SMITH,
Per D. C. F.

SPECIFICATION OF CAUSES.

(Arthur Cort.)

Filed January 7, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOSEPH CALABRESE and ARTHUR CORT, *Plaintiffs-in-Error.*	*On Indictment for Murder.* *On Writ of Error to Essex Oyer and Terminer.* *Specification of Causes.*

And the said plaintiff-in-error, Arthur Cort, by Charles Becker, his attorney, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

1. Because the Court erroneously overruled the challenge to the array of the panel of jurors interposed by the defendants, which challenge was based upon the ground that all of the names of the general panel of jurors were not in the box from which they were drawn at the time the drawing began and during the drawing of the jury.

2. Because the Court, over the objection of the defendants, erroneously permitted the drawing of the names of jurors from a box that did not contain the names of all the members of the general panel at the time of such drawing.

3. Because the Court erroneously permitted the Prosecutor, over the objections of the defendants, to question the prospective jurors on their *voir dire,* without any challenge for cause having been interposed.

4. Because the Court erroneously sustained the objection to the following question put to prospective juror, George C. Braumuller, when sworn on his *voir dire,* said question being asked by counsel for the defense: "Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case?"

5. Because the Court, over the objection of the defendants, erroneously sustained the challenge for cause interposed by the State against Harry E. Bataile, when sworn on his *voir dire,* and excused said juror for cause, over the objection of the defendants.

6. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Harold J. Butts, over the objection of the defendants, and excused said juror upon such challenge.

7. Because the Court erroneously sustained the challenge for cause interposed by the State against Henry W. Adams, a prospective juror, and excused said juror from service upon such challenge, over the objection of the defendants.

8. Because the Court erroneously overruled the objection of the defendants to the following question put by the State to the prospective juror, Louis C. Bassini, when sworn on his voir dire: "Q So that this opposition that you have to capital punishment would interfere with the proper performance of your duties in a murder case where the death penalty is involved?"

9. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Louis C. Bassini, over the objection of the defendants.

10. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Henry Cahill, over the objection of the defendants.

11. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Emil E. Argast, Jr., over the objection of the defendants.

12. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Ames S. Borst, over the objection of the defendants.

13. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, William Bal, over the objection of the defendants.

14. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Terance P. Butler, over the objection of the defendants.

15. Because the Court erroneously sustained the challenge for cause interposed by the State

against the prospective juror, John J. Daley, over the objection of the defendants.

16. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Robert T. Burns, over the objection of the defendants.

17. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, David Dalrymple, over the objection of the defendants.

18. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles H. Adams, over the objection of the defendants.

19. Because the Court erroneously sustained the challenge for cause interposed by the State against prospective juror, Michael J. Ryan, over the objection of the defendants.

20. Because the Court erroneously overruled the challenge for cause interposed by the defendants to prospective juror, William F. Dick.

21. Because the Court erroneously sustained the challenge for cause interposed by the State against the prospective juror, Charles R. Arndt, over the objections of the defendants.

22. Because the Court erroneously excused numerous jurors upon the challenge of the State upon grounds not constituting grounds for challenge for cause, beyond the number of peremptory challenges allowed by law to the State.

23. Because the Court erroneously sustained the objection of the State to the following question put to the witness Brex by counsel for the

defendants: "Mr. McGeehan: Q I would like to ask one question of the Chief—were his statements later reduced to writing?"

24. Because the Court erroneously overruled the objection of the defendants to the following question put to the witness Brex: "Q Did you have a conversation with him?"

25. Because the Court erroneously permitted the State to introduce in evidence the verbal statements of the defendant, Calabrese, which statements had been reduced to writing, over the objection of the defendants that said verbal statements did not constitute the best evidence of the admissions of the said defendant, in view of the fact that the same had been reduced to writing, and that the said writing was the best evidence of such statements.

26. Because the Court erroneously admitted in evidence the alleged written confession of the defendant, Calabrese, over the objection of the defendant.

27. Because the Court erroneously admitted in evidence, over the objection of the defendants, during the testimony of Lieutenant Linarducci, the additional written statement or confession of the defendant, Calabrese.

28. Because the Court erroneously sustained the objection of the State to the following question put by the attorney for the defendants to the witness, Calabrese: "Q Did you at any time intend to kill him or seriously wound him?"

29. Because the Court erroneously overruled the objection of the defendants to the following question put to the defendant and witness, Calabrese, on cross examination by the State: "Q

Well, I show you the statement. Now, is that in the statement?''

30. Because the Court erroneously charged the jury in part as follows: ''Murder is the killing of a reasonable being with malice aforethought—that is, with an intent to do evil. A purpose to do great bodily harm is sufficient and malice may be presumed from the character of the killing. And it will be implied when a killing is perpetrated in an attempt to do serious bodily harm.''

31. Because the Court erroneously charged the jury in part as follows: ''So far as your duty in this case is concerned. while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:

First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then, the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others,

took part in the pepetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree."

32. Because the Court erroneously charged the jury in part as follows: "If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be."

33. Because the Court erroneously charged the jury in part as follows: "However, the Court of Pardons could grant them a pardon if they were sentenced to life imprisonment at hard labor, the Court of Pardons could, at any time during their confinement, grant them a pardon."

34. Because the Court erroneously refused to charge the third request to charge of the defendants, which read as follows: "3. The jury, under the Statute, if it find the defendant guilty of murder in the first degree, cannot recommend life imprisonment except upon and after a consideration of all the evidence in the case, but upon and after a consideration of all the evidence in the case, the jury has the absolute right to recommend such life imprisonment, if, in its judgment, it deems such recommendation proper, no matter what facts are

proven by such evidence or the nature of the defendant's acts."

CHARLES BECKER,
Attorney for and of Counsel
with Plaintiff-in-Error.

Service of the within specification of causes is hereby acknowledged this 6th day of January, 1930.

JOSEPH L. SMITH,
Per D. C. F.

LENOX ST

30'

DRUG STORE
ST# 658

50'

50'-6"

SANFORD AVE

#658 Sanford Ave
Newark N.J.

C.S. 10
Scale 1/4" = 1 ft.

C.S. 9

John J. Bracken - Surveyor
776 Broad St, Newark N.J.
April 27. 1929.

shelf
Counter

sink

shelf
Counter

Counter 16.50

shelves

Chair

15.75'

Stool

Counter

Show Case

Spring Case

Counter

Cash Register

Soap Stand

Telephone Booths

Candy Case

28'

6 Stools.

Soda Counter

Show Case

TABLE

Pen Pencil Case

Cigar Case

SCALE

Radiator

Radiator

C.S.11.

18.50'

SANFORD AVE

658 Sanford Ave
Newark. N.J.

Scale 1/8 1 ft.

John J. Bracken - Surveyor
776 Broad St, Newark N.J.
April 27. 1929.

OR ACCIDENT



EXHIBIT S. 5.





EXHIBIT S. 6.

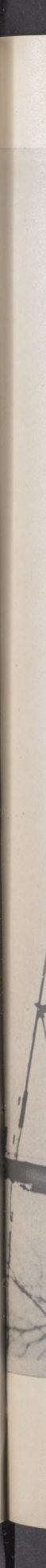




EXHIBIT S. 8.



EXHIBIT S. 9.



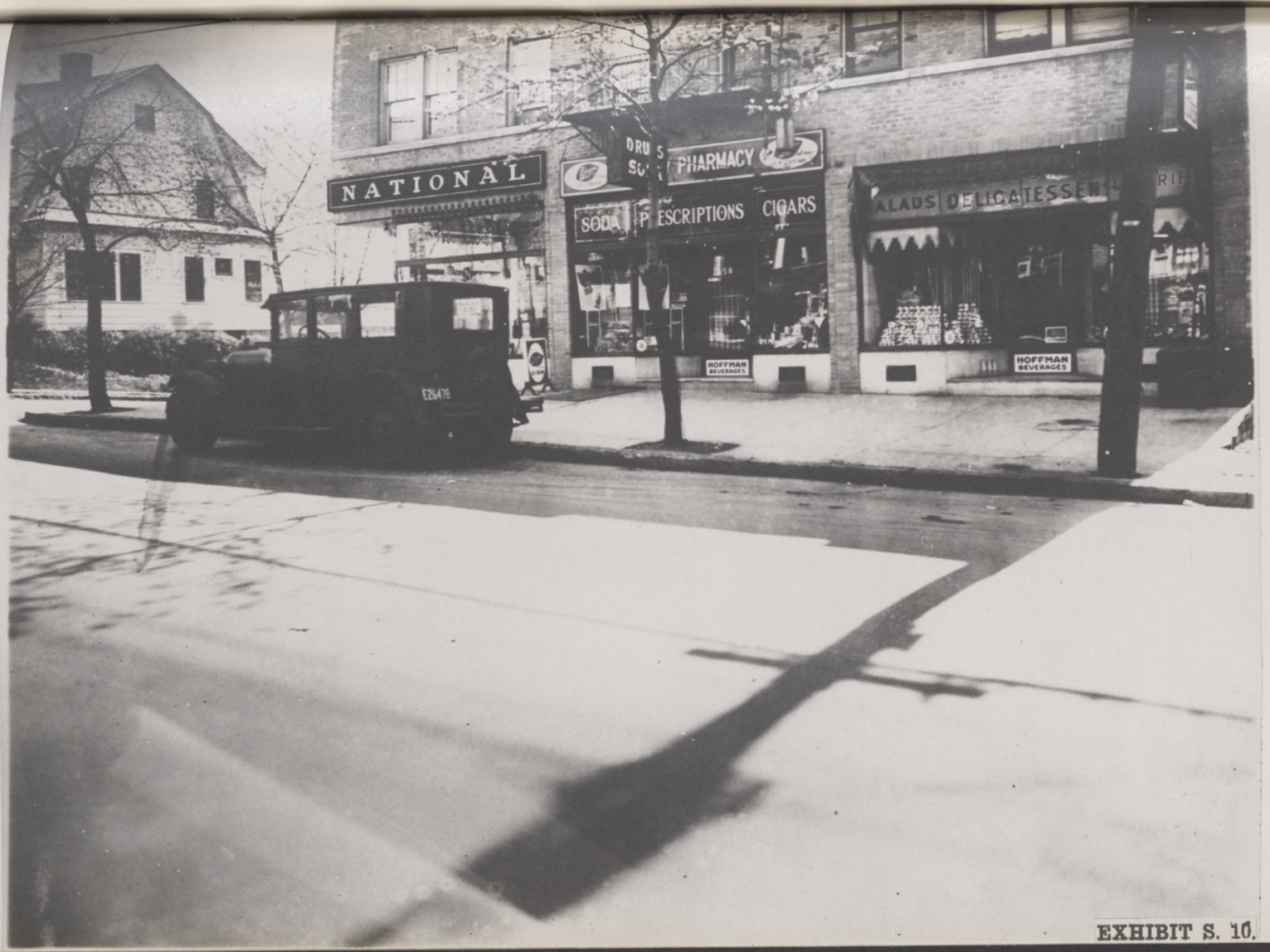

NATIONAL
PHARMACY
SODA
PRESCRIPTIONS
CIGARS
SALADS
DELICATESSEN
HOFFMAN BEVERAGES
HOFFMAN BEVERAGES
E26478

EXHIBIT S. 10.



EXHIBIT S. 11.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,*	*On Indictment for Murder.*
vs.	
JOSEPH CALABRESE and ARTHUR CORT, *Plaintiffs-in-Error.*	*On Writ of Error to Essex Oyer and Terminer.*

BRIEF OF DEFENDANTS, JOSEPH CALABRESE and ARTHUR CORT.

The plaintiffs-in-error, Joseph Calabrese and Arthur Cort, were convicted of murder in the first degree with no recommendation for life imprisonment, after trial before the Essex County Court of Oyer and Terminer, and were accordingly both sentenced to death. The indictment upon which they were tried was for the alleged murder of one Maurice Grossman. The contention of the State at the trial was that the alleged murder was committed during the perpetration of an attempted robbery by these defendants and others on April 22, 1929. The evidence showed that Grossman was the proprietor of a drug store on Sanford avenue, in the City of Newark, and on the above date, the defendant, Calabrese and several others entered the store for the purpose of committing a robbery and attempted to do so, while the defendant, Cort, remained at the wheel of their automobile to await them around the corner from the drug store; that the decedent, Grossman, who was at the rear of the store near the cash register, forcibly resisted, and thereupon Calabrese and the others accompanying him gave up their

attempt to obtain the money and attempted to escape, and in doing so moved toward the front door, with Grossman striking at the robbers and hanging on to one of them the entire length of the store to the front door thereof, out of which the defendant, Calabrese, and his companions succeeded in emerging to the street, where Grossman continued to hold on to one of the men, who struggled with him on the sidewalk to get away. The evidence further showed that no shots were fired at the cash register, or anywhere in the store, but that on the sidewalk while they were trying to get away, Calabrese tried to pry Grossman and Lamolino apart, Grossman having hold of Lamolino from behind him, and Grossman was trying to tussle for Lamolino's gun. Calabrese then said "Let go, you damn fool, or you will be shot," according to his testimony, or "Let go, you damn fool, or I will shoot," according to the confession put in evidence. That thereafter, Victor Bruno, (not on trial) fired a shot and that Calabrese then fired a shot at Grossman's arm (this according to Calabrese's testimony, although the State disputed that this shot was fired at the arm). Grossman continued to hold on to Lamolino until they got into the street, where Grossman and Lamolino fell, and thereupon Lamolino got up and the defendant, Calabrese with Lamolino and Bruno entered the car which Cort was at the wheel of, and they fled.

In a confession given to the police after his arrest and in his testimony at the trial, Calabrese admitted having participated in the attempted hold-up in the store, but testified that they had ceased their effort to commit the robbery and were and had been attempting to get away long before the shots were fired, and at

the time the shots were fired they had come the entire length of the store and across the sidewalk, and that the shot which he fired was fired to hit the arm of Grossman after blows had failed to break his grip, so as to assist in the escape of Lamolino.

Upon the convictions of the defendants by the jury, these writs of error were issued out of the Court of Errors and Appeals, after the filing of a certificate of refusal by the Chancellor of a writ of grace to the Supreme Court, and the case comes before this Court on assignments of error and specifications of causes for reversal, the entire record having been certified and returned pursuant to Section 136 of our Criminal Procedure Act.

Numerous errors are assigned and causes specified, consisting chiefly of alleged errors in the manner of drawing and excluding jurors, rulings of the Trial Court with relation to evidence, and particularly alleged errors in the charge of the Court. The assignments of errors and specification of causes for reversal will be argued separately, being grouped together whenever the same principles of law or questions of error apply similarly to the several.

ARGUMENT.

POINT I.

Assignment of Errors No. 1, Specification of Causes No. 1.

> "Because the Court erroneously overruled the challenge to the array of the panel of jurors interposed by the defendants, which challenge was based upon the ground that all of the names of the general panel of jurors were not in the box from which they were

drawn at the time the drawing began and during the drawing of the jury."

Assignment of Errors No. 2, Specification of Causes No. 2.

"Because the Court, over the objection of the defendants, erroneously permitted the drawing of the names of jurors from a box that did not contain the names of all the members of the general panel at the time of such drawing."

A special panel of forty-eight names of jurors had been properly served upon the defendants, and in accordance with the proper and prescribed practice, the names were drawn from a box containing these names until the names of the members of the special panel were exhausted. Thereupon, the Court directed the drawing of names from the general panel. The Sheriff proceeded to draw names from the general panel from a box, but at a point when seven jurors had been drawn and accepted and therefore before the jury was completed, the Sheriff had drawn all the names that had been contained in the particular box from which he had been drawing the names of the general panel jurors, and then he proceeded to draw names from another separate box, these names also being of persons who were members of the general panel of jurors; in other words, he did not have all the names of the members of the general panel from which he was drawing mixed together in one box, but had separated them into two distinct boxes, calling the names of all in one box before drawing from those contained in the other box. Counsel for the defendants thereupon interposed the following challenge to the array (p. 42, S. C.):

"Mr. McGeehan:

I have a challenge to the array upon the ground that the full list of the jurors was not in the box from which the names of previous jurors was taken, and that there is now presented another jury box with another group of names that were not in the box from which the prior jurors were drawn, at the time of the drawing of the same, and I ask that the Sheriff be sworn to establish that"

and the following written challenge to the array was filed:

"The defendants Joseph Calabrese and Arthur Cort hereby challenge the array of jurors on the ground that all the names of the jurors serving or drawn at this time were not in the box at the time of the drawing of names of the general panel of jurors.

John W. McGeehan, Jr., Charles Becker."

Deputy Sheriff Batchellor in charge of the drawing, then testified that after exhausting the special panel he had proceeded to draw from the general panel. He was asked:

"Q Did you use a box for that purpose?

A Yes, sir.

Q Were all of the names of the general panel in that box that you have been drawing from up to this point?

A No, sir.

Q And what proportion of the names of the general panel were in that box?

A The even numbers were not in the box.

Q And the odd numbers were?

A Yes, sir.

Q So that approximately one-half of the jurors serving this term, their names were not in the box?

A Yes, sir.

Q And you completed the drawing from that box, have you?

A Yes, sir.

Q Now, have you opened another box?
A Yes, sir.
Q And that contains approximately one-half of the names of the jurors serving in this term, or for this two-week period?
A Yes, sir.
Q And you are about to draw from that?
A Yes, sir."

On cross examination, it was brought out that together the two boxes contained all of the names.

Under-Sheriff Walker was next sworn, and he testified that the practice was intended to be pursuant to the Statute of 1927 and that:

"Q Do you know whether or not there has been any order?
A In the latter part of 1927, after the passage of this Act—I thought it was the first part of 1928—the Chief Justice issued that order to the late Under-Sheriff Mills through Judge Dungan and Judge Smith.
Q And that order has been in full force and effect?
A Yes, sir."

The Court then ruled:

"The Court:

There has been a challenge to the array and testimony has been taken, and I will overrule the challenge and allow an exception to both defendants, and ask the Sheriff to proceed to draw the names from the general panel, but from the other part than that from which he has been drawing heretofore. The panel which he has been drawing from heretofore has now been exhausted."

To this ruling, exceptions were taken by the defendants.

It is respectfully submitted that the challenge to the array should have prevailed, and that the Court erred in overruling the same. Section 83

of the Criminal Procedure Act (Comp. Stat., p. 1847) provides as follows:

> "83. When the special panel or list of jurors served on a defendant in any case in which the defendant shall be entitled to twenty peremptory challenges shall be exhausted from any cause before a jury for the trial of the indictment shall be obtained, talesmen shall be taken from the general panel of jurors returned, for the term at which such defendant is to be tried, if any remain; and if more talesmen should be required than the number of jurors remaining on the general panel, the Sheriff or other proper officer shall forthwith summon from among the by-standers or others such additional numbers of persons qualified to serve as jurors as may be ordered by the Court, etc."

The foregoing section, it will be noted, is a part of the Criminal Procedure Act, and applies only to cases where a defendant in a criminal trial is entitled to twenty peremptory challenges, which, of course, is the situation in the present case. This Statute (P. L. 1898, p. 827) as amended (P. L. 1906, p. 569), it will be observed, was passed subsequently to Section 27 of the Jury Act (Comp. Stat. 2975), which provides as follows:

> "That the name of each person who shall be summoned and returned by any sheriff or coroners as petit jurors in any of the aforesaid courts, shall be written or printed on separate pieces of paper * * *; which pieces of paper shall be * * * put into a box; and whenever for the trial of a cause, civil or criminal, a jury shall be required, the said box shall be shaken so as to intermix the said papers; and thereupon the sheriff or clerk, or some other person, by the direction of the court, publicly and in open court, shall draw such papers from the said box, one at a time, until twelve per-

> sons, whose names are found written thereon, shall appear; and if any of the twelve persons so appearing shall be successfully challenged or be excused from serving on that jury, the said drawing shall be continued until twelve persons not thus challenged or excused shall appear; and such twelve being severally sworn or affirmed, shall constitute a jury for the trial of the said cause."

The clear intendment of Section 83 of the Criminal Procedure Act appears to be that upon the exhaustion of the special panel, the drawing shall continue from the entire general panel, and it is urged that this statute never having been amended or supplemented, there was no justification for the division of the panel into two parts, with a drawing first from one part and then from another part of the general panel. The supplement to the Jury Act, passed in 1927 (P. L. 1927, p. 546) is not and does not purport by its title or terms to be an amendment of or supplement to Section 83 of the Criminal Procedure Act. It is merely a supplement to the Jury Act and therefore the reliance of the State upon the supplementary Statute of 1927 does not seem to be well founded. Section 27 of the Jury Act (Rev. 1877, p. 528, C. S. p. 2975) was in existence at the time the Legislature passed the Criminal Procedure Act, and up to the passage of the supplement to the Jury Act in 1927, the necessity of having all of the names in the box from the beginning of the drawing has been asserted by our Courts. We can find no case where the question has been precisely similarly raised under Section 83 of the Criminal Procedure Act, but the importance to a defendant of the order in which his challenges may be exercised has been asserted in rulings where the question was raised under Section 27 of the Jury

Act. The Supreme Court, in the case of *State* v. *Lapp* (84 N. J. Law, p. 19), in an opinion by Justice Garrison, construed this section of the Jury Act upon the following circumstances:

The plaintiff-in-error was tried on an indictment for grand larceny. When all the names had been drawn out of the box, the Court ordered the Sheriff to call in talesmen, and a talesman so called in took his seat. The Sheriff then informed the Court that the names of some of the regular panel had not been in the box at all during the drawing of the jury. The Court ordered these names to be put in the box and the drawing of names out of the box to proceed. When the first name was drawn out of the box, an exception was prayed and allowed to the defendant. The talesman who had been called and who had taken his seat was at this juncture ordered off the jury, and a juror whose name was drawn out of the box was substituted, over the objection of the defendant, who took his exception upon the ground *inter alia* that his challenges had been exhausted. The Supreme Court reversed the conviction because of the adding of such names to those contained in the box when the previous jurors' names were called. The Court, after summarizing the above quoted section of the Statute, said:

> "The right of challenge which is thus, in a measure, dependent upon the order in which the names are drawn from the box, may be radically affected if additional names can be put into the box after the drawing of the jury has begun and is practically taken away if such names are put in the box after the defendant's challenges are exhausted.
>
> The statutory provision for the drawing and challenging of the jury was clearly violated, and a more manifest injury to the defendant cannot well be imagined.

> It is no answer to say that the law was not violated with any wrongful intent or any design to wrong the defendant; a law once violated will soon be laid hold of by designing men with a wrongful intent. While the rights of the defendant are primarily considered in deciding whether the law has been violated, the prime importance of the decision is that the inviolability of the law is maintained.
>
> Nor is it any answer to say that the jury was composed of duly qualified jurors; it may well be that no one has a right to say by what particular jurors he shall be tried, but he has a right, within his statutory privilege, to say by what particular jurors he shall not be tried, and this right is taken from him if after he has exhausted his challenges new names are for the first time put in and drawn out of the box."

The foregoing decision establishes definitely that the subsequent adding of additional names of members of the general panel to those included within the box when the drawing of the jury began is a violation of the Statute, and while in *State* v. *Lapp, supra,* the challenges of the defendant were entirely exhausted when this was done, while in the present case they were only partially exhausted when this was done, this would not either by the reasoning or language of the Supreme Court distinguish the cases in the harmful effect to the defendant of this improper practice. As the Court stated:

> "The right of challenge which is thus, in a measure, dependent upon the order in which the names are drawn from the box, may be radically affected if additional names can be put into the box *after the drawing of the jury has begun* and is practically taken away if such names are put in the box after the defendant's challenges are exhausted." (Italics ours.)

In the present case, at the time it was revealed in Court that the box from which the names of the general panel were being drawn, did not contain all the names but only one-half of the names, seven jurors had already been selected and five more remained to be selected. The defendants were entitled to have all the names of the general panel in the box at one time under the explicit directions of the Statute, and the mere fact that a second box was used, containing half the names of the general panel after the other box containing the other half was used up, was of precisely the same effect as if one-half of the names were left out of the first box and then placed therein to be drawn from for the first time. The Sheriff sought to justify his action and the State now seeks to sustain it before this Court, by a reliance upon Chapter 296 of the Laws of 1927 (P. L. 1927, p. 546). This Act is a supplement to the Act concerning Juries, of which the above quoted Section 27 is a part.

This Act, neither by its provisions or by implication, repeals the provision of Section 83 of the Criminal Procedure Act, which remains in full force and effect, but is merely a supplement to Section 27 of the Jury Act, which also remains in full force and effect, except upon certain conditions prescribed in the new Statute of 1927, under which the method of drawing jurors in general is permitted to be changed to the extent of dividing the panel into two parts. The supplement of 1927 provides:

> "1. In counties where there are two or more judges of the Court of Common Pleas, the said court shall have power at its discretion, by general order, or by order made from time to time, to divide the general panel of petit jurors summoned for the trial

> of issues or causes in such county, into two or more separate panels; and the judges sitting for the trial of issues or causes in the courts of said county, before whom such jurors are serving, shall have power to direct the drawing of juries from one or more of such panels."

By the terms of Section 83 of the Criminal Procedure Act, after the exhaustion of the special panel "talesmen shall be taken from the general panel of jurors returned, for the term at which such defendant is to be tried, if any remain;" it does not say from a part of such general panel, and the words "if any remain" indicate that the entire remaining members of the general panel are the ones to be drawn from, and this is further indicated by the then following provision "and if more talesmen should be required than the number of jurors remaining on the general panel," that then additional talesmen may be summoned from the by-standers.

While it is true that the defendants did not exhaust their challenges, still they were entitled to have come before them for acceptance names selected from the entire general panel, for any man experienced in trial work must realize that as defendant's counsel nears the end of his number of challenges allowed, he is constrained in order to avoid being confronted by a situation where his challenges are exhausted and he must needs accept an entirely unsatisfactory juror, to frequently accept one who is not entirely satisfactory to him and who might not have been called if his name were mixed in with the general panel, instead of only a small portion of the same. Furthermore, while a defendant is not entitled to the service upon him of any excepting the special panel, he being aware of the provisions of the Statute calling

for the drawing of the jury from the general panel if the special panel is exhausted, is harmed if the drawing take place from names containing only a part of the general panel which he has no means in advance of knowing the composition of. While the right of peremptory challenge involves, as has been held, a right of rejection rather than of selection, still the sole purpose of the steps in the selection of a jury is to afford the defendant the right to reject, by the use of a number of peremptory challenges allowed him, a number of jurors to whom he is unfavorable. As the Supreme Court stated in *State* v. *Lapp, supra*:

> "The right of challenge which is thus, in a measure, dependent upon the order in which the names are drawn from the box, may be radically affected if additional names can be put into the box after the drawing of the jury has begun."

It is respectfully urged that the overruling of the challenge to the array was error harmful to the defendants

POINT II.

Assignment of Errors No. 3. Specification of Causes No. 3.

> "Because the Court erroneously permitted the Prosecutor, over the objections of the defendants, to question the prospective jurors on their *voir dire*, without any challenge for cause having been interposed."

The foregoing point involves a question of the right of the State to examine jurors for the purpose of exercising a right of peremptory challenge, over the objection of the defendants, and it is contended that the Court erred in permitting such examination of jurors. When the first

talesman, J. Roy Bergen, was called to the book, objection was made to the questioning of the juror as follows (p. 12, S. C.):

> "Mr. McGeehan: I object to the questioning of the juror at this time by the Prosecutor, or the holding of any conversation with him."

The Court ruled that the Prosecutor had the right and the defendants had the right to question the prospective jurors on their *voir dire*, to which defendants objected and an exception was taken. When the next question was asked of the same juror (p. 12, S. C.):

> "Q Have you any conscientious scruples against capital punishment?"

this was objected to "as improper at this time," and again an exception was taken. When the next question was asked, the same objection was made and the same ruling and exception were applied. The Court having made a blanket ruling on the subject, counsel of course did not object to each question. But when juror after juror was questioned at length as to his scruples and what verdict he would render under various suppositive states of fact, the objection was again made upon the examination of juror, Harold E. Shaw (p. 28, S. C.). There an objection was made by the defense that there was nothing pending before the Court to entitle the question to be asked, and the ruling in the case of *Clifford* v. *State* (61 N. J. Law, p. 217) was referred to, and while the stenographic record is apparently garbled in the recording of counsel's language, it is apparent that the objection was that it was improper to question the jurors except upon a challenge for cause. In *Clifford* v. *State*, this Court, in an opinion by Chief Justice Magie, definitely established the rule (in criminal cases) that the questioning of jurors not upon

challenge for cause was improper and not to be allowed when objected to. The question arose on exceptions taken by defense counsel to the refusal of the Trial Court to permit him to question a juror. As is stated in the opinion:

> "When counsel proposed to propound these questions to the juror, no challenge of any kind had been interposed and counsel stated the purpose of the questions to be, to elicit information for counsel 'so that the right of exercising a peremptory challenge may be intelligently used.'"

The Court held:

> "As the juror was not put under oath, and it was not proposed to put him under oath, the proposition was to permit counsel to engage in open and audible conversation with the juror, a conversation over which, *as there was no challenge or issue to be tried, the court would seem to have no control.* (Italics ours.)
>
> The trial court refused to permit the questions to be propounded to the juror, and thereupon exception was taken and allowed to such refusal.
>
> *The refusal thus complained of was in our judgment in accord with ancient and inveterate practice, never departed from, so far as we have observed, when objection was interposed.*" (Italics ours.)

The Court then proceeded to refer to *State* v. *Zellers* (2 Halst. 220), where the same ruling was made, the Court there, in replying to the suggestion that the contrary was frequently done, saying:

> "It is true we have slipped into the practice, but on looking into it I am satisfied it is not the true way; the only proper way is to make the challenge and then prove it on oath."

This same ruling was following in *State* v. *Martin* (132 Atl. 95, 102 N. J. Law, 388), where-

in the Court sustained the refusal of the Trial Court to permit defendants' counsel to question the juror on the ground:

> "The juror had not been challenged. There was no issue before the court."

So also in *State* v. *Palmieri* (93 N. J. Law, p. 195), wherein the Court stated:

> "Point 5 is, that the court erred in refusing to permit defendant's counsel to question jurors as to their views of capital punishment, without having challenged for cause. It is conceded that Clifford *v.* State, 61 N. J. L. 217, in this court, supports the action of the trial judge, and we are in effect asked to overrule that decision, on the authority of cases in other jurisdictions which have evidently departed from the salutary rules of the common law in this regard. A reading of the opinion in the Clifford case will demonstrate, we think, the soundness and propriety of the rule there enunciated by a unanimous court, and which we see no reason to question or criticize."

In the present case, the defendants objected to such questioning of the jurors and yet the Court permitted it in spite of the foregoing decisions holding that such questioning was improper when objected to, and perhaps even if not objected to. This Court has, in the above instances, sustained convictions for murder by applying the above rule to the refusal of the Court to permit defense counsel to question jurors, and it is contended that the rule should be applied likewise for the benefit of a defendant where it is violated by permitting questions to jurors without a challenge for cause having first been interposed when defendants objected to the same. There was a clear violation of a repeatedly enunciated rule of law, and that the error of the Trial Court in permitting such question-

ing was harmful to the defendants, cannot be doubted, because the State thereby was enabled to obtain information in advance upon which to later base its challenges, peremptory or for cause, and to divine thereby the attitude of the jurors toward the defendants and toward the State's case. The questions that the Court permitted over this objection went into every phase of the juror's attitude and had to do not only with matters going to possible challenge for cause, but also to matters that would afford a basis for only a peremptory challenge. That the defendants questioned jurors as well does not render the Court's error or the harm to the defendants any the less, for it questioned the jurors not by way of a consent to the practice, but with accompanying objections to any questions being asked of the jurors by either side.

It is respectfully submitted that upon the authority of the foregoing cases, the convictions in this case should be set aside for this reason.

POINT III.

Assignment of Errors No. 4. Specification of Causes No. 4.

> "Because the Court erroneously sustained the objection to the following question put to prospective juror, George C. Braumuller, when sworn on his *voir dire,* said question being asked by counsel for the defense: Q Mr. Braumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment

in the case, uninfluenced by any acquaintance with any of the parties in the case?' "

The foregoing question was objected to by the State, which objection was sustained and an exception taken by the defendants. The presenting of this assignment of error may seem in conflict with the theory of the previous assignment, and it is urged only in the event that this Court should hold that the Court's ruling permitting the questioning of jurors was proper. However, there was no objection to the questioning of jurors interposed by the State against the defense, contrary to the attitude of the defense toward the State's questions, but if the allowance of any questions was proper, certainly this question was one that the defense was entitled to ask the juror. By it, the direct question was asked of the juror as to whether or not he could impartially and conscientiously decide the issues in the case. If any question were proper in form, it would seem that such a question should be, and as the State, over the objection of the defense, was permitted to ask innumerable questions of every talesman called to the book, the refusal to permit this question to be asked by the defense of this juror had the effect of preventing the defendants from determining whether or not as a fact the juror was partial to the State by reason of an acquaintance with counsel for the State. The defense had previously asked the direct question as to whether the juror was acquainted with the Prosecutor and the Court sustained the objection to this question, probably by reason of the ruling in the civil case of *Boyd* v. *Husted* (3 Misc. Rep. 225), but the extent to which the decision in *Boyd* v. *Husted* went was that the mere question as to whether the juror was acquainted with counsel

"had no tendency to show a lack of impartiality of such juror as between the parties to the suit"; but the above question in the present case, after acquainting the juror with the identity of counsel for the State went to the very question of the ability of the juror to impartially decide the case upon the circumstance that such Prosecutors were trying the same.

It is respectfully urged that it was error for the Court to sustained the objection to this question.

POINT IV.

Assignment of Errors Nos. 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 21. Specification of Causes Nos. 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 21.

> "Because the Court, over the objection of the defendants, erroneously sustained the challenge for cause interposed by the State against Harry E. Bataille, when sworn on his *voir dire,* and excused said juror for cause, over the objection of the defendants."

(The foregoing is the language of Assignment of Errors No. 5 and Specification of Causes No. 5, and as the other fourteen assignments of error and specification of causes covered by this point are the same as No. 5, except as to the name of the respective juror so excused, they will be argued together and not separately.)

Assignment of Errors No. 22. Specification of Causes No. 22.

> "Because the Court erroneously excused numerous jurors upon the challenge of the State upon grounds not constituting grounds for challenge for cause, beyond the number

of peremptory challenges allowed by law to the State."

The foregoing assignments all arose out of the fact that at least fifteen jurors were challenged for cause by the State, which challenges were allowed by the Court, over the objection of the defendants. Under the Statute, the State was allowed twelve peremptory challenges, and it was the right of the defendants to have the State limited to this prescribed number, so that it would clearly be error harmful to the defendants for the Court to have permitted the State to excuse without proper cause a greater number of jurors than twelve, and it is patent that the effect of discharging as for cause at least fifteen jurors upon insufficient grounds thereby had the effect of giving the State, in addition to the peremptory challenges it exercised, an unlimited number of challenges, so that it thereby excluded numerous jurors who were satisfactory to the defendants.

Furthermore, the uniform ruling of the Court, excluding any juror who professed any conscientious scruples against capital punishment, regardless of his sworn ability to decide the entire case upon the evidence, had the extremely harmful effect of limiting those from whom the defendants could select a jury to such jurors as had, in effect, conscientious scruples in favor of the death penalty. This feature became extremely important in the present case, particularly because of the admissions of the defendants before and at the trial of the commission of acts which made a conviction of murder in the first degree a probable result of the trial, so as to make the element of the recommendation or non-recommendation of life imprison-

ment a most important consideration in the case. In each of the fifteen instances of the fifteen jurors mentioned in the assignments of error and specification of causes, the juror was challenged and discharged for cause because he stated he had conscientious scruples against capital punishment. In most of the instances, the established rule of law requiring the challenge for cause as the proper procedure upon a challenge for cause was not followed, the challenge for cause coming at the end of a previous examination rather than by way of a challenge being interposed and then tried by the Court. Also, there was, in most of the instances, no statement of the basis of the challenge for cause. Furthermore, it is respectfully submitted that the jurors in question were discharged without there being a proper basis for a challenge for cause, and that the mere entertainment of conscientious scruples against capital punishment was not of itself sufficient to justify their discharge.

It is not only reasonable that if the discharge of jurors on challenge for cause by the State is erroneously made by the Court or upon insufficient grounds to sustain such challenge for cause, that this should be reversible error, but this position was also sustained by long standing authority in this State, *State* v. *Patterson* (48 N. J. Law, 381), until the decision in *State* v. *Langhans* (95 N. J. Law, 213). In the case of *State* v. *Patterson* (48 N. J. L. 381), the conviction of the defendant was reversed because the trial court erroneously sustained the challenge for cause of the State to certain jurors. The Supreme Court in an opinion written by Justice Van Syckel reviewing the principles governing

the question of error arising upon such discharge for cause of jurors stated:

> "The remaining questions to be considered relate to challenges to the favor. At common law, upon the trial of such challenges, the finding of the triers as to facts was not reviewable. The functions of the triers being, by our State, vested in the trial court, the finding of the judge upon questions of fact involved in a challenge are conclusive. The decision of the judge is the subject of exception only when he makes a mistake of principle in determining whether the challenge shall prevail. Under a system of criminal jurisprudence, which shields a defendant by the presumption of the necessity of a unanimous verdict to convict, courts of review should not be astute to seize upon ground for reversal where the challenge by the State to the favor has been successfully made. There should be very clear error to constitute a mistrial.
>
> The State challenged Sidney H. Sproul to the favor.
>
> It appeared that at the same term he had served as a juror in another case of the State against the same defendant, Patterson, in which he had formed an opinion, but he stated that he knew nothing about the present case and supposed he could try it according to the evidence. Two other jurors were challenged by the State for like cause, and the challenges were sustained by the Court.
>
> 'It is no legal objection to a juror that he had been one of the jury in another cause against the same defendant for a different offense.' United States v. Watkins, 3 Cranch C. C. 443.
>
> The fact that jurors have tried and convicted a defendant of a crime does not disqualify them from sitting as jurors in the trial of another indictment against him for a similar offense at the same term. Commonwealth *v.* Hill, 4 Allen 591; Thompson & Mer. on Juries, 194, 195.

In sustaining these challenges the Trial Court erred.

The State also challenges William J. Johnson to the favor, because it appeared that the defendant is a brother to one Austin Patterson, and that the said Austin Patterson and the father of said Johnson married sisters. This was no legal ground of challenge and it was erroneously sustained.

The defendant challenged John S. Hubbard to the favor, because he was tenant in common of certain real estate with two of the endorsers on the promissory notes alleged to have been forged by the defendant. This challenge was properly overruled.

For the reasons given, the judgment must be reversed and a new trial ordered."

The foregoing case is cited in *State* v. *Morehouse* (97 N. J. L. p. 285), as authority for the statement in the Morehouse case that the Court's finding on the challenge for cause has been a question of fact and is conclusive and is not reviewable, but the above excerpt from *State* v. *Patterson* clearly shows that the Court on appeal will consider the correctness of the trial court's basis for the discharge of the jurors on the challenge for cause and the correctness or incorrectness of its ruling from the standpoint of whether the evidence revealed any just basis for the discharge of the jurors.

It is true that this Court in *State* v. *Langhans* (95 N. J. Law 213) disaffirms the principles enunciated in *Patterson* v. *State,* but a careful reading of the decision in *State* v. *Langhans* shows that there was only one juror alleged to have been improperly excused for cause, while in the present case the large number of jurors so discharged was sufficient in number to render nugatory the rule limiting the peremptory challenges of the State, if the State could challenge as for

cause a large number of jurors and thereby have them excused beyond the number of the State's peremptory challenges.

It is furthermore to be observed that *State* v. *Langhans* was not a murder case or case in which the defendant was entitled to the service upon him of a special panel. Under this statute the defendant in a murder case is entitled to service upon him of a list of forty-eight names of talesmen from whom his jury shall be called and it has been held that the service of this list is a right so important that it cannot be waived in a capital case. The service of this list, however, becomes a mere meaningless gesture if the trial court be permitted to deplete it by excluding a dozen persons thereon from service without requiring the State to exercise its limited number of peremptory challenges. If jurors are repeatedly excused by the Court on a challenge from the State for grounds not constituting legal ground for challenge for cause this is in effect increasing beyond the statutory number the peremptory challenges allowed to the State.

In the present case, the addition of the incorrect challenges for cause and the peremptory challenges used by the State total a number far in excess of the allotted number of peremptory challenges allowed to the State, and thereby completely defeat the statute and deprive the defendants of the right to have the State exclude only twelve jurors for objections not constituting grounds for a challenge for cause.

The above contention that the rule to be applied in a murder case where a special panel is required should differ from that applying to an ordinary case is given force by the statement of this Court in *State* v. *Moore* (75 N. J. Law 619),

where the prosecution was for keeping a disorderly house, where the Court stated, "The rest of the general panel was left from which a jury was selected." In the present case, the rest of the special panel was not left from which a jury was selected. It is also pointed out in *State* v. *Deliso* (75 N. J. Law 808), by Chief Justice Garrison, speaking for this Court, that in that case, as in *State* v. *Moore,* the list was not exhausted, this being a circumstance differing the present case from any of the above cited cases. It is true that the additional point was made in the foregoing cases by the Court that there was no exhaustion of the peremptory challenges of the defendants.

Furthermore, as above stated, an examination of the records showing the manner in which the so-called challenges for cause were made reveals that they were not made in accordance with the rules governing such challenges. In the first place, the general challenge "for cause" was made by the Prosecutor in almost each case. In *State* v. *Drake* (53 N. J. Law 23), it was held:

> "Moreover, the challenge was not legally interposed. It was merely 'for cause' without stating whether it was for principal cause or to the favor and without setting out the facts on which it rested. This is insufficient. State *v.* Spencer, 21 N. J. L. 196."

If such a challenge is insufficient, so as to render an overruling of the challenge for cause proper on that ground, then certainly the same defect should render improper the allowing of a challenge for cause so interposed.

In addition thereto, the challenges in many instances set forth in the assignments of error and specification of causes, were made not by way of a challenge for cause followed by an examination

of the jurors on a trial of the challenge, but by the challenge for cause being interposed after listening to the answers of the talesmen upon the general examination afforded for peremptory challenges. The rule requiring a challenge for cause to be first interposed and then tried was violated, and certainly the law requiring adherence to the proper manner of challenging for cause should be applied with as much strictness in reversing the decision where such challenges are incorrectly sustained when made by the State, as in affirming decisions where incorrectly interposed challenges are overruled when made by the defendant.

That the basis for the Court's discharge of the talesmen upon the challenge for cause was not warranted by the evidence taken either before or after such challenge, but on the contrary that the Court misconceived and misapplied the law governing the juror's qualifications and obligations seems apparent by a reading of the statute now in force governing jurors and verdicts in murder cases, and comparing therewith the answers of the prospective jurors on their examination.

This statute as amended (P. L. 1919 p. 303) reads as follows:

> "Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed; and every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years."

Under this statute, the jury is given the right, upon and after consideration of all the evidence,

to recommend life imprisonment in any case wherein they have found the defendant guilty of first degree murder. If the juror possesses the qualifications, will and purpose to sit conscientiously and impartially as a juror, to hear the evidence in the case and decide upon the defendant's guilt or innocence in accordance therewith, he is qualified to sit as a juror and the mere fact that, by reason of conscientious scruples or otherwise, he would recommend life imprisonment, after the consideration of all the evidence in the case, would not disqualify him as a juror even though it might render him unsatisfactory to the prosecution and thereby render their *peremptory* challenge advisable. The statute gives such jurors the right to recommend life imprisonment even though the evidence shows clear guilt of the highest degree of murder known, to wit, first degree murder. The questions and answers to and of the talesmen merely show a preference on their part for life imprisonment against execution for one convicted of murder in the first degree and in no way rendered the talesmen unfit to sit in the trial.

This same point was considered in the case of *State* v. *Juliano* (138 Atl. 575 at p. 579), wherein the Court refused to reverse on the strength of *State* v. *Langhans, supra,* but, as has been previously argued, in *State* v. *Langhans,* the discharge of only one juror was involved, while in the present case a large number of them were improperly excused for cause, thereby defeating the intention of the statute limiting the peremptory challenges of the State. In *State* v. *Juliano* the Court further sustained the correctness of the trial court's discharge of the jurors for the cause that they were opposed to capital punishment, but so far as the language of the opinion

reveals in that case, the challenge was made "to jurors whose scruples against capital punishment precluded their finding a verdict without recommendation for life imprisonment." That the jurors who were excluded were excluded because they absolutely stated they could not find a verdict in accordance with the evidence is indicated by the following excerpts from the Court's opinion:

> "It was the right of the state to have jurors who would receive this contention with open mind, and when the jurors upon their examination disclosed that this phase of the case could not be so submitted to them, they were obviously disqualified to pass upon one of the phases of the evidence as to which they might or might not exercise the clemency contemplated by the statute."

And further:

> "If sworn as jurors their scruples would shut out this proof and be in defiance of the law."

It is respectfully submitted that the answers given by the jurors upon their examination in connection with the challenge for cause in the present case did not bring them within the ruling in the Juliano case. For instance on the challenge to Henry W. Adams, he was questioned before any challenge was interposed and he stated that he had conscientious scruples opposed to capital punishment, and when asked whether his opposition to capital punishment would interfere with his duties as a juror in a case in which death is involved, he said, "No, I don't think so." He was further asked (p. 49, S. C.):

> "Q Do you think that in spite of your scruples against electrocution, that you could sit in a murder case and render a verdict of

guilty of murder in the first degree when you knew that the penalty was death?

A I think so."

He later seemed to answer directly the opposite of this in some of the questions put by the Prosecutor, and then had the following questions put to him:

"Q Would you be willing to render a proper verdict on the evidence as to the guilt or innocence of the defendants?

A Certainly.

Q And if the law allows you as a juror, gives you the right in the performance of your duty as such, to be the sole judge and the absolute judge, after a consideration by you of all the evidence, whether the defendants shall be sentenced to death or to life imprisonment, could you perform your duty under that law as a juror?

A Yes, sir.

Q And would you give consideration to the evidence in arriving at your verdict of guilty or not guilty and of a recommendation or no recommendation?

A Yes, sir."

Thereupon, the defense counsel objected to the challenge for cause and the Court asked the juror:

"The Court: But you would never vote for the death penalty, would you?

The Witness: No."

Thereupon the Court sustained the challenge.

It is respectfully submitted that this juror showed himself qualified to sit in the case under the statute, and that his answer to the question as to whether he would ever vote for the death penalty without having been given the benefit of hearing the trial or the entire charge of the Court, was merely an expression of opinion by him of what his action would be at the end of the case, and that having expressed his ability

to consider the evidence and to vote according to the charge of the Court on all of the aspects of the case, he was entitled to sit as a juror unless peremptorily challenged, and that this, one of the many challenges for cause by the State on similar grounds, when sustained by the Court, had the direct effect of wiping out the limit on the State's peremptory challenges. And the practice followed by the Court limited to such an extent the list of jurors from whom the defendants could select the jury to try them, as to limit such jurors to a group already predisposed to capital punishment in all first degree cases.

In the case of juror Charles R. Arndt, the juror stated that he was opposed to capital punishment and would not render a death verdict, but stated that he would take into consideration in voting for or against a recommendation of life imprisonment all of the evidence in the case, and would consider that evidence.

In the examination of Louis C. Bassini, he said he had conscientious scruples against capital punishment to a certain extent, but said that:

> "If the case warranted it and the preponderance of the evidence was that way, probably it would have no effect."

He then stated in answer to a question by the Prosecutor:

> "Well, I think I would do my duty,"

and further reiterated in answer to the following question:

> "Well, you told me just a moment ago that you thought your opposition to capital punishment would interfere with your arriving at a verdict of guilty of murder. Now, is that right or isn't it?
>
> A Well, in a measure that is right. It would all depend upon the evidence."

The Prosecutor then continued to ask him numerous questions along this line, and he finally put the following question and got the following answer:

> "Q And would your opposition to capital punishment interfere with your determination of that proposition, from the evidence?
> A I think it would."

He was thereupon challenged for cause, and objection was made by the defense to the discharge of the juror. The Court then asked the following question:

> "The Court: Would it interfere, Mr. Bassini, to the extent that you could not consider that as the verdict you might render?
>
> The Witness: I might consider it, I would not say that, yes, I might.
>
> The Court: Having decided in your mind that the defendants were guilty, if you did decide that, and then if you come to the question of fixing the punishment of life imprisonment or death in the electric chair, is your prejudice against death in the electric chair so strong that that would be out of the question?
>
> The Witness: I think it would."

The Court thereupon sustained the challenge of the State.

From the foregoing, it is plain that this juror was being asked questions as to his opinion as to what he would do at the end of a case which he had not yet heard and without hearing a full charge of the Court as to the law applying to such case, and even in his ignorance of these features, the utmost that he said was that he "thinks" his opposition to capital punishment would interfere with his decision of the question of whether or not to recommend life imprisonment, and while this would undoubtedly be a situation that would incline the State to excuse

this juror upon a peremptory challenge, it does not appear to be a situation in which the State was entitled to get rid of the juror by way of a challenge for cause.

The next juror, Henry Cahill, also stated that he would consider the evidence in rendering his verdict.

The juror, Argast, had admitted his preference for life imprisonment, but said that he would consider the evidence in arriving at his verdict, although he admitted that his scruples would lead him naturally to recommend life imprisonment.

The next juror, Borst, also stated that he entertained conscientious scruples, but said he would consider the evidence if the Court so charged him, and would make his recommendation only after a consideration of all the evidence, although he said that he would never vote for the death penalty.

The juror, William Bal, testified to substantially the same thing, and all the other jurors testified to substantially the same thing, and a summary of their attitude is revealed in the examination of juror, John J. Daley, in his following answers (pp. 82 and 83, S. C.):

> "Q You mean that you would be inclined to vote for life imprisonment?
>
> A Yes, I would not only be inclined to vote, but if having one of the two alternatives I would vote for life imprisonment.
>
> Q And you would do that after and upon a consideration of all the evidence in the case?
>
> A I would."

It is respectfully urged that each one of these jurors stated definitely that he could render a proper verdict of guilty or not guilty upon the

evidence in the case, uninfluenced by any scruples or other consideration except the evidence and the law as given by the charge of the Court. Therefore, the chief function as a juror could be performed by each of these jurors and it is only as to the extra function of recommendation that the scruples entertained by the jurors would have an effect. That this recommendation is not a part of the verdict was held before the amendment of the statute, in *State* v. *Martin* (92 N. J. Law 436). Then the statute was amended so as to read (P. L. 1919, p. 303):

> "Every person convicted of murder in the first degree * * * shall suffer death unless the jury shall by their verdict, and as part thereof, upon and after a consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."

This statute applies solely and only to the punishment after a conviction for murder. It in no wise changes the ordinary functions of a jury which are to determine the guilt or innocence of a defendant, and it gives a privilege to be exercised in some cases to the jury to attach to its verdict and as a part thereof a recommendation upon and after a consideration of all the evidence. The effect of the amendment of the statute is merely to require that the recommendation shall be "upon and after a consideration of all the evidence," and it is respectfully submitted that such recommendation would not and should not come into consideration even until after a jury has reached its verdict of guilty or not guilty. If a juror could reach this decision based upon the evidence, he should be qualified to sit upon the jury. If a defendant were so found guilty of murder in the first degree, then and

thereafter would the question of recommendation only arise, and it would necessarily have to be upon and after a consideration of all the evidence that he would arrive at his verdict of guilty and therefore of necessity his consideration of the recommendation would have to be upon and after a consideration of all the evidence. Certainly, some men would be inclined toward capital punishment in a first degree case, and others would not be. The effect of excluding jurors having scruples against capital punishment has the positive effect of limiting the jurors by whom the defendant may be tried to jurors who are in favor of capital punishment for first degree murderers and thus practically nullifies the effect of the statute giving to jurors the right to extend the mercy that the recommendation would involve.

Slightly different from the other jurors was the basis for the discharge for cause of Harry E. Bataille, who had no scruples against capital punishment, but who said that he would insist upon the State proving the defendants guilty beyond all possible doubt, and thereupon the juror was challenged for cause. He then was asked very lengthy and involved questions by the Court, to one of which he answered: "Not guilty, then, if there is a doubt." He then answered numerous additional questions, in which he adhered to this position, but he also answered that he would convict if he were satisfied of their guilt beyond a reasonable doubt. The State challenged him for cause, and the challenge was sustained, over the objection of the defendants. Nothing in his answers constituted a basis for a challenge for cause under the recognized rules requiring evidence showing either that the juror was biased or concerned in the result or otherwise disquali-

fied. He might properly have been challenged peremptorily, but to excuse him for cause, it is respectfully urged, was error.

It is respectfully urged that the large number of jurors discharged as for cause by the Court on the challenge of the State, regardless of the exhaustion or non-exhaustion of challenges by the defense, was by reason of its effect upon the entire drawing of the jury something that appears upon the record showing "that the plaintiff in-error on the trial below suffered manifest wrong or injury," for which "the appellate court shall remedy such wrong or injury and give judgment accordingly, and order a new trial," as specified in Section 136 of the Criminal Procedure Act.

POINT V.

Assignment of Errors No. 8. Specification of Causes No. 8 are withdrawn.

POINT VI.

Assignment of Errors No. 20. Specification of Causes No. 20.

> "Because the Court erroneously overruled the challenge for cause interposed by the defendants to prospective juror, William F. Dick."

This exception is interesting, because we find in the answers of this juror an attitude indicating that he was in favor of capital punishment and would not under any circumstances vote for a recommendation of life imprisonment, regardless of the evidence. We thus have presented a situation where the juror indicated a state of mind that was tantamount to a conscien-

tious scruple against life imprisonment. As the Court had repeatedly excused jurors on a challenge for cause by the State who had conscientious scruples against capital punishment, it is rather surprising to find that when the defendants interposed such a challenge for cause against a juror who stated that he would not, under any circumstances, vote for a recommendation for life imprisonment, that the Court, instead of following its policy with regard to the challenges interposed by the State, actually overruled the challenge of the defense. The following are some of the questions and answers put to and given by this juror (p. 52, S. C.):

"Q Well, saving time from repeating it, taking that law into consideration would you in any case where you would find a defendant guilty of murder in the first degree refuse to recommend life imprisonment regardless of the evidence?

A Regardless of the evidence.

Q If the evidence was sufficient to convict of murder in the first degree?

A Then I would say it is life for life.

Q You mean you would not vote for a recommendation?

A Exactly.

Q In any case where you found a first degree verdict?

A Yes."

On examination by the Prosecutor, the juror did say that he would give the instructions of the Court consideration, but he immediately followed this with the following answer to this question:

"Q And you would follow the instructions of the Court in that regard and satisfy your own convictions with regard to whether or not it was the proper law?

A I would not say I would. My convictions on that point are very, very strong."

On further questions by the Court, he reiterated his prejudice and the utmost that he said was that there was a possibility that he might vote for life imprisonment, and the Court thereupon overruled the challenge for cause interposed by the defendants, to which exception was taken.

If the action of the Court in sustaining the State's challenges because of prejudice against capital punishment was not error, then certainly the defense was entitled to have this juror excused for cause. If a mind predetermined to recommend life imprisonment was a just basis for challenge for cause by the State, then certainly a mind predetermined to refuse to recommend life imprisonment was a just basis for challenge for cause by the defense, and with the Court ruling one way on this proposition in favor of the State and the other way against the defense when each interposed their respective challenges, is an indication of the harm suffered by the defendants in the manner of choosing the jury. It is true that this juror was then peremptorily challenged by the defense, but if there is any meaning whatever in the law providing the number of peremptory challenges, then certainly the intention of that law is defeated when in numerous instances in the selection of the jury the State has in effect its number of peremptory challenges increased by the very ruling upon a ground of law which, when applied to the defense's challenges, causes the defense to use up its peremptory challenges. In other words, the entire policy of the Court in drawing the jury, as evidenced by its rulings on the challenges for cause, had the effect of extending far beyond the limit allowed by law the number of challenges available to the State and diminishing those available to the defense.

It is respectfully urged that on an entire consideration of the drawing of the jury, there should be a reversal in this case.

POINT VII.

Assignment of Errors Nos. 23, 24 and 25; Specification of Causes Nos. 23, 24 and 25 are hereby withdrawn.

Assignment of Errors Nos. 26 and 27; Specification of Causes Nos. 26 and 27 are hereby withdrawn.

POINT VIII.

Assignment of Errors No. 28. Specification of Causes No. 28.

> "Because the Court erroneously sustained the objection of the State to the following question put by the Attorney for the defendants to the witness, Calabrese: 'Q Did you at any time intend to kill him or seriously wound him'?"

The ruling of the Court in sustaining the State's objection to this question, it is respectfully contended, was error and of great harm to the defendant, Calabrese, particularly in view of the nature of his testimony and his defense at the trial. Calabrese in his testimony admitted firing a shot at the arm of Grossman, and had testified that he had previously attempted to hold up the druggist in the store, but that when Grossman resisted, he ran and was trying to get away and assist his companion to get away after the attempt to commit a robbery had been abandoned. That he succeeded in getting out of the store to a point on the sidewalk where Grossman still clung to one of the men, and Calabrese testified

that he fired a shot only after he had attempted by other forcible means to break the hold of Grossman upon Lamolino, and that he warned him "Let go, you damn fool, or you will be shot" and then fired at his arm. The testimony of the medical examiner who testified for the State was that one bullet had gone through the arm of the decedent. Certainly, the intention with which Calabrese fired the shot as to whether or not he intended to kill or seriously wound Grossman was a fact that the jury was entitled to know, at least from the standpoint of determining whether or not, even if they convicted him of first degree murder, to recommend life imprisonment or consign him to the chair by a failure to do so. The nature of the defendant's testimony on the stand indicated that it was a full, frank and penitent confession of his acts on the day in question, and having admitted the shooting, it is respectfully urged that it was competent and proper for him to state with what intention and purpose he fired the shot, which was one of the two that struck Grossman. Under the amended statute, a jury may make a recommendation for life imprisonment "upon and after a consideration of all the evidence," and if this recommendation is made, it is made as a part of the verdict. Therefore, any pertinent facts concerning the actions, purposes and objects of the defendant that would reasonably enter into a jury's judgment and consideration of the defendant's action, so as to assist it in reaching a determination as to a recommendation, should be admissible in the case, and to exclude it in this kind of a case is to deprive a defendant of the right to have all of the facts regarding his actions placed before the jury.

In addition thereto, the defendant was legally entitled to state the intention with which he fired

New Jersey State Library

the shot as proper evidence upon the question of the degree of his guilt. It is true that the law presumes that a person intends the natural and probable consequences of his act, but as Calabrese had testified that he shot only at the arm of the decedent, it was a jury question as to whether or not the natural and probable consequences would be death, and the intention with which the action was done would necessarily enter into the jury's consideration from several angles. First of all, while the evidence in the case would warrant a finding of first degree guilt on the theory of a killing perpetrated in the commission of a robbery, still that same evidence still left it as a jury question as to whether or not the killing was done after the attempt to rob had been terminated and ended and as a part of a battle between the defendant and the decedent, which, if the jury found as a fact that the killing was not done in the perpetration of a robbery or attempted robbery, would entitle the jury to find the defendant guilty of second degree murder. If the jury found that the killing was not in the perpetration or attempted perpetration of a robbery, but took place after the attempt was over, that the defendant would be guilty of a degree of murder depending upon his intent or lack of intent to kill, for if he intended to merely seriously wound him and therefore could not have taken his life with a wilful, deliberate and premeditated intent to take human life, he would be guilty only of second degree murder. Of course, the testimony of the defendant as to his intent would not be conclusive, and it might be entirely outweighed by the circumstances existing, but it was an element of proof which the defendant was entitled to give and which the jury was entitled to take into consideration in determining the elements of the act of the defendant. There-

fore, in addition to the relevancy of this testimony on the question of a recommendation of life imprisonment it was also relevant as part of the trial of the issue of guilt and as it cut so deeply into the merits of the case, it is respectfully urged that the sustaining by the Court of the Prosecutor's objection to this question constituted error most harmful to the defendant for which there should be a reversal. The right of the jury to have found a verdict of second degree murder is argued more fully under Point X where this question is squarely brought up in the charge of the Court.

POINT IX.

Assignment of Errors No. 29. Specification of Causes No. 29 are withdrawn.

Assignment of Errors No. 30. Specification of Causes No. 30 are withdrawn.

POINT X.

Assignment of Errors No. 31. Specification of Causes No. 31.

> "Because the Court erroneously charged the jury in part as follows: 'So far as your duty in this case is concerned, while it is of the highest importance, the facts which you have to determine are rather simple. They are as follows:
>
> First, was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.
>
> Secondly, did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being

so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

If your answer to these questions is in the affirmative, then, the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

If you then find, as a matter of fact, that these two defendants, either with or without others, took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree.' ''

Assignment of Errors No. 32. Specification of Causes No. 32.

''Because the Court erroneously charged the jury in part as follows: 'If you should convict either or both of these defendants of murder in the first degree, and, as I said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be.' ''

The foregoing excerpts from the charge, it is submitted, were objectionable and constituted error from several standpoints. In the first place, they are tantamount to a direction to the jury that it must find the defendants, or at least the defendant Calabrese, guilty of murder in the first degree, and left practically nothing for the

jury to decide as a question of fact. For instance, the Court instructed the jury that certain facts had to be determined by the jury upon a finding of which the defendants would be guilty of murder in the first degree. As a part of this portion of the charge, the first fact which the Court instructed the jury it must determine was:

> "First, was a robbery being perpetrated in the Grossman store at the time he was shot?"

This is immediately followed by an instruction of the Court giving the answer to this question, the Court not leaving it to the jury to decide, but stating to the jury:

> "According to the testimony of Calabrese there was."

This was not a mere comment upon the evidence, leaving to the jury the determination of the ultimate fact, but a definite charge to the jury that the testimony of Calabrese established under the rules of law of the Court that there "was a robbery being perpetrated in the Grossman store at the time he was shot." As a matter of record, Calabrese did not so testify, although his testimony left it open to the jury to decide whether his evidence and all the other evidence in the case proved beyond a reasonable doubt that a robbery was being perpetrated in which the decedent was shot. But the Court took this essential fact out of the realm of the jury's consideration, and distinctly charged them that according to the testimony of Calabrese, this element not only was established as a fact but that the facts so stated by the Court to be testified to constituted a killing as part of a robbery. This practically amounted to a direction of verdict of guilty of murder in the first degree by the Court, for the other questions submitted by the Court, to wit, whether Grossman died as the

result of his wounds and whether the defendants took part in whatever occurred, were admitted by the defendants on the stand. As a matter of fact, what Calabrese had testified to was that while they had gone to the Grossman store to commit a robbery and had attempted to do so and he had beaten them off and they stole nothing and they were fleeing from the scene of the attempt at the time the shooting took place. He testified that after having been in the back room of the drug store, covering a girl who was there, he heard a scuffle in the drug store proper and came to the door and saw a fight going on between Grossman, Bruno and Lamolino, and that Grossman was swinging at the others, trying to grab Lamolino's gun, and that he and the others tried to go and that they ran out of the drug store, and as they were doing so, Grossman tripped Lamolino and jumped on him, and that when they got up, Grossman and Lamolino continued on to the sidewalk and the defendant, Calabrese, tried to pry them apart and Grossman was trying to tussle for the gun and had ahold of it, and that Calabrese said: "Let go, you damn fool, or you will be shot," and that then Victor Bruno fired a shot and Calabrese fired at Grossman's arm. Long prior to this and in the store he testified that when he saw the fighting he said: "Let us go," and that he then tried to go. It is undoubtedly true that from this situation, the jury would have a right to find that the killing took place in the perpetration of a hold-up, but it still remained a jury question of fact.

The case of *State* v. *Turco* (99 N. J. Law 96), establishes the principle that a person may be convicted of a murder as having been committed in the perpetration of a robbery, even if the killing take place after the robbery itself, but in that

case the Court had submitted to the jury in its charge the matter of determining whether the facts brought the case within the statute.

> "The trial judge charged the jury that the effect of the statute which provides that if, in an attempt to commit robbery, one man, or any number of men, kill another, even though they did not start with that purpose in mind, but with the single purpose of robbery, their act, in such circumstances, under the law, is denominated murder."

The Court of Errors and Appeals held:

> "This was correct, and the facts of the case clearly brought the homicide within the statutory description."

The facts that appeared in the Turco case, however, were that the murder in that case was committed while the robbers were fleeing with the goods which they had stolen, and as the Court of Errors and Appeals pointed out:

> "The object and purpose of the conspiracy in this case was through robbery to seize the truck and run it to Easton, Pennsylvania, and distribute the silk in some portions among themselves."

In the present case, however, the defendants were not continuing a robbery by carrying off any stolen goods, but had completely abandoned their attempt to rob, and at the time of the shooting were, or at least the jury would have had the right to find as a fact, that they were men guilty of an attempted crime, fleeing from the scene of their act, and that the killing took place not as part of the robbery or attempt to rob, but as an act performed by a criminal seeking to avoid arrest and capture, the same as if he were attempted to be seized at another time by the man whom he had attempted to rob. There is nothing in the opinion in the case of

State v. *Turco, supra,* that goes beyond holding that the charge of the Court in that case was correct, and the opinion of the Court that the robbery was not completed appears to be predicated on the fact that the robbery was not completed because the fruits of the robbery were in their possession and the killing was committed in their effort to transport it from the scene of the robbery to the place where they intended to secrete it or dispose of it.

This same fact seems to be the basis of the finding of the Supreme Court in *State* v. *Carlino* (98 N. J. Law 48), affirmed by the Court of Errors and Appeals in (99 N. J. Law 292) in the opinion in the Supreme Court upon this point, for the Court there points out that when the killing took place, the robbers were holding two of their victims in their custody,

> " * * * and as long as the truck and the silk seized by the robbers remained in their control at the scene of the robbery and homicide with the evident intent on their part to return to Pennsylvania—the state from which they came—we think the robbery was not at an end. The robbers themselves must have contemplated further joint action until they had made their escape; holding the chauffeur and his companion as prisoners in bonds was itself an act in pursuance of the concert of action to commit the robbery. The holding of the two men as prisoners was a continuous act, and it would be preposterous to attempt to say at what instant of time, short of their release or escape, the responsibility of the robbers ceased.
>
> Carlino was guilty therefore of murder as defined in section 106 of the Crimes Act. *The jury ascertained under section* 107 *that this was murder in the first degree,* as it must have been under our construction of section 106.
>
> (Italics ours.)

The Court then charged the jury (Pg. 619 S. C.):

> "If you then find, as a matter of fact, that these two defendants, either with or without others, took part in the perpetration of that robbery, *as a result of which Grossman was shot and killed,* then you are justified in finding them guilty of murder in the first degree, *for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree.*"
> (Italics ours.)

This latter statement, first of all, does not follow the language of the statute and neither does it follow the language of the cases specifying what shall constitute murder in the perpetration of a robbery or the other specified crimes. The Court's charge made the defendants' guilt on question whether Grossman's killing was "as a result" of the defendants' taking part in a robbery, which would leave to the jury the impression that any killing which was "a result" no matter how remote, of a previous robbery or attempted robbery, would be murder in the first degree. Section 107 of the Crimes Act (Comp. Stat. 1780) reads:

> "Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall *be committed in perpetrating or attempting to perpetrate* any * * * robbery * * * shall be murder in the first degree."

This statute requires the killing to be "in perpetrating or attempting to perpetrate" such crime, and it does not say, as the charge of the Court said, that a killing committed "as a result" of such perpetrating or attempting to perpetrate a robbery, shall be murder in the first degree.

The charge approved in *State* v. *Turco, supra,* was:

> "* * * that if, *in* an attempt to commit robbery, one man, or any number of men, kill another * * *"

they shall be guilty of murder.

The charge approved in *State* v. *Merra* (137 Atl. 575), was in part:

> "If you believe beyond a reasonable doubt that a robbery was being perpetrated on June 4th, and that Conway was murdered in the course thereof,"

this Court saying in passing upon the charge in the Merra case:

> "The charge as a whole made it perfectly plain to the jury that it would not be justified in convicting the plaintiffs in error unless it was satisfied that Conway was murdered *in* an attempt to perpetrate a robbery and that they took part in that attempt."
>
> (Italics ours.)

In addition to the erroneous statement as to what facts would constitute guilt under the statute, the Court in this all-important portion of its charge, did not even require the jury to find such facts "beyond a reasonable doubt." He merely charged the jury that they must find such facts "as a matter of fact." It is true that in the beginning part of his charge, the Court in a general statement specified that the guilt of the defendants must be shown by the evidence beyond a reasonable doubt, but when the Court undertook, near the end of his charge, to state under what circumstances the jury would be justified in finding the defendants guilty, he omitted the instruction that such facts must be found "beyond a reasonable doubt," and substituted the phrase that they must be found "as a matter of fact."

It may be argued that if the above quoted portion of the Court's charge is erroneous, wherein the jury is instructed it could predicate guilt if the killing were committed "as a result" of an attempted robbery, that this is corrected by a previous portion of the charge which gave the correct rule. The Court did charge.

> "If you find, as a matter of fact, that these defendants, or either of them, together with others, went to the Grossman store on the day in question for the purpose of holding up and robbing Grossman of moneys or things then in his custody and that, in the course of the perpetration of such robbery, Grossman was shot and killed by any one of them, then they are all guilty of murder in the first degree."

The substance of this portion of the charge would be corrected if the Court had included in it that such facts must be found "beyond a reasonable doubt" and not merely "as a matter of fact"; but the possible corrective effect of this portion of the charge is destroyed by this error within itself. Furthermore, it is held in *State* v. *Parks* (115 Atl. 305):

> "An erroneous instruction is not cured by the existence of correct instructions elsewhere in the charge, unless the illegal one is withdrawn."

It is therefore respectfully urged that the charge of the Court did not properly instruct the jury as to the circumstances under which the defendants could be found guilty of murder in the first degree, but on the contrary erroneously charged them as to the law applicable to the case to such an extent that the harm to the defendants cannot be estimated, and that there should be a reversal by reason thereof.

POINT XI.

Assignment of Errors No. 33. Specification of Causes No. 33 are withdrawn.

POINT XII.

Assignment of Errors No. 34. Specification of Causes No. 34 are withdrawn.

JOHN W. McGEEHAN, JR.,
Attorney for and of Counsel with
Defendant, Joseph Calabrese.

CHARLES BECKER,
Attorney for ~~and of Counsel with~~
Defendant, Arthur Cort.

John W. McGeehan Jr
Counsel.

62 FEB.1.1930

Filed after the Oral Argum
by leave of Court.

NEW JERSEY COURT OF ERRORS
AND APPEALS

THE STATE OF NEW JERSEY
Defendant in Error

v.

ARTHUR CORT AND
JOSEPH CALABRESE
Plaintiffs in Error

ON ERROR

BRIEF FOR THE STATE.

The plaintiffs in error, Arthur Cort and Joseph Calabrese, were tried and convicted in the October Term, 1929, of the Essex County Court of Oyer and Terminer, of murder in the first degree without recommendation for life imprisonment, for the murder of Morris Grossman on April 22nd, 1929, in the City of Newark, and were accordingly sentenced to death.

This Writ of Error is taken on assignments of error and specifications of causes, for reversal and under section 136 of our criminal procedure Act. The facts of the case are practically uncontro verted. We shall therefore herewith give a summary statement of the evidence adduced at the trial.

Cort and Calabrese were indicted jointly with Victor Bruno and Dominick Lamilino. Victor Bruno has not yet been apprehended and Lamilino has been committeed for mental incapacity, and is mentally unfit for trial.

STATEMENT OF THE FACTS.

According to the statement made by Joseph Calabrese, which is corroborated in all its important

particulars by the written statement of Arthur Cort, and by their testimony given in court and by the testimony of William Raymondo, the facts in the case are as follows:

On Sunday, April 21, 1929, at about 8 o'clock p. m., Calabrese met Cort at the Public Service Terminal, Park Place, Newark, and talked about finding a way to get some money, and decided to hold up some store. Cort promised to steal a car and then to call for Calabrese on Monday morning: they then separated.

At about 4 o'clock Monday morning Cort, according to previously arranged plans, stole a Chrysler blue sedan automobile, on Milford Avenue, Newark, and drove to Calabrese's home with the same, and met Calabrese at about 7 A. M. Calabrese then got into the car and the two drove to the home of William Raymondo at 18 Jay street, near Orange street, Newark, and asked Raymondo to join them. Upon an inquiry made by Raymondo as to where they were going, Calabrese told him they were going around to see if they could find a place to stick-up and make some money. Raymondo joined them. He got into the rear seat of the car and the three drove over to Sussex avenue where they met Samuel Simione, who was waiting for Raymondo. Simione joined them. The four of them (Cort at the wheel, Calabrese next to him, and Raymondo and Simione in the back seat) then drove to Orange looking for a suitable place to hold up. They stopped in front of a butcher shop and Raymondo, Simione and Calabrese got out of the car and walked to the butcher shop. Upon arriving there they saw three butchers in the shop and decided it would not be favorable and too risky to hold up three men. On their way to Orange Raymondo gave Calabrese a gun; It was loaded

with five steel-jacketed cartridges and one lead cartridge.

After abandoning the plan to hold up the butcher shop the four of them drove around the town looking for a better place to hold up, and at Sanford avenue and Lenox street, Newark, they came upon a drug store which they considered suitable for the purpose of a hold-up. Finding the place closed, (this was early in the morning) they drove away. A few minutes later they returned to the store. At this time Raymondo and Simione got "cold feet" and refused to go on with the hold-up. Then Cort drove Raymondo and Simione to their respective homes, and Cort and Calabrese further discussed the plan to hold up the drug store at Sanford avenue and Lenox street, operated by Morris Grossman, the deceased. During this discussion Calabrese suggested the names of Victor Bruno and Dominick Lamilino, whom both knew from the Rahway Reformatory, to come and join them in the execution of their plans, and Cort was satisfied to take Lamilino and Bruno in on the scheme. Lamilino lived in Hoboken and Bruno lived in New York. Accordingly, they made arrangements with Bruno and Lamilino to meet them at the D. L. & W. Railroad station in Newark. Lamilino and Bruno were told to bring their "sweethearts" along meaning their guns. At about 5:45 P. M. on Monday April 22, according to pre-arranged plans, Cort and Calabrese met Bruno and Lamilino at the Lackawanna Railroad station. They then decided to drive around in the Chrysler sedan. While driving around the street Calabrese asked Bruno and Lamilino if they brought their guns with them; both said "yes", and in return asked Calabrese if he had his gun with him. Calabrese told them he had it in his overcoat pocket, which was the gun given him during the day by Raymondo. Cort and

Calabrese then explained to Lamilino and Bruno the details of their plan to hold up the Grossman drug store on Sanford avenue, which to them looked like an easy place for a "stick-up", because they figured that a druggist, as a rule, would not put up a fight, and all agreed to share in the loot on an equal basis. They then drove away to Lenox street and Sanford avenue and parked the car on the south side of Lenox street, around the corner from the drug store.

The plan to hold up was as follows:

Bruno was to go into the store and buy a package of chewing gum in order to bring the druggist out of the prescription room into the store. Lamilino and Calabrese were to follow him after a minute or so. Calabrese was to go directly to the rear in the prescription department to cover any person who might be there, while Lamilino and Bruno were to hold up the druggist at the point of their guns and command him to hand over any money and jewelry he might have, and Cort was to remain at the wheel of the automobile waiting to make the get-away. Accordingly Bruno went in first with a gun in his overcoat pocket. Shortly thereafter Lamilino and Calabrese entered and saw Bruno receiving his change from the druggist, who was standing behind the counter beside the cash register. Bruno was standing directly in front of the cash register. Upon entering the store Calabrese closed the door and walked toward the druggist and he and Bruno drew their revolvers and said to Grossman "stick 'em up." Without wasting any time Calabrese went into the prescription room, where he found Miss MacAvoy, and told her to be quiet if she did not want to be shot.

At this point we refer to the testimony of Miss MacAvoy.

Calabrese pointed a gun in her face and told her to keep quiet. While she was in this position she heard the sudden scuffling of feet around the cash register in the front room. At this time Calabrese left the prescription room and went to the front room to help Cort, Lamilino and Bruno who were beating Mr. Grossman, the druggist, while Mr. Grossman was attempting to prevent the opening of the cash register by the invaders. Calabrese joined Cort, Bruno and Lamilino in the assault upon Grossman. All four men were landing heavy blows upon the head of Grossman with the butts of their revolvers while Grossman with one hand was resisting the four assailants and with the other hand holding on to the cash register. Miss MacAvoy, seeing the blows about to descend upon the head of Grossman, attempted to cover Grossman's head with her hands, and one of the intended blows struck her hand breaking one of her fingers. Mr. Grossman was severely bruised, cut, and bleeding profusely, but he still refused to give up possession of the cash register. According to Miss MacAvoy, during the scuffle and attempt to get possession of the cash register in the store back of the counter, one shot was fired by Calabrese at Grossman, after which the four assailants attempted to escape. Grossman, bleeding though he was, held fast to one of them and was dragged along the floor. Near the entrance of the store the three men picked up Mr. Grossman and threw him over the steam radiator but did not suceced in shaking him off. Mr. Grossman followed them to the street, still holding on to one of the four. During the scuffle at the curb Calabrese, according to his own testimony called out to Grossman "you damn fool, let go or I'll shoot." (See statement Exhibit S-18).

According to Calabrese's statement introduced in evidence and corroborated by his own testimony,

two shots were fired outside of the store on the curb; one by Bruno and one by himself. Calabrese's shot him Grossman on the right side near the lung. A few seconds after Calabrese shot Grossman the latter slumped to the ground, and the defendants ran to the car waiting for them, with Cort at the wheel, and made their get-away. Mr. Grossman was immediately removed to the hospital where he died three days later as the direct result of the bullet wounds and the blows he received from the men. (See Dr. Martland's testimony.)

Returning to Calabreses's statement and testimony, the three assailants returned to the car, and, with Arthur Cort at the wheel, the four of them sped away with revolvers drawn in case they should be followed and seeing that they were not being followed they returned to Calabrese's room at 70 Plane Street, Newark, after parking the car a few blocks away. On the way to 70 Plane Street Cort was given all the details of what occurred in the store, upon which Cort said that when he heard the shots he feared one of the group had been shot and was glad to see them run for the car, because then he knew that they were not the ones who had been shot. At 70 Plane Street in Calabrese's room the men washed the blood spots from their clothes, and Lamilino's white shirt which had been badly blood-stained, was cut into small pieces and burned in the garbage can. While the four men were at Calabrese's room William Raymondo came up to the room and he was informed of all that had happened and was told to keep his mouth shut, otherwise he would be taken for a ride. At about 8:30 P. M. Lamilino and Bruno returned to Hoboken. During that night Calabrese offered to return the gun to Raymondo, but upon the latter's advice he kept it to be used

in case he should be stopped or some one should attempt to arrest him. The following Saturday, April 27, he returned the gun to Raymondo, who in turn gave it to Simione. The gun was put in evidence as Exhibit S-16.

All the above stated facts are corroborated by the testimony of the culprits in court, as well as by their written statements and the testimony of the various witnesses. One controverted fact being whether or not Grossman was shot twice or three times; or, if only twice, whether or not he was shot once in the store and once outside the store or both times outside the store. According to Miss MacAvoy, he was shot once inside, near the cash register, and twice outside the store. According to Calabrese's testimony, Grossman received both shots outside the store at the curb; one shot being fired by Bruno and one shot being fired by himself, Calabrese.

An autopsy of the body of Grossman disclosed three bullet wounds, the witness, Dr. Harrison S. Martland, designating them as Nos. 1, 2 and 3. No. 1 pierced the right forearm, entering from the outer side and making its exit on the inner side. This one shot shows no powder marks or burns or other indications of the shot being fired at close range. Wound No. 2 was of entrance of the right chest and the bullet, a .32 calibre lead bullet, was found lodged between the liver and the diaphram. Wound No. 3 was also a wound of entrance about three inches below wound No. 2, and the bullet, a 32 calibre steel jacket, was found near the spine. It is probable that either wound No. 2 or wound No. 3 was caused by the same bullet that caused the arm wound.

Col. Calvin Goddard, ballistic expert, demonstarted and proved that the two bullets recovered from

the body of Grossman were fired from the same gun; (Exhibit 16) the one carried by Calabrese.

According to Cort's testimony, Bruno's gun was rendered useless, the trigger having been broken while he was using the gun as a club upon the head of Mr. Grossman while Grossman was standing beside the cash register in the store. This is corroborated by the finding of the piece of trigger guard in the store after the departure of the assailants.

ARGUMENT

POINT I.

Assignment of Errors and Specification of Causes 1 and 2.

These assignments and specifications bring for argument the challenge to the array of the panel of jurors interposed by the defendants on the ground that all of the names of the general panel of jurors were not in the box from which they were drawn at the time the drawing began and during the drawing of the jury.

The special panel of 48 names had been properly served upon the defendants, and names were drawn from the Special Panel until all the names of the Special Panel were exhausted. Then, in accordance with section 83 of the Criminal Procedure Act, (Comp. Stat. 1847) the drawing of jurors was begun from the General panel. The general panel had been divided into two boxes; the odd numbers in box "A" and the even numbers in box "B". This had been done by the Sheriff in compliance with an order of the Judges of the Court of Common Pleas on March 23, 1928, which reads as follows:

"General Order dividing the general panel of jurors summoned for the trial of issues or causes in the County of Essex.

Order dividing Jury Panel.

Pursuant to the statute in such case made and provided, and until hereafter ordered otherwise.

It is by this general order made on the 22nd day of March, 1928,

ORDERED that the general panel of Petit Jurors hereafter summoned for the trial of issues or causes in Essex County shall be divided into two separate panels, one designated A. panel and the other designated B. panel.

The jurors whose designating numbers are odd shall constitute Panel A., and the jurors whose designating numbers are even shall constitute Panel B.

This order to take effect commencing with the April term next.

Dallas Flannagan,

Walter D. Van Riper,

Daniel J. Brennan,

March 23, 1928.

J. J."

The names in box "A" had been drawn and exhausted and the Under-Sheriff was about to begin to draw names from Box "B" when the challenge to the array was interposed on the ground that the general panel was not complete in one box

and had been divided into two boxes. At this point seven jurors had been drawn and sworn.

The course followed was in perfect accord with Chap. 296 of the laws of 1927, which provides as follows:

> "Chapter 296.
>
> "A Further Supplement to an act entitled 'An act concerning juries' (Revision), approved March twenty-seventh, eighteen hundred and seventy-four.
>
> "BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> "1. In counties where there are two or more judges of the Court of Common Pleas, the said court shall have power at its discretion, by general order, or by order from time to time, to divide the general panel of petit jurors summoned for the trial of issues of causes in such county, into two or more separate panels; and the judges sitting for the trial of issues or causes in the courts of said county, before whom such jurors are serving, shall have power to direct the drawing of juries from one or more of such panels.
>
> "2. In drawing a jury for the trial of *any issue or cause in any of the courts of said county,* there shall be put into the box only the names of the jurors constituting one of the separate panels to be designated by the trial judge and from that panel the jury shall be drawn in the usual way.
>
> "3. If, by reason of challenges or the default of jurors, or otherwise, a sufficient number cannot be had of jurors from the

jurors composing any separate panel to try *any issue or cause,* the court in which such issue or cause is pending shall direct the sheriff to order the jurors composing another of the separate panels into which the general panel may have been divided, to attend that court, and thereupon the sheriff shall put into the box the names of the jurors composing such other separate panel and proceed therefrom to draw the jury in the usual way.

"4. All acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby repealed.

"5. This act shall take effect immediately."

(Italics ours.)

It is conceded by counsel for plaintiffs-in-error that the procedure followed in the case at bar was in accord with the act of 1927, above quoted, but, it is argued, by counsel for plaintiffs-in-error, that the act of 1927 does not cover criminal cases in that it does not purport to be, by its title, an amendment of or a supplement to Section 83 of the Criminal Procedure Act. This argument of counsel for plaintiffs-in-error is untenable by reason of the wording of the statute, and by the decisions of this court on very similar legislation.

The act, by its wording, covers "any issue or cause in any of the courts of said county", and repeals all acts inconsistent with the new act.

The act is a supplement to the act commonly designated as "The Jury Act", and it cannot be seriously disputed by counsel for plaintiffs-in-error that the jury act does cover criminal trials.

Section 27 of the Jury Act (C. S. 2975) providing for the selection of jurors, expressly provides for trial of criminal as well as civil matters. It is true that this section was superceded by Section 83 of the Criminal Procedure Act (C. S. 1847) but said section 83 of the Criminal Procedure Act was in turn superceded by Chapter 296 of the laws of 1927, which, by its terms, repeals all acts inconsistent with it. Chapter 296 of laws of 1927 is a supplement to to the Jury Act. The Jury Act being applicable to criminal causes, it follows, without argument, that its supplements, too, are applicable to criminal causes.

It is true that under the construction given by the Supreme Court in *State v. Lapp,* 84 N. J. L., p. 19, to the provisions of Section 83 of the Criminal Procedure Act, all the names on the general panel should be in the box; but, under the new act, (Chap. 296, of laws of 1927,) any one of the separate panels, designated by the trial judge, is the general panel for the cause on trial.

The sole argument of counsel for plaintiffs-in-error is that Chapter 296 of the laws of 1927, does not apply to criminal causes because it does not purport to be an amendment of or supplement to Section 83 of the Criminal Procedure Act.

We think the question involved is precisely the same in principle as the question raised in *State v. Juliano,* 103 *N. J. L.* 663, decided by this Court in 1927.

In the *Juliano* case it was contended by plaintiffs-in-error

> "That the Court erroneously refused to sustain the defendants' challenge to the array of jurors. Section 82 of the Criminal Procedure act (Comp. Stat., p. 1847) pro-

> vides that the list of forty-eight names shall be drawn "from the general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which such defendant is to be tried.'"

Disposing of this argument the Court held that the Chancellor Jury Commissioner Act of 1913 was properly followed in the case and that therefore there was no error. Section 9 of the Chancellor Commissioner Act, (Sup. Comp. Stat., p. 835,) provides as follows:

> "Justice of the Supreme Court may direct that the panel of petit jurors so drawn shall serve for a designated portion of the next ensuing term only, and in such event they shall be so summoned, and the said justice may direct said commissioners at a time to be fixed by the justice, to draw a new panel or panels of petit jurors to serve for another designated part of such term, and such new panel or panels shall be drawn and summoned from the list certified by the commissioners prior to the commencement of such term in the same manner as hereinabove provided."

Petit jurors in Essex County were drawn to serve for periods of two weeks each, in the following manner:

> "The special panel of forty-eight names drawn and served upon the defendants was taken from the fourth panel of petit jurors for the September term, composed of one hundred and fifty persons, summoned in accordance with such order on November 10th, 1926. This was the panel serving at the time in the courts of the county. It is contended by the appellants that the forty-

> eight names should have been drawn from the combined panels of the term and not from the panel then serving, and that the approximately six hundred names comprising these panels should have been placed in the box and the forty-eight names drawn therefrom."

Then the Court deciding the case held

> "That the contention is unsound. By the terms of the act of 1913, where so indicated by an order of the Supreme Court justice, panels chosen for different periods in the term are for the time being a general panel and the only panel of jurors serving or available. The panels previously summoned and serving had ceased to be jurors, as by section 9 they shall serve for the designated portionly 'only'. In like manner those that might follow, if any, had not yet come into existence. It results, therefore, that for all purposes within the comtemplation of the statute the current panel of jurors then serving constituted the general panel."

It will be noted that the Act of 1913, known as the Chancellor Jury Act, does not by its title or otherwise purport to be an amendment of or supplement to the Criminal Procedure Act, nevertheless, this Court held that it was applicable to Criminal causes, and that section 82 of the Criminal Procedure Act was affected thereby.

As it was held in the *Juliano* case,

> "Panels chosen for different periods in the term are for the time being a general panel and the only panel of jurors then serving or available."

And likewise, it is submitted, under the provi-

sions of section 296 of the laws of 1927, providing that, "In drawing a jury for the trial of any issue or cause in any of the Courts of said County, there shall be put into the box only the names of the jurors constituting one of the separate panels to be designated by the trial judge, and from that panel the jury shall be drawn", such separate panel is the only general panel then available for the trial of any cause, until such separate panel is exhausted.

It is submitted, therefore, that under the provisions of Chapter 296 of the laws of 1927, the drawing of the jury from Box A and then from Box B. was proper.

POINT II.

Assignment and Specification No. 3.

It is assigned for error that "the Court erroneously permitted the Prosecutor, over the objection of the defendants, to question the respective jurors on their *voire dire*, without any challenge for cause having been interposed."

Counsel for the defense made such objection after the swearing of J. Roy Bergen on his *voire dire*, (p. 12, L. 9) and again upon the examination of Harold E. Shaw, (p. 28, L. 35), *also after the juror had been sworn upon voire dire.*

That counsel for plaintiffs-in-error questioned prospective jurors similarly is conceded by plaintiffs-in-error. It is argued, however, that such a practice on their part did not amount to an acquiescense or a waiver of their right under the objections taken.

Assuming this to be so, it is respectfully submitted that the Court did not err in allowing the examination of jurors on *voire dire* without the

interposing of a challenge, *where such jurors had first been sworn.*

Before taking up the cases cited by counsel for the plaintiffs-in-error we should like to bring to the Court's attention certain phases of the question. At the outset it should be borne in mind that the procedure followed in the present case is the common procedure followed, not only in the courts of Essex County, but in the State of New Jersey.

In Essex County, this procedure has been followed since the appointment of Judge Wm. P. Martin, in 1911, and probably for many years prior thereto. In the instant case, under this procedure, the name of a juror was drawn from the box by the Sheriff, and called to the book; the juror was then administered the following oath:

> "You do solemnly swear that you will well and truly answer such questions put to you touching your competency as a juror in the trial of this issue by Traverse Joined between the State of New Jersey and the prisoners at the bar, so help you God."

Having taken such an oath, then counsel for both sides were allowed, under the strict supervision of the Court, to ask relevant and pertinent questions to the juror, touching upon his competency. The scope of the examination, and the time consumed by it, were controlled by the Court; so that our Courts, under the practice now employed, are enabled to use their good discretion to supervise the scope and duration of *Voir dire* examinations according to the needs of each individual case. This discretionary control, so carefully employed by our courts heretofore, has worked more to the benefit of defendants than for the State, and there is not a case on record where defend-

ants have complained of an abuse of discretion by the Court in this respect.

To adhere to an arbitrary rule of demanding the interposition of a challenge before examination, even where the talesman has been sworn, would prejudice the interests of the defendant rather than assist him. The reason for this is simple; in most murder cases, the special panel of 48 men,—which is served upon the defendants,—and they are supposed to have an opportunity to learn of the tendencies of the 48 persons listed on the special panel,—is exhausted long before the full jury is drawn; and often, not only is the general panel exhausted, but it becomes necessary to bring in talesmen, so that neither the State nor the defendant is able to receive even a list of such talesmen; for, under section 83 of the Criminal Procedure Act, providing for the summoning of jurors after exhaustion of the special panel,

> "The defendant shall not be entitled to the service of a list of the talesmen taken from the general panel after the special panel is exhausted, nor of the talesmen summoned by order of the Court."

Under such circumstances, the only opportunity either side has to disclose any grounds of challenge, is by being permitted to ask a few general and relevant questions. A reference to the state of the case in the instant case will at once disclose that the questions asked were to the point, few in number, and well controlled by the Court.

A strict adherence to an arbitrary rule claimed by the plaintiffs-in-error to have been enunciated in the *Clifford* case, would not only not expedite the selection of a jury, but would, on the contrary, very much delay it.

Were counsel compelled to interpose a challenge before examination, in order to be pro-

tected against surprises, they would interpose a challenge on all possible grounds imaginable, even though they did not expect to question the juror on all of the grounds. Bearing in mind, that often over 100 to 150 persons are examined before a full jury is drawn, (especially where there are two or more defendants), the mere interposing of the challenges would by far delay rather than expedite the selection of the jury; furthermore, having interposed the challenges, counsel would have the right to examine the juror upon each of the grounds and the Court would have no right to prevent or restrict him in so doing; whereas, under the manner of examination as is now the practice in our courts, the Court allows counsel to ask a few relevant questions; he, himself, often joins in the examination; and if the answers of the juror disclose any ground of challenge, he then allows the interposition of a challenge. Thus, our courts have used their discretion in allowing a practice which is conceded to be of general use, because defendants on trial, as well as the State, have found it more expedient and more practicable. As long as the courts use their discretion properly, the practice now followed is more expedient, and more beneficial to the defendants; and there is no charge of abuse of discretion.

The present practice of examining before chal lenge,—the juror first having been sworn on *voire dire*,—has become more common and more preferable, especially since the enactment, in 1919, of the statute which gives to jurors the power to recommend life imprisonment as a part of their verdict in first degree murder convictions. (P. L. 1919, p. 303).

Since the passage of this statute it has become essential to know the prospective juror's mind on the question of capital punishment, and it would

serve no practical purpose to first challenge a juror on the ground that said juror has scruples against capital punishment when either side knows absolutely nothing upon which to base such a challenge, and it would serve no purpose other than to groundlessly accuse a juror of entertaining certain views, which would incapacitate him as a juror. It would in fact mean waste of time. Precisely the same method of examining jurors on a *voire dire* was followed in the case of *State v. Juliano, et als. supra,* represented by the same counsel, where four defendants were tried and convicted for first degree murder and sentenced to death. Even though the precise point was not argued on the appeal in the *Juliano* case, the entire record in the case was in this court on review under section 136 of our Criminal Procedure Act, and had there been anything inherently wrong with this procedure of first swearing the juror, then examining on his *voire dire,* and then interposing the challenge, this Court would no doubt have reversed the judgment in that case for harm done; but not even a criticism was made by the Court in the *Juliano* case in respect to this practice. No doubt this court concluded that the accused suffered no harm by the practice.

IT IS RESPECTFULLY SUBMITTED, THEREFORE, THAT ON PRINCIPLES OF JUSTICE TO THE ACCUSED, AND FOR THE EXPEDIENCY OF CRIMINAL TRIALS, THE PRESENT PRACTICE ADOPTED BY OUR TRIAL COURTS, IN THE PROPER USE OF THEIR DISCRETION, OF ALLOWING COUNSEL FOR BOTH SIDES TO ASK RELEVANT AND PERTINENT QUESTIONS OF A JUROR WHO HAS BEEN SWORN ON HIS *VOIRE DIRE,* AND THEN INTERPOSING A CHALLENGE, THE WHOLE PROCEDURE BEING ACTUALLY UNDER THE CON-

TROL OF THE COURT, IS HIGHLY PROPER, AND CONSTITUTES NO ERROR.

This practice is highly recommended by the California Court in the case of *People vs. Raynolds*, 16 *Cal.* 128, where the Court said that a party should first be allowed to examine jurors to ascertain if there was any ground for challenge and that the mere fact of challenging the juror was so calculated to prejudice him against the challenging party, *that to require such challenging before examination would amount almost to a denial of justice.* (Italics ours.)

And in the application of this practice in our courts, which is concededly the fact, during a long period of years, there has never been any reason to suppose that any accused person has suffered in the least degree from the partiality or unfairness of a jury empanelled under the practice now in use; and we think this is due to the fact that our trial courts, endowed as they are with discretionary powers, have lived up to their duties, and have not failed to have in mind the rendering of justice to the accused, as well as the expediency of the trial.

It is, however, claimed by plaintiffs-in-error that the New Jersey Courts have arbitrarily set down the rule that the juror must be challenged before he is sworn and examined, and certain cases have been cited by plaintiffs-in-error, among which, *State v. Clifford*, 61 *N. J. L.* 217, is the leading case. These cases, cited by counsel for plaintiffs-in-error, merely state that the trial court is not *bound* to allow the examination of a juror when no challenge is interposed and the venireman is first sworn. These cases do not establish an arbitrary and mandatory rule of Law, that the juror must be challenged before he is sworn. The rule enun-

ciated by the cases is one which permits the trial court to exercise his discretion, and hold that it is not error for him to require a challenge prior to examination.

That the power of the Court on this point is purely discretionary is borne out by decisions as well as by the authorities.

Thompson. on trials, at page 113, Par. 101, says:

> *"That there is much authority for the conclusion that the trial judge has a discretion to allow either party to interrogate the juror without first interposing a challenge and that this seems to be the general practice of the courts. The Court may exercise a sound legal discretion in respect of the pertinency of the questions put and the limits to which the examination shall be extended."* (Italics ours.)

And in *35 C. J. 388,* we find

> "While considerable latitude must, of necessity, be allowed for this purpose, and questions are not barred, although directed to matters not in issue, provided they are pertinent, and made in good faith, the nature and extent of *this examination must be left largely to the discretion of the trial court, which has the power, whenever the examination is unduly protracted, or when it appears that the questions are impertinent or irrelevant, or are not asked in good faith, summarily to check counsel.* It is a legal discretion, subject to review, but unless an abuse of such discretion is shown, the rule of the trial Court will be sustained."

According to *16 Ruling Case Law, 241, No. 63,*

> "Voire Dire Examination Generally.—The right to interrogate a juror on his *voir dire* in order to determine whether it is expedient to challenge him peremptorily, and the proper scope and limits of such interrogation, where allowable, are questions upon which widely varying opinions have been entertained. *Some courts declare the rule that counsel for the defendant in a criminal prosecution cannot insist, as a matter of right, upon interrogating a juror on his voir dire, or upon having the judge interrogate him, for the purpose of ascertaining the advisability of interposing a peremptory challenge, but that the court may or may not, in its discretion, permit or conduct such an examination.* Most of the authorities, however, take a different view of this question, and declare that the defendant in a criminal prosecution is entitled to make reasonable and pertinent inquiries of a juror on his voire dire, so that he may exercise intelligently and wisely his right of peremptory challenge." (Italics ours.)

It is submitted that the italicised portion of the excerpt from Ruling Case Law clearly defines the status of the law in New Jersey: that the allowance of such examination before challenge is discretionary with the trial court.

Ruling Case Law, on the same page, goes on to say.

> "And so the examination of a juror on his voir dire has a two-fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of

> peremptory challenge given to parties by the law. It is often important that a party should know the relation sustained by a person called as a juror to his adversary, in order that he may interpose a challenge for cause, or exercise his peremptory right to challenge."

Under section 64, 16, R. C. L. p. 241, the discretionary power of the trial court is again brought out, as the proper check on *voir dire* examination.

> 64. "The trial court may, in the exercise of a sound discretion, properly limit the extent of an examination upon any of the particulars of qualifications of jurors."

There is not a case in New Jersey where the discretionary power of the Court was disputed; in fact, all the cases cited by the plaintiffs-in-error affirm the exercise of such discretionary power.

The rule in Alabama is precisely the same as in New Jersey; that is, that *before challenge neither party has a right to interrogate* a juror to escertain whether he is subject to challenge. Holding that neither party, *as a matter of right*, can examine a venireman without first interposing a challenge, the Alabama Supreme Court, in the case of *State vs. Jarvis*, 34 *South*, 1025, *at page* 1031, *says*:

> "While it is doubtless true that the rule prevailing in this state is that, before challenge, neither party has a right to interrogate a juror to ascertain whether he is subject to challenge (Bales v. State, 63 Ala. 30; Hawes v. State, 88 Ala. 66, 2 South. 302; Lundy v. State, 91 Ala. 100, 9 South. 189; Hornsby v. State, 94 Ala. 55, 10 South. 522), yet the court, in the exercise of its discretion, may permit it to be done, and,

> when allowed, it is not revisable. Mann v. State, 134 Ala. 1, 32 South. 704; State v. Lautenschlager, 22 Minn. 514; 1 Thompson on Trials, §101, p. 100. The action of the court in allowing the solicitor to interrogate Jurors Rabby and McMillan as to their relation, either by blood or by marriage, with the defendant, and in permitting the solicitor to ask Juror Curtis Bush, "Are you opposed to capital punishment in a case of murder?" is not revisable. And we might say, with all propriety, that the action of the court was entirely proper."

And in the case of Mann v. State, 32 South. 704, (Ala.) the Court held that on a prosecution for murder, on the organization of a jury even though the juror had not been challenged, the State was allowed to examine a juror and this was held to be within the unrevisable discretion of the Court.

It is respectfully submitted, therefore, that according to the logical interpretation of the New Jersey cases, and according to the unmistakable language of text writers and decisions of other states holding the same view as New Jersey, the allowance of such an examination is discretionary with the Court.

An examination of the cases cited by the plaintiffs-in-error, further points out that the refusal in those cases to permit counsel to examine the jurors without first interposing a challenge was based on the ground that the juror had not been sworn, whereas in our cases each venireman was administered the oath above quoted.

In the leading case of *Clifford v. State,* 61 *N. J. L.* 217, the Court says: (p. 221.)

> *"As the juror was not put under oath, and it was not proposed to put him under*

oath, the proposition was to permit counsel to engage in open and audible conversation with the juror, a conversation over which there was no challenge or issue to be tried, the Court would seem to have no control." (Italics ours.)

Then the Court quotes Chief Justice Kirkpatrick in the case of *State v. Zellers,* 7 *N. J. L.* 220, as follows:

"What a man says not under oath cannot be received in any form."

Returning to the *Clifford* case, the Court concludes, (Italics ours.)

"If the Court is bound to permit counsel to engage in a public conversation with each juror, for the purpose of enabling counsel to determine whether he should interpose a challenge or not, what control has the Court over the examination? Where can it draw the line between proper and improper questions, when the purpose of the talk is not to prove a fact or to establish a challenge but only to furnish counsel information? How is a juror to be protected against improper questions, except by his refusal to answer them? And if he refuses to answer proper questions, what power has the Court to compel him to answer? *Or, if a juror is anxious to escape service, how can it be discovered whether his answers, not given under the sanctity of an oath, are true or false?* Such practice would introduce into this State, happily so far from them, the unseemly, vexatious and expensive *delays* in impanelling juries in criminal cases which have been a reproach to the ad-

> ministration of criminal justice in some other states."

The veniremen in the case at bar, having been individually sworn, the dangers anticipated in the *Clifford* case were no longer existent. The questions asked were limited to matters "touching the competency" of the juror, and counsel were not allowed to ask improper and impertinent questions; the answers being given under oath, a juror was not able to escape service by giving untrue answers.

It is further evident from the opinion in the *Clifford* case and the cases following it, that the rule is promulgated for the benefit of prospective jurors, and not for the benefit of the accused, and the relaxation of the rule caused no possible harm to defendants. Thus, in the *Clifford* case, the Court asks,

> "How is a juror to be protected against improper questions, except by his refusal to answer them?"

The examination having in fact been properly controlled and limited by the Court in the exercise of his discretionary power, the fear of exposing the juror to impertinent questions becomes groundless; it is not even claimed that in the instant case any impertinent questions were asked. Furthermore, any relaxation of a rule made for the protection of a juror, could not possibly harm the defendants.

THE ARGUMENT OF PLAINTIFFS-IN-ERROR IS SIMPLY THIS: THAT AN ARBITRARY RULE HAS BEEN SET DOWN BY CERTAIN CASES TO THE EFFECT THAT THE CHALLENGE MUST PRECEDE THE EXAMINATION, AND THAT THIS RULE WAS VIOLATED; BUT THEY DO NOT INDICATE IN WHAT MANNER

THEY WERE PREJUDICED, THEY, THEMSELVES, HAVING FULLY PARTICIPATED IN SUCH EXAMINATIONS.

It is respectfully submitted, therefore, that no error has been shown on this point,

1st. Because the ruling of the Court on this point was within his discretionary power, and no abuse of discretion is even alleged.

2nd. Cases cited by plaintiffs-in-error do not deny the discretionary power of the Court to allow such an examination, but merely affirm his discretionary power to refuse it.

3rd. In none of the cases cited by plaintiffs-in-error was the juror sworn before examination, and the lack of such an oath was the ground upon which the refusal of examination before challenge was sustained; whereas, in our case the proper oath was administered.

4th. None of the fears entertained in the *Clifford* case have existence in the case at bar, because an oath was taken by the juror, under which the scope of the examination would be controlled by the Court and would be limited to matters touching upon the competency of the juror, and the juror could be compelled to answer proper questions.

5th. The rule of the *Clifford* case, relied upon by plaintiffs-in-error, is for the protection of veniremen, and defendants cannot suffer any harm by its relaxation, and do not in fact show that they did suffer any harm.

6th. The practice followed in the instant case has been the practice in all important cases in Essex County as well as in New Jersey, and has been found by the State as well as by defendants, more effective for the purpose of rendering justice to defendants and expediting criminal trials, and such examinations have in fact been under the control of the Court and it is not alleged that there was any abuse of discretion, or that the practice caused any undue delays whereby the defendants suffered or were prejudiced in their defense on the merits.

POINT III.

Assignment and Specification No. 4.

During the examination of George C. Braumuller on his *voir dire* the following question was asked by counsel for defendant Calabrese. (Case p. 15, L. 14-40.)

"Q Are you acquainted with Prosecutor Smith?

Mr. Fisch: I object.

The Court: Sustained.

"Q Mr. Brumuller, in this case of the State versus Cort and Calabrese, the State's case is to be presented by Prosecutor Smith and Assistant Prosecutor Fisch, and I ask you whether or not, in your judgment, there is anything that would prevent your conscientiously deciding this case or whether you would be able to render a just judgment in the case, uninfluenced by any acquaintance with any of the parties in the case.

"Mr. Fisch: I object to that.

"(Argument.)

"The Court: That is objectionable insofar as it implies an acquaintance with the Prosecutor. It is certainly proper to ask him whether he could render a just verdict.

"The Court: The objection is sustained.

"Defendant Calabrese prays an exception to this ruling of the Court."

It is argued by counsel for plaintiffs-in-error that by the above question the direct question was asked of the juror as to whether or not he could impartially and conscientiously decide the issue in the case.

The remarks made by the court make it very evident that that part of the question which asked the juror whether he could render a just verdict, (the "direct question" referred to by counsel) was held proper, if counsel would frame his question accordingly; but the question was properly excluded because it implied an acquantance with the prosecutors, and spoke of the prosecutors as the parties in the case.

It is only favor and partiality between parties that may be made the ground of challenge, and an acquaintance with counsel is no ground for challenge. *Boyd v. Husted,* 3 *N. J. Misc. Rep.* 225. (Supreme Court decision Per Curiam.)

It is further submitted that no harm was suffered by either defendant by reason of the Court's ruling because Mr. Brummuller was peremptorily challenged, and, as counsel for plaintiffs-in-error will concede, neither defendant exhausted his

peremptory challenges after selection of the complete jury.

This Court, in the case of *State v. Martin,* 102 *N. J. L.* 388, on page 291, said:

"Assuming for argument that the challenges were made and wrongfully disallowed, the record discloses no harm or prejudice to the defendant by these rulings. The jurors mentioned were not members of the jury which tried the defendant. They must have been, therefore, challenged peremptorily. The defendant was allowed twenty peremptory challenges. He challenged peremptorily sixteen jurors. His peremptory challenges were not exhausted when the drawing of the jury was completed. He was therefore not harmed by the rulings of the trial judge, of which he now complains. Such rulings constitute no ground for reversal. *Drake v. State,* 53 *N. J. L.* 23."

It is submitted that there was no error made by the Court on this point, and if there was any error, it was harmless.

POINT IV.

Assignments and Specifications 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22.

All these assignments and specifications bring for argument the ruling of the Court upon challenges made by the State to several jurors, because of their avowed scruples against capital punishment, and other grounds of challenge.

Counsel for plaintiffs-in-error argues on page 21 of his brief, that these challenges were not interposed at the proper time, in that the examination of the prospective juror upon his *voir dire* preceded the challenge for cause. We have argued

the matter under Point II, and it is submitted that such a course was proper, and harmless to defendants.

Counsel for plaintiffs-in-error has quoted (p. 21 of brief) from the opinion of Justice Van Syckel in the case of *State v. Patterson,* 48 *N. J. L.* 381:

We agree with counsel that Justice Van Syckel gave the correct rule of law, that,

> "At common law, upon the trial of such challenges, the finding of the triers as to facts was not reviewable. The functions of the triers being, by our State, vested in the trial court, the finding of the judge upon questions of fact involved in a challege are conclusive. The decision of the judge is the subject of exception only when he makes a mistake of principle in determining whether the challenge shall prevail. Under a system of criminal jurisprudence, which shields a defendant by the presumption of the necessity of a unanimous verdict to convict, courts of review should not be astute to seize upon ground for reversal where the challenge by the State to the favor has been successfully made. There should be very clear error to constitute a mistrial."

In the *Patterson* case, just quoted, the judgment was reversed *because the grounds of challenge made by the State were not legal grounds.* The Court was very clear in giving the rule, that if the *ground of challenge is legal,* the finding of the court from answers given by a juror in his *voir dire examination,* as to whether that certain juror has disclosed facts which make him objectionable on those legal grounds, are conclusive and not reviewable.

The question raised, therefore, is, whether a conclusion finding that a prospective juror has scruples against capital punishment is proper for challenge.

Precisely the same point was decided by this Court in the Case of *State v. Juliano,* 103 *N. J. L.* 663.

In that case, on pages 670 and 671, this Court said:

> "The next point raised in sequence is that the court erroneously sustained the challenge made by the state to jurors whose scruples against capital punishment precluded their finding a verdict without recommendation for life imprisonment.. Inasmuch as it appears that none of the defendants had exhausted their peremptory challenges they suffered no injury by reason of this ruling of the court. *State v. Langhans,* 95 *N. J. L.* 213. Apart from this fact we think the challenge was properly sustained. By chapter 134 of the act of 1919 (page 303) it is provided that '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.' It was the privilege of the state to contend before the jury under this statute that upon the evidence the crime was of such atrocity that the jury's verdict should be without recommendation. *It was the right of the state to have jurors who would receive this contention with open mind, and when the jur-*

ors, upon their examination, disclosed that this phase of the case could not be so submitted to them they were obviously disqualified to pass upon one of the phases of the evidence as to which they might or might not exercise the clemency contemplated by the statute. If sworn as jurors their scruples would shut out this proof and be in defiance of the law which submitted to them the proper punishment to impose on the defendants based upon the evidence solely. To hold otherwise might be to, in effect, work the practical abolition of capital punishment in this state; a function and right of the legislature only. The murder trial is rare in which numbers of the general panel of jurors are not found conscientiously opposed to capital punishment. With the limited number of peremptory challenges allowed to the state, the probable inclusion on the trial panel of one or more jurors so opposed would necessarily result in a verdict of life imprisonment or a disagreement. The conclusion we have reached is fortified by authority generally throughout the country. Many states have committed to juries the power to render verdicts "without capital punishment" or to substitute imprisonment for the death penalty. Disqualification to bring a capital verdict has repeatedly been held a cause for challenge. 35 *C. J.* 355." (Italics ours.)

The question, whether or not the scruples of each juror challenged, against capital punishment was strong enough to preclude him from finding a verdict of first degree murder without recommendation, was a question of fact, and on that point the finding of the court was conclusive and not reviewable.

Counsel takes a few instances of these challenges for cause, based upon the juror's scruples against capital punishment.

We will take these in the order taken by counsel for plaintiffs-in-error.

First: Henry W. Adams.

Case p. 49, L. 25.

> "Q Have you any conscientious scruples opposed to capital punishment?" A Yes, sir. (Case p. 49, L. 26.)
>
> "Q So that under those circumstances could you render a verdict of guilty of murder in the first degree where the penalty is death? A No.
>
> "Q Irrespective of what the proof or the evidence might me? A Yes, sir.
>
> "Q That would not make any difference? A No.
>
> "Q (P. 50, L. 19) But you would never vote for the death penalty, would you?
>
> A No."

This comes squarely within the situation anticipated by the Court in the *Juliano* case, where one man in the jury opposed to capital punishment would practically nullify the statute providing death penalty.

It is true that the juror said he would consider the evidence in arriving at the verdict, but he also made it very clear that no matter what the evidence, he would *never* vote for the death penalty.

The challenge was properly allowed.

Second: Charles R. Arndt. (Case p. 56-57)

"Q You have said you are opposed to capital punishment, is that right? A Yes.

"Q Well, this is a murder case. Would you render a verdict of guilty of murder in the first degree if the penalty were death? A No.

"Q Under no circumstance? A No.

"Q Irrespective of what the evidence might be, is that right? A Yes."

P. 71, L. 1.

"The Court: What do you mean when you say you would consider the evidence before you decide on what the sentence would be? A moment ago you told the prosecutor you would never vote for the death penalty.

"The Talesman. That is what I said, that I would not vote for a death penalty. I would vote for life imprisonment.

"The Court: * * * Is there any case under any circumstances where you would vote for death in the electrict chair?

"The Talesman. No.

"The Court: Absolutely none?

"The Talesman: Absolutely none.

"The Court: Under any circumstances?

"The Talesman: Under any circumstances.

"The Court: And in no case, is that right?

"The Talesman: That is right."

Third: Louis C. Bassini. (Case p. 61.)

"Q And would your opposition to capital punishment interfere with your determination of that proposition, from the evidence? A I think it would.

"The Court: Having decided in your mind that the defendants were guilty, if you decide that, and then if you come to the question of fixing the punishment of life imprisonment or death in the electrict chair, is your prejudice against death in the electric chair so strong that that would be out of the question?

"The Talesman: I think it would."

Here, again, is a juror for whom, no matter what the evidence, the death penalty is out of the question. When he comes to consider the penalty he puts death penalty completely aside, out of consideration. Death penalty is precluded from his mind.

Fourth: Henry Cahill. (Case p. 63.)

"Q In other words, because of your disbelief in the death penalty, if you were chosen as a juror in a murder case, irrespective of what the evidence might be, you would never vote to convict of murder in the first degree where the death penalty was to be imposed? A No, sir."

Fifth: Emil E. Argast, Jr. (p. 68.)

"Q Have you any conscientious scruples opposed to capital punishment? A Yes, sir.

"Q So that these scruples would render you biased, and interfere with your duties as juror in a murder case where the death penalty is involved? A Yes.

"Q And irrespective of the evidence, you would not vote for a verdict of murder in the first degree without attaching a recommendation of life imprisonment? A That is right.

"Q (By Mr. McGeehan) And upon and after a consideration of the evidence you would consider the question of whether you should make a recommendation or not? A Well, in that case, I don't believe in capital punishment, and naturally I would recommend life imprisonment."

Sixth: Amos S. Bornt. (p. 71.)

"Q Have you any scruples which are opposed to capital punishment? A I have.

"Q Would those scruples which you have opposed to capital punishment, interfere with your duties as a juror in arriving at a just and fair verdict in a case involving the death penalty? A They would.

"Q Would they interfere with your duties, do you think, to such an extent that irrespective of what the evidence might be in a case, you would never vote to convict the defendants of murder in the first degree where the death penalty was to be imposed? A No, sir; I never would.

"Q (By Mr. McGeehan) What is this scruple or feeling, what does it consist of in your mind? What is the opinion that you have? A That I cannot sentence a man to death."

Seventh: William Bal. (p. 75.)

"Q So irrespective of what the evidence might be, you would never vote to convict

> the defendants of murder in the first degree without attaching a recommendation? A No, I would not convict under any circumstances for execution.
>
> "Q Irrespective of what the evidence was? A Yes, I have conscientious scruples against it."

We do not deem it necessary to go into the argument that the excusing of the above jurors, even if erroneous, would constitute no cause for reversal, under the rule laid down in the case of *State v. Langhans*, 95 *N. J. L.* 213, because the testimony of each juror referred to by counsel for Plaintiffs-in-Error shows beyond the least doubt, that each and every one of them had such strong convictions against capital punishment, that the death sentence was entirely out of the question for them; their minds were precluded from considering the death pepnalty.

It is argued by counsel for Plaintiffs-in-Error that these jurors said they could render a verdict upon the evidence; but they also said that they would never render a verdict of guilty of murder in the first degree if the result would be a death sentence; that is, such a verdict would be beyond their consideration, and as said in the *Juliano* case, the state is entitled to have such a verdict considered by the jury.

> "The reason why a juror is considered disqualified by such scruple is, that they would prevent him from performing his part as such juror in the due administration of the law. We think this reason applies with equal force, whether the law prescribes the single punishment of death, or invests the jury with a discretionary power to inflict that punishment or another.

> If in the one case his scruples would not permit him to render a verdict in accordance with the law, in the other they would not permit him to exercise the discretionary power with which he is invested, and which it is essential he should exercise to carry out the spirit and intention of the law."
>
> State v. Wooley, (Mo.) 115 S. W. 417, 434.
>
> "In our opinion, jurors should possess such qualifications as would enable them to fully conform to the provisions of the statute and if the testimony developed upon the trial should show a case of such an aggravated character as demanded the infliction of the highest punishment, they would do so."
>
> Demato v. People (Col.) 111 Pac. 703, 35 L. R. A., N. S. 621.

Counsel for Plaintiffs-in-Error further argues that the recommendation is no part of the verdict, and cites *State v. Martin* 92 N. J. L. 436; that rule was expressly superceded by the amendment of 1919, (P. L. 1919, p. 303) which makes the recommendation of life imprisonment a part of the verdict.

The point, however, is that under the statute and under the decision of the *Juliano* case, the State is entitled to have a jury with an open mind for the consideration of the death penalty, and it cannot be disputed that each of the excused jurors had their minds closed to the question.

We further think that the allowance of the challenges were harmless to the plaintiffs-in-error, because a satisfactory jury of twelve men was selected and still neither defendant had exhausted his

peremptory challenges. There was no error which could have prejudiced the defendants in maintaining his defense upon the merits. In the Langhans case, supra, it is held,

(95 Law, p. 216.)

"He was entitled in the selection of the jury to exercise the right of challenge which gives to a defendant the opportunity of saying that he shall not be tried by some particular jurors. The right of challenge, however, is the right of exclusion, not a right of selection. It does not give to a defendant the right of saying what particular jurors shall try him. The law on this subject was very clearly stated in this court in the case of *State v. Deliso*, 75 *N. J. L.* 808, 811, where Mr. Justice Garrison, speaking for the court, said:

"The essence of the right of challenge is that it shall afford an opportunity to every person to say that some particular jurors shall not try him, but it is no part of this or of any other system of trial known to our law (unless it be that of arbitration) that a person shall say by what particular jurors he or his cause shall be tried. A right that is in this sense unknown to the law is non-existent as a legal right, and the denial of a right that is legally non-existent cannot inflict a legal injury. In the recent case of *State v. Moore*, in this court, this doctrine was applied to the allowance of a peremptory challenge to a juror by one of two defendants jointly indicted against the protest of the other. The decision was that even if that challenge was not one that the trial court was bound to allow, the non-

challenging defendant was not, in a legal sense, injured thereby, the effect being merely to reduce the number of the general panel from which the trial panel was selected. In his opinion Mr. Justice Reed adverts to the circumstance that it did not appear in the record that the protesting defendant had exhausted his challenges, or that the selection of a jury from the general panel was impaired. The same may be said in the present case, although in view of the statutory provision for summoning talesmen the latter circumstance may be without significance. The matter decided was that the allowance of a peremptory challenge was not a ground for reversal upon error so long as neither the right of the plaintiffs-in-error to have a trial jury selected from the jurors legally summoned nor his right to reject such jurors was impaired."

"In the present case the complaint of the defendant is that he was by the ruling of the trial court deprived of having a particular juror, Benjamin W. Brown, sit as a member of the jury for the trial of the indictments. Upon the completion of the drawing of the jury, the record shows that the state and defendant had each used only two of the ten peremptory challenges to which each was entitled. This exclusion, as he expressed his satisfaction with the jury as drawn and with the juror who had taken the place of Mr. Brown. If he had been dissastisfied, he would have exercised his right of peremptory challenge. The state had forced on the defendant no objectionable juror and had deprived the defend-

> ant indirectly of no juror which it could not have excluded by peremptory challenge. As the law is that a defendant has no right to say that some particular juror shall try him, it follows that in the present case the defendant suffered no injury by the court's ruling. The denial of a non-existent right can inflict no legal injury."

Counsel for plaintiffs-in-error attempted to distinguish the *Langhans* case on the ground that the *Langhans* case was not a murder case and that there defendant was not entitled to a special panel of forty-eight names. That is true, but counsel does not even claim that any of the jurors above named, who were challenged, were from the special panel list or that the special panel list was depleted by reason of such challenges.

It is further argued by plaintiffs-in-error, that the challenges should not have been allowed because they were made "for cause" without stating the specific ground, and the case of *State v. Drake*, 53 *N. J. L.* 23, is cited for the rule.

The rule given in the Drake cake is that the challenger must state whether the challenge is for principal cause or to the favor, otherwise a disallowance of the challenge is not error.

The rule given in *Mann v. Glover*, 14, *N. J. L.* 195, is, that a challenge must be in such terms that the court can see whether it is for principal cause or to the favor, *and so determine by what forum it shall be tried, and whether the facts, if true, support the challenge.* (Italics ours.)

The rule given in *O'Donnell v. Weiler*, 72 *N. J. L.* 142, is, that before the Court is required to entertain the challenge of a juror to the favor, the ground of the challenge must be stated, that the

Court may see that what is alleged as a ground would, if proven, be sufficient.

And in *State v. Spencer*, 21 *N. J. L.* 196, it is said:

"Challenges *propter affectum* are of two kinds: principal challenges, to be tried by the court; and challenges to the favor, to be tried and decided by the triors."

There are several points made apparent by the above cases.

First. The Court is not *bound* to allow the challenge where the ground is not stated, but there is nothing to show that it would be error to allow such a challenge and to proceed to examination, as would be done in the above cited cases where the challenge preceded the examination.

Secondly: In the above cited cases, the challengor was required to state the grounds in order *to acquaint the Court with the issue involved,* whereas in a case, as in the case at bar, where the juror has already been examined on his oath, and the questions and answers clearly disclose what the issue is, and the facts have alreay been evinced, it would be a mere formality for the challenger to state the facts.

Thirdly: In all the cases cited above, the issues raised by a challenge were tried by two tribunals, or forums; principal challenges by the Court, and challenges to the favor by triors; ;it was therefore necessary for the Court to know which category the challenge fell in, in order to decide the forum. In our case, as in all cases now, both types are tried by the Court, and therefore, the necessity of deciding a forum does not arise.

It is submitted, therefore, that in the case at bar, "challenge for cause" was sufficient.

And it is respectfully submitted that no error has been shown under this point, because the allowance of the several challenges were harmless to defendants in their defense on the merits; and because the challenges were legally allowed because of the finding of the Court, which is conclusive, that the minds of the jurors in question were precluded from considering capital punishment; and because the Court was amply justified in its finding.

Finally, it is argued that Harry E. Bataille was improperly discharged for cause.

The examination of Mr. Bataille will be found on page 17 of the case.

Mr. Bataille was properly discharged because he insisted that, no matter what the evidence, or what the rulings of the Court, he would demand proof beyond all possible doubt in order to find defendants guilty.

He was asked

> "Q So that irrespective of the charge you would insist upon the State proving the defendants guilty beyond all possible doubt, is that it? A Yes, sir."

The Court then defined Reasonable Doubt to Mr. Bataille, and asked him if he still would insist on proof beyond all possible doubt, or would proof beyond reasonable doubt be sufficient, and Mr. Bataille answered that he would insist on proof beyond all possible doubt.

> "The Court (p. 23) That, (meaning proof beyond possible doubt) is what you would insist on?

"The Talesman: *Yes, not reasonable doubt.*

"The Court: And a satisfaction beyond a reasonable doubt would not be enough?

A Yes, sir.

"The Court: In spite of a charge to that effect? A Yes, sir."

It is submitted that Mr. Bataille was clearly disqualified, and the Court properly allowed challenge for cause.

POINT V.

(Not argued.)

POINT VI.

This brings for argument the defendant's challenge for cause, to William F. Dick, and its disallowance.

After stating that if he found defendant guilty of first degree murder, he would say it is life for life, Mr. Dick, on voir dire, said he would consider the evidence and decide, according to the law and instructions given by the Court, whether or not he would recommend life imprisonment. Even though he was "strongly in favor of capital punishment" his mind was not shut against a recommendation for life imprisonment.

It is respectfully urged that Mr. Dick was not disqqualified as a juror; that being in favor of capital punishment is no ground for challenge.

If he was in favor of capital punishment, he was precisely what the law wants him to be. His belief and convictions on the subject were exactly in line with the convictions of society at large, which, through its legislators, has enacted that a

person convicted of murder in the first degree shall suffer death,—shall pay life for life, as the juror put it,—unless the jury should recommend life imprisonment. It is clear that the dictate of society is that it shall be life for life, unless, by reason of any mitigating circumstance, the jury should recommend life imprisonment. Mr. Dick did not have a mind shut against such a recommendation; he was, as the law would expect him to be, in favor of capital punishment.

It is respectfully submitted that the challenge was properly disallowed.

However, such a disallowance caused the defendants no harm; Mr. Dick was peremptorily challenged, and thereafter, a full jury of twelve men, satisfactory to both defendants was chosen, and neither defendant had yet exhausted his peremptory challenges.

Point VII.

Assignments and Specifications 23, 24 25 26 and 27. Not argued.

Point VIII.

Assignment and Specification 28.

The question asked and the arguments relative thereto will be found on pages 538, etc., of the State of the Case.

Calabrese, the defendant, who had fired the shot which killed Grossman, was asked:

> "Did you at any time intend to kill him or seriously injure him?"

This was objected to; objection was sustained; and Calabrese was then asked by his counsel, p. 542.

> "Did you at any time aim at his body in the shooting? A No."

It was argued by counsel for accused at the trial, that the indictment being in the statutory form, intent was material.

It is not disputed that the defendants were entitled to show all the circumstances under which they killed Grossman; but intent of the defendant in firing the shot was entirely irrelevant in this case. The intent of the defendant in the abstract would be relevant if the State had proceeded on the theory of a killing done by premeditation, deliberation, and wilfully. The State proceeded upon the theory of a killing committed in the perpetration, or attempted perpetration, of a robbery. If intent were relevant, the State could never, under any circumstances, have convicted Cort, who according to defendant's testimony and statements was seated at the wheel, in the automobile, while the beating and shooting of Grossman was going on; but the law in this State is too well settled that intent to kill is irrelevant where murder is done in the perpetration or attempted perpetration of robbery. The intent to rob takes the place of the intent to kill.

Section 107 of the Crimes Act, defining degrees of murder, provides, (C. S. 1780)

> "Murder which shall be perpetrated by means of poison *or* by any other kind of wilful, deliberate and premeditated killing, *or* which shall be committed in perpetrating or attempting to perpertrate any * * * robbery, * * *, shall be murder in the first degree."

Section 36 of the Criminal Procedure Act (C. S. 1832) provides:

> "In any indictment for murder or manslaughter it shall not be necessary to set

> forth the *manner in which,* or the means by which the death of the deceased was caused, but it shall be sufficient in *every* indictment for murder to charge that the defendant did wilfully, feloniously and of his malice aforethought, kill and murder the deceased." (Italics ours.)

That is the form used in Essex County. (Case p. 5, L. 25.)

It is settled law in this state that the statutory form is sufficient in every indictment for murder, whether the theory of the State was premeditated killing, or killing in the perpetration or attempted perpetration of a robbery.

In *State v. Titus,* 49 *N. J. L.* 36, Chief Justice Beasley held that a count in the indictment drawn in the form provided for by section 45 of the Criminal Procedure Act, (which is the same as section 36 of the present act) charging that the defendant feloniously, wilfully and of his malice aforethought did kill and murder, etc., was sufficient to cover a murder committed in the perpetration of rape, and that it did not have to allege such rape, and that the state, under this indictment could show murder committed in the perpetration of rape. In that case, the jury was instructed that, if it appeared that the killing was perpetrated by the defendant in committing, or attempting to commit, a rape upon the woman, he should be found guilty of murder in the first degree, *without reference to the question whether such killing was wilful or unintentional.* (Italics ours.)

In *Bullock v. State,* 65 N. J. L. 557, it was held that the same statutory form was sufficient to cover the killing of an officer in the execution of his office, and the State could prove those sets of facts under such an indictment.

As the law now stands, it cannot seriously be disputed that under the abbreviated form of indictment provided by our statute, the State may prove a murder committed in the perpetration or attempted perpetration of robbery, and that the intent to kill is irrelevant.

It is argued by counsel for the plaintiffs-in-error, that it was for the jury to decide whether the death would be the natural and probable consequence of Calabrese's act.

Under the common law, the rule was that, (see *State v. Carlino*, 98 N. J. L. p. 52)

> "If divers persons came in one company to do any unlawful thing, as to kill, rob, or beat a man or to commit a riot or to do any other traspass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting and consenting to the act or ready to aid him, though they did but look on."
>
> "A qualification came to be introduced by which the rule was limited to cases where a homicide was the natural and probable result of the crime actually intended. It is enough to refer to the cases cited in 21 *Cyc.* 689. Substantially this limitation is now embodied in section 107 of the Crimes Act. *The crimes therein specified are all crimes, the natural and probable consequence of which is a homicide.*"
>
> (Italics ours.)

And in the case of *State v. Turco*, 99 *N. J. L. at p.* 101, the following comment is made on the subject of intent.

> "In 29 Corp. Jur. 1117 §101, it is stated

> that where killing in the perpetration or attempt to perpetrate a felony, or one of certain enumerated felonies, is made murder in the first degree, *the perpetration or attempt to perpetrate the felony is regarded as standing in the place of, or as the legal equivalent of, the wilfulness, deliberation and premeditation necessary under the statute as to other killings, and dispenses with the necessity of proof thereof.*"

So it is evident, from the above, that where a person is killed in the perpetration of a robbery, *it is a conclusive presumption, a rule of law, unrebuttable,* that the homicide was the probable and natural consequence of the robbery, and the intent to rob, in contemplation of law, fulfills the requirement of intent to kill, and the actual intent to kill is irrelevant.

No error was committed on this point.

POINT IX.

(Not Argued.)

POINT X.

Assignments and Specifications 31 and 32.

These two assignments bring for argument alleged errors in the charge to the jury. The full charges will be found on pages 612, etc., of the State of the Case.

The gist of the argument of Plaintiffs-in-Error is that, first, the killing was not *in* the perpetration or attempted perpetration of robbery. Second, that this was a question of fact which should have been left to the jury, and that the Court did not do so.

The Court did not take the determination of

this question of fact away from the jury. The following excerpts from the charge will support our contention that the question was fairly left to the jury.

p. 617.

> "If you find, therefore, as a matter of fact, that the deceased, Grossman, was murdered *during* the course of perpetration of a robbery or *attempted robbery* in his store, the person or persons who are responsible for his death, are guilty of murder in the first degree." (Italics ours.)

> "If you find, as a matter of fact, that these defendants, or either of them, together with others, went to the Grossman store on the day in question for the purpose of holding up and robbing Grossman of moneys or things then in his custody and that, *in* the course of the perpetration of such robbery, Grossman was shot and killed by any one of them, they are all guilty of murder in the first degree."

And the Court was justified in instructing the jury that the facts to be decided by the jury were rather simple. The Court said:

> "*First,* was a robbery being perpetrated in the Grossman store at the time he was shot? According to the testimony of Calabrese there was.

> "*Secondly,* did Grossman die as a result of the wounds which he received during the perpetration of the robbery if one was being so perpetrated? According to the undisputed testimony of Dr. Martland, he did.

"*If your answer* to these question is in the affirmative, then, the next question for you to decide is who were the men who participated in that robbery and shooting, and in considering who participated, consider it in the light of the definition which I have just given you as to the guilt of all who took part.

"If you then find, as a matter of fact, that these two defendants either with or without others, took part in the perpetration of that robbery, as a result of which Grossman was shot and killed, then you are justified in finding them guilty of murder in the first degree, for under the facts in this case, and under the law as I have charged you, there is no other crime for which the defendants may be found guilty under this indictment except that of murder in the first degree."

"If you should convict either or both of these defendants of murder in the first degree, and, as I have said before, that is the only thing for which they may be convicted, then you can denote by your verdict what the punishment shall be."

It is a well established rule that a charge must be taken as a whole.

An instruction must be taken as an entirety, that is, each clause must be considered in connection with others of a series referring to the same subject and connected therewith, and, if when taken together they properly express the law applicable, no ground of complaint exists even though a single clause by itself is inaccurate or incomplete. *State vs. Randall,* 95 *N. J. L.* 452, 113 *A.* 231.

The ultimate test of soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole. *State vs. Pitman,* 98 *N. J. L.* 626, 121 *A.* 597, *judgment affirmed* 124 *A.* 926.

Assignments of error directed to portion of a charge severed from its contexts is unavailing, where, on consideration of the charge, as a whole, no error appears. *State vs. Giberson* 99 *N. J. L.* 85, 122 *A.* 724.

It is submitted that taking the charge of the Court as a whole, it gave the correct rule of law in that if the jury found, as a matter of fact, that the deceased, Grossman, was murdered *during* the course of the perpetration of a robbery, *or attemped robbery* in his store, the person or persons who are responsible for his death are guilty of murder in the first degree.

The instructions of the Court limiting the verdict to an acquittal or a first degree murder was also proper. The defendants could only be convicted of first degree murder, under the undisputed facts of the case. They were either not guilty, or guilty of first degree murder, and such a charge was not erroneous.

In the case of *State v. Boccadoro, Vol. VII N. J. Adv. Rep. p.* 305, *the accused* was tried for the killing of one Thompson, in the perpetration of a robbery. And in that case the trial court said to the jury "Now, gentlemen, the question which you must decide in this case is simply this: "did Boccadoro kill Thompson?" The argument was raised that this instruction was improper because the jury should have been told to find not only that

fact, but also that the killing occurred during the perpetration of a burglary. And this Court decided that the attempted burglary being uncontroverted, the instructions were proper.

Plaintiffs-in-Error content, however, that, upon the conceded facts in the case at bar, the murder was committed not *"in"* the attempted perpetration of a robbery, but "after".

This contention is not borne out by the theory of our law, nor by our decisions.

At the outset it must be borne in mind that section 107 of our Crimes Act, employing the phrase, "in the perpetration or attempted perpetration of robbery" is an enactment of the common law; and under the common law, where a homicide was the natural and probable *result* of the crime intended, it was murder. And by our section 107, those heinous crimes were enumerated and their resulting homicides were made murder in the first degree. (*See State v. Carlino,* 98 *N. J. L. at p.* 52.)

The contention of the State that the facts of the case at bar, taken in the light of the testimony of the plaintiffs-in-error, constitute a murder *"in* the attempted perpetration of a robbery" is definitely borne out by the cases.

In the case of *State v. Carlino,* 98 *N. J. L. p.* 48, the defendants had waylaid a truck and robbed it. The defendant Carlino, with three of his associates, tied the Chauffuer and his companions and held them as prisoners. While they were there the deceased, Koster, came down the road on a motorcycle on his way to work. Turko, one of Carlino's associates, stopped him and shot him, that he might not spread the news of the robbery. Turko was indicted for and convicted of murder. Carlino was also convicted of murder. Carlino was not within

sight or near the spot where Kolster was killed. The conviction was on the theory of a murder in the perpetration of a robbery committeed by one of his associates in the robbery.

Thus we have here a set of facts where the robbery proper was complete, but the Court held that all four men were jointly liable for the shooting, and said that they must have contemplated "joint action until they had made their escape and further, that, "It would be preposterous to attempt to say at what instant of time, short of their release or escape, the responsibility of the robbers ceased."

The Court in State v. Carlino, supra, had no difficulty in holding that the killing was "*in* perpetration of robbery." It is argued by the plaintiffs-in-error that in the Carlino case, the defendants had succeeded in obtaining the loot and had the loot in their possession at the time of the shooting.

It is respectfully urged that this point is irrelevant because the statute expressly included attempted robbery, which necessarily implies failure to secure the loot.

The most conclusive decision on the point will be found in the case of *State v. Turco,* 99 *N. J. L. p.* 96, decided by this court. The facts in the case are the same as in the *Carlino* case,

In the Turco case, where defendant was convicted of first degree murder, the Court made the following comments and discussions which squarely covered the case at bar.

> "The object and purpose of the conspiracy in this case was through robbery to seize the truck and run it to Easton, Pennsylvania, and distribute the silk in some portions among themselves. Clearly, the killing of Koster by Turco in the circumstances above detailed, was murder in the first de-

gree according to our statute. 2 Comp. Stat., p. 1779, § 106, 107.

In *Conrad v. State*, 75 *Ohio St.* 52, it was held that where one starts to carry out the purpose to commit a robbery and kills another *under circumstances so closely connected with the crime which he has undertaken as to be a part of the res gestae thereof*, he is guilty of murder in the first degree within the meaning of the statute, whether the crime which he originally undertook has been technically completed or not. And (at p. 72) that 'if the taking of life before reaching the building and also after breaking and entering the building, and before leaving it, is taking of life in the perpetration or attempt to perpetrate burglary, at what point after the breaking and entering is the line of distinction to be drawn? At what point can it be drawn short of the absolute completion or abandonment of the whole enterprise? It seems logical there can be no such intermediate point, and we know of no case which holds otherwise.' And again (at p. 73), that 'when a person takes with force and violance the goods of another from his person, or presence, and against his will, he has committed robbery; but it does not necessarily complete the crime. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed. When Brown and his co-defendants took the property by force they committed the crime of robbery so far as to render themselves liable to punishment for it; but the robbery is contemplation of

law was not complete until the taking and carrying away was ended.' "

"The killing of Koster by Turco was clearly part of the *res gestae* of the robbery, which, in contemplation of law so far as the murder is concerned, was not completed. The purpose of Turco was clear. Koster had unintentionally come upon the robbers in his passage along the road to his work. Turco, the leader, undoubtedly believed that if Koster was allowed to pass and go on to the next town he would give the alarm, and he shot him in an attempt to conceal the crime for the time being and enable the robbers to make their escape unpursued.

Chief Justice Beasley, in Hunter v. State, 40 *N. J. L.* 495, treated the subject of *res gestae*, and, quoting Wharton, said (at p. 538) that the *res gestae* are those circumstances which are the undersigned incidents of a particular litigated act which are admissible when illustrative of such act; that these incidents may be separated from the act by a lapse of time more or less appreciable; that the distinguishing feature is that the acts should be necessary incidents of the litigated acts; necessary, in the sense that they are part of the immediate preparations for, or emanations of, such act.

"That the conduct of the defendant after the fact may constitute part of the *res gestae* is laid down by this court in *State v. Rombolo,* 91 *N. J. L.* 560.

"The trial judge charged the jury that the effect of the statute which provides that if, in an attempt to commit robbery, one man, or any number of men, kill an-

other, even though they did not start with that purpose in mind, but with the single purpose of robbery, their act, in such circumstances under the law, is denominated murder. This was correct, and the facts of the case clearly brought the homicide within the statutory description."

It is respectfully urged that the facts in the case at bar constitute a murder in the perpetration or attempted perpetration of robbery.

POINT *XI*

Not Argued.

POINT XII

Not Argued.

IT IS RESPECTFULLY URGED, THEREFORE, THAT THE JUDGMENT OF THE ESSEX COURT OF OYER AND TERMINER SHOULD BE SUSTAINED.

Respectfully submitted,

JOSEPH L. SMITH,
Prosecutor.

SIMON L. FISCH,
First Assistant Prosecutor.