1973

Brief for Defendant-Appellant

Lewis M. Steel '63

To be argued by
GRETCHEN WHITE OBERMAN

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM A. MAYNARD, JR.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

GRETCHEN WHITE OBERMAN
Attorney for Defendant-Appellant
277 Broadway
New York, New York 10007
(212) 267-7637

Of Counsel:
DANIEL L. MEYERS
LEWIS M. STEEL
351 Broadway
New York, N. Y. 10013

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WILLIAM A. MAYNARD, JR.,
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BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

The appellant, William A. Maynard, Jr., appeals pursuant to permission granted on November 17, 1972, by the Hon. Francis T. Murphy, Justice of the Supreme Court, Appellate Division, First Department, from the order and judgment of the Appellate Division rendered November 9, 1972, affirming, by a 3-2 vote, the judgment of the Supreme Court, New York County (Davidson, J.), rendered February 4, 1971, convicting appellant, after trial, of manslaughter, first degree, and sentencing him to 10-20 years' imprisonment. The appellant is presently incarcerated pursuant to the judgment.

A timely notice of appeal was filed and this Court granted leave to proceed *in forma pauperis* and assigned counsel on the appeal.

On June 29, 1972, after judgment and prior to the appeal being heard in the Appellate Division, the Hon.

Oliver Sutton, Jr., J.S.C., granted bail pending appeal in the following order:

> "After giving full consideration to all aspects of this case, including length of time the defendant has been confined as well as the likelihood of ultimate reversal of the judgment, the motion for an order granting bail pending appeal is granted and bail is set in the amount of ($50,000) fifty thousand dollars."

Although bail was posted, the appellant was never released, as the District Attorney challenged that order in an Article 78 proceeding brought in the Appellate Division. On November 9, 1972, the Appellate Division declared the proceeding moot by a divided vote.

The Indictment

The indictment charged, in one count, that the appellant wilfully, feloniously and of malice aforethought shot and killed Michael Kroll on April 3, 1967.

Prior Proceedings

The first trial in this case was held in May and June of 1969 (Martinez, J.) and resulted in a hung jury.[1]

The second trial in this case commenced in August of 1970 (Carney, J.) and resulted in the declaration of a mistrial.

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1. The record on appeal was expanded by order of the Appellate Division dated October 19, 1971, to include the minutes of the first trial pertaining to the identification issue. References to the minutes of the first trial, not included in the appendix, are designated "(F)". References to the minutes of the present trial, not included in the appendix, are designated by page numbers.

References to minutes of the first trial, which are reproduced in the appendix, are prefixed "AF". References to the minutes of the present trial, which are reproduced in the appendix, are prefixed "A".

Questions Presented

1. Was appellant's right to due process and a fair trial violated when the trial court refused to permit proof that the police fabricated evidence to be used against him and was the error compounded by the prosecutor's argument in summation?

2. Was the evidence insufficient as a matter of law to prove guilt beyond a reasonable doubt and to show that the identifications were not obtained or affected by improper pre-trial methods? Alternatively, was it error to deny a full hearing on the question of independent source? Did the court further err in refusing requested cautionary instructions on identification?

3. Did the trial court err in precluding a defense lighting expert from rebutting testimony given by a prosecution lighting expert and two lay witnesses?

4. Was it error to receive physical evidence into evidence over objection that it was not connected, and was the error compounded by the prosecutor's argument in summation?

5. Was it error to permit an alleged admission by conduct, over objection, and was the error compounded by the prosecutor's improper argument in summation?

6. Was it error to preclude proof that another person confessed to the crime?

7. Were prior inconsistent statements of defense witnesses obtained by fraud, coercion and improper inducements, and should they have been excluded as inherently unreliable on the court's own initiative; alternatively, was it error to refuse a requested charge that if the jury found the statements to be coerced, it could not consider them for impeachment?

8. Did the court below err in permitting the former prosecutor to testify beyond the proper scope of rebuttal; in failing to give requested limiting instructions as to this testimony; and in improperly denying cross-examination about prior bad acts and evidence of the witness's poor reputation for integrity in the legal community?

9. Did the prosecutor completely overstep the bounds of fair advocacy and deny appellant a fair trial by indulging in at least 16 separate instances of forensic misconduct in summation?

10. Was the appellant's right to due process violated by the prosecutor's failure to make timely disclosure of exculpatory evidence?

11. Did the trial court deny the right to a fair trial by ordering the district attorney to indict a defense witness for perjury before all the evidence was in?

12. Did the trial court err in precluding rehabilitation of defense witnesses after impeachment, and in permitting their improper impeachment?

13. Did the trial court err in precluding defense impeachment of prosecution witnesses in various respects?

14. Did the trial court err in precluding appellant's rehabilitation after impeachment and in permitting his impeachment with extrinsic evidence on a collateral matter?

15. Did the trial court err in charging the jury upon many vital issues in the case; in refusing requests to charge; and in marshaling the evidence?

16. Given the extent of the error which permeated the record below, can the judgment of conviction be allowed to stand?

Statement of Facts

Pre-trial Motions

A series of written motions were made prior to trial and are part of the record on appeal. They were argued and denied at (2-130), and will be discussed *infra.*

The Prosecution's Case

The prosecution called 18 witnesses. Appellant has summarized the testimony of the major witnesses only.

Patrolman John T. Dowd testified that, on April 3, 1967, at about 4 a.m., he saw a dispute between Robert Crist, and an unidentified Negro male in the vicinity of the Purple Onion, a night club on West 3rd Street (554-55).[2] Crist appeared to have been drinking (594) for Dowd recalled having smelled alcohol on his breath (595). Dowd escorted the black man away and continued to walk his post (555).

Between 4:15 and 4:30 a.m. Dowd saw a car being wildly driven the wrong way on West 3rd Street (556, 588-89). Crist was driving. He picked up Dowd and drove him to West 4th Street off Sixth Avenue, where Michael Kroll lay dying in the street (561-62).

Patrolman George L. Gardella responded to a call that a man had been shot (646). He arrived at the scene about 4:35 a.m. and assisted in removing Kroll to a hospital (647-48).

Sergeant Robert Plansker arrived at West 4th Street and Sixth Avenue about 4:35 a.m. (1686). He saw Stephen Berman (1688) and as a result of a conversation between Berman and another officer, pursued and stopped a taxicab (1689). Plansker brought back the two black passen-

2. For the Court's convenience, the diagram of the area (Peo.'s Ex. 1), has been reproduced and is annexed hereto.

gers, Warner Guy and Russell Jackson (1690-91) to the scene, and had them viewed by two prosecution witnesses, Crist and Michael Feebles. The men were then released (1691). See Point IX (14).

Robert Crist testified that on April 3, 1967, he was a boatswain's mate in the Navy and was returning to Norfolk, Virginia from upstate New York (689). He arrived at the Port Authority terminal about 9 p.m. on April 2 and went to various bars (689, 690). About 3:30 a.m., he went to the Village for a little fun and entertainment (693).

Crist said he was having a sandwich and beer on Sixth Avenue when a colored man (later identified as James Barnhart) he never saw before started looking at him (694). This man then put his arm on Crist and propositioned him (695). Crist, who described himself as probably intoxicated, but in control of his faculties, got angry and chased the man and knocked him down on West 3rd Street, near the Purple Onion (696-97). A policeman separated them. As Crist was walking on West 3rd Street toward Sixth Avenue, a Negro and a white man approached him from behind, and told him he should not have hit a man who was older and smaller than he was (703).

Crist described the Negro as 5'10"-5'11", medium build, clean shaven, 18-22 years old wearing a light coat (A20-21). Crist then made a courtroom identification of the appellant (701), but stated that there was a time when he was not positive the appellant was the man (A22). Crist said he took no particular notice of the white man and had no recollection of him at all (A43-44).

Cirst stated that his exchange of words with the two men took 5-10 minutes. A car pulled up and Kroll got out and asked if he could help (709). Immediately afterward,

the two men walked away (709). Crist got in Kroll's car, and the latter asked if Crist wanted to finish the argument "now that there were two of us." Crist admitted that after he got into the car, he intended to find the two men and start a fight (817).

Kroll's car turned into West 4th Street and Crist saw two men on the sidewalk where the playground ends and the buildings begin (712). Kroll stopped in front of the men and went around the back of the car (717). Crist said he saw the black man pull a gun or a pipe (717), and called to Kroll that it was a gun (720). A shot was fired. Kroll fell (720). Crist ducked on the car seat (721). He looked up about 30 seconds later. Neither man was in view. Crist went to Kroll, got back in the car and went for the police (722). He described the way he drove as "wildly" and said he was in "a state of shock" (723).

On cross, Crist admitted that before the Grand Jury in November 1967, when shown a photograph of the appellant and asked whether he recollected the man, he answered "No I don't" (A23). Crist felt only that the appellant's photograph bore a strong resemblance to the man he had seen on April 3rd (A24).

Crist felt there was nothing distinctive about the man he saw that night.[3] He testified that the black man's face (A37-38):

3. Crist was also asked about his testimony at the first trial where he was asked if he noticed anything about the black man (A37). It was brought out that at the first trial Crist had testified (AF627):

> "A. Did notice that his build was a good build, he wasn't fat or skinny; he seemed to be solid, as far as his arms and chest would be.
>
> Q. What color was his skin? A. Not a really dark color, not light; medium tone.
>
> Q. What was the shape of his face, would you know? A. It wasn't—I would say it was an average shaped face, too, it wasn't pointed chin or wasn't real narrow eyes, nothing outstanding like that registered in my mind.
>
> Q. Have high cheekbones or low cheekbones? A. This, I couldn't remember."

"* * * didn't bear any characteristics which would be associated with a—say the Chinese race such as a slant to the eyes. There was nothing—nothing definitely different from the majority of the rest of the people in the world that made it stand out in my mind.

Q. In other words, it was like most other black faces; is that what you are trying to say? A. Yes, like the average looks of a person that you pass in the street.

Q. Like the average black person you pass in the street; isn't that correct? A. Yes."

Crist was 6 feet tall. He testified that he was taller than the black man, and was aware of this height difference during the argument (A35-36). The judge, over objection, refused to let the record reflect that when the appellant stood next to Crist in the courtroom, Maynard, who was 6'1", was the taller man (905-06).

At the trial, Crist stated that the black man was 18-22 years old (699). At various other times he had judged his age to be 18-22 (859) or 19-20 (860) or 18-20 (865) or 17-20 (A40). He felt that Kroll's assailant was very close to his own age of 20. As a sailor, he was in constant contact with youths his own age (A42). In April, 1967, the appellant was 31 years old.

Crist admitted that, at the prior trial and before the Grand Jury, he testified he was drunk on April 3, 1967. Crist also admitted he could remember nothing about the rest of the weekend.[4]

4. He could not remember if he had been drinking the entire weekend (A30), if he drove into New York City or took a bus (A28), how much money he had been paid before going on leave (A28), whether he had a girlfriend or a date (A30), where he had dinner that Sunday night (A31), or how he got from the subway stop at 14th Street and 8th Avenue to 6th Avenue (932).

Crist had no recollection of what occurred after he arrived at the police station on the morning of April 3rd. He didn't recall the names or faces of persons he spoke to (A33) and he had no independent recollection of what any police officer he dealt with that morning looked like (A34).

Crist was asked whether he could identify the two men on West 4th Street whom he saw through the rear windshield of Kroll's car (825). He answered that he "assumed" by general appearance, that they were the same two men that he had seen before on West 3rd (825). He was about 40' away from the men (825, 828). West 4th Street was darker than West 3rd (823).

Crist had initially stated that when Kroll left the car on West 4th and walked back to the two men, one drew a gun from somewhere and fired (717-20). He later recalled that the man holding the gun had warned Kroll not to come any closer or he would shoot (832).

Dennis Morris testified he came down to the Village about 10 p.m. on April 2nd (1272). He was in and out of Mills Bar all that night with his friends, drinking beer, or in Washington Square Park collecting deposit bottles (1274-75). About 4:30 a.m. as he was carrying a shopping bag full of bottles to cash in (1336) he noticed a sailor (Crist) walking behind him, because the man was acting "you know, kind of wildly, like he'd had a couple too many" (1339). Crist was making "all kinds of gestures * * * like he was—mad about something" (1339). Then a white and a black man had "a slight disagreement" with Crist (1278). Morris was standing between a subway entrance (located on the corner of Sixth Avenue and West 3rd Street (1279)) and Sixth Avenue (1341).

Morris testified he was only able to see part of the black man's face in profile (A72). There were quite a few people

blocking his view and he was 20′ away[5] (A74). The two men left Crist and passed by the corner where Morris was standing. Morris could only see the black man's full face for a second or two (A75-77). Morris made an in-court identification (1280).

Morris testified that a marine (Kroll) drove up and talked to Crist on West Third Street (1295). Kroll called to the two men to come back. They did not, and Crist got into Kroll's car (1293-94). When the black and the white man were about ¾ of a block away from him going north on Sixth Avenue, Morris began walking north on Sixth Avenue (1361). The two men turned right on West Fourth, and Morris could only see them through the park fence (1371). Morris saw Kroll's car go past, and turn right at West Fourth Street (1373). The two men stopped at the end of the park (1376-79) and Kroll's car pulled up beyond them (1379). Morris was now standing at the telephone booth on West Fourth Street (some 50 feet behind the two men) (1380).

Morris testified that Kroll got out of the car and that Morris saw a shotgun in the black man's hand (1380-81). He heard a shot and saw Kroll fall (1385). Morris turned and ran back towards West Third, stopped, turned and went to where Kroll was lying (1385-88). The two men had already gone (1388), and Crist had driven off (1415). Morris testified that Crist "drove very wildly. I thought he was going to crack it up" (1310).

At the trial Morris described the black man as "5′7″ to 6′ tall. Kind of medium complexion and Afro type hair cut" (A71). He remembered the man wore a dark jacket but nothing else about his dress (1382). Morris testified that when he was interviewed in the morning, he told the

5. He had told the Grand Jury he was 15 *meters* (or 165′) away (1365).

police the black man was "eighteen to twenty, twenty, twenty one, twenty two three" (A79) and was about 5'8" or 5'9" tall (A79). Morris was 6' tall (A79).

Morris also testified he told the police the black man had a round face, slim nose and had features like Martin Luther King (A80). Morris said that the black and white pair were definitely not "Village" but were college boys (1424). He thought the white boy was an Italian, because he had features like an Italian and light, sandy colored hair (A81).

Over objection, the prosecutor also was permitted to have Morris testify that he picked the appellant out of a line-up on April 22, 1969 (1479-83). This testimony will be discussed in Point II, *infra.*

Michael Feebles testified that he went to work at the Cafe Reinzi at about 3 or 4 p.m. on April 2nd (1028-29), and that about 3:30 a.m. he left to go home with his friend Jaime (965-66).[6] They were wheeling a 10-speed bicycle (966).

Feebles got to the corner of Sixth Avenue and West Third Street (972). He was looking south on Sixth Avenue for a cab. He testified he saw an argument between Crist and the black and the white man take place *behind* him, to the north, on Sixth Avenue, between Third and Fourth Streets (972-74; A57-58). Both Morris and Crist had testified that the argument took place on West Third Street near the Purple Onion.

Feebles looked at the argument "off and on" (976), actually observing it for "maybe a half-a-minute, maybe

6. Feebles had worked as either a bouncer or a cook. He had been unemployed for more than half the time between 1967 and the second trial (1027). He moved his place of residence about 7 or 8 times and when he was working, had had a variety of jobs such as meat lugger, apprentice butcher and painter (1024-25). At the first trial he was employed as a roofer and at this trial, as a house painter (961). He admitted to having been convicted of petit larceny (862).

less'' (A61) from a distance of about 25 feet (A59-60) and during this half-minute or less, his vision was sometimes blocked (A62). He didn't pay much attention to the argument (A62).

When the argument broke up, Feebles and Jaime had gotten their cab and had begun putting in the bicycle (977). Feebles stated he sat in the back seat, on the curb side (978). At this point Kroll drove up to Crist and the black and the white man ''were gone, already on Fourth Street towards McDougal'' (978).

According to Feebles, the traffic was heavy, ''all the lanes were filled with cars'' so that the cab moved very slowly north up Sixth Avenue (1062-63). Crist had testified that the traffic was light (818, 819), and Patrolman Dowd had stated that there was hardly any traffic in the area (587-88).

Feebles stated that when his cab stopped at Sixth Avenue and West Fourth Street, Kroll's car cut in front, going east on West Fourth Street. Feebles' cab then proceeded uptown (979, 1065). Morris and Crist had testified that Kroll's car did not cut off any other car when it turned the corner of Sixth Avenue and West Fourth Street (1373-74, 821).

Feebles stated that he did not look down West Fourth Street as his cab drove past (1073). He said that when his cab was between West Fourth and Washington Place, on Sixth Avenue, he heard a blast, argued with his friend ''for a matter of minutes'' as to what it was, turned from his position in the back curbside seat (983) and saw through the rear window of the cab, two men run out of West Fourth Street onto Sixth Avenue (979-84). Feebles testified that the cab was still proceeding uptown and the two men ran

along side the cab for "a good amount of distance" so that he could see their faces (985). He stated that the two men were running faster than the cab (1079).[7]

Feebles said he was seated in the rear, curb-side seat of the cab. At the first trial, Feebles said he sat on the rear, inside seat and that Paime sat on the curb-side seat (F449). In the Grand Jury, Feebles testified that he was sitting in the front seat of the cab because the bicycle was in the back seat (1053-54).

Feebles could not remember whether he told an Assistant District Attorney he saw a tall male on West Fourth Street wearing dark clothes, no hat and that he saw this person come up with a metallic object, which looked like a lead pipe (1075), as he had testified at the Grand Jury (see F501). He also could not remember telling Detective O'Brien that he saw the marine fall (1074). When asked (1076):

> "Q. Mr. Feebles, have you given different versions of the events that occurred on April 3, 1967 to different people?"

Feebles answered:

> "I don't remember."

Feebles also testified that after the men ran east into Washington Place, he asked the cab to stop, gave his apartment keys and money for the fare to Jaime, then got out and chased the men as they were running east on Washington Place (990, 991, 1081-82).

Feebles stated that when the men he was chasing on Washington Place were about half-a-block away he saw the

7. At the first trial, Feebles testified that the two men ran past the cab in a second or two, and he only saw their faces for the few seconds it took them to pass the cab (AF636-37).

white man throw "an object" toward the street (A55-56). He later stated it could have been "anything" as he did not see what it was (A69). Feebles testified that he was present later that morning when a bag was found under a car (1004, 1086).

Feebles stated that the black man he saw on April 3, 1967 was "sort of tall" "not very heavily built," broad shoulders and that he did not really notice anything else about him (A51-52). In response to questions, he stated the man had dark skin and a slender face (A52) with a large cheekbone (A53). The man wore an Afro (A54).

On cross, Feebles was asked to describe what the black person was wearing. He said the man had on a black, ¾ length coat and dark pants (1094-96). Feebles did not recall telling Lieutenant Stone that the man was 19 to 20 years old (A68). When asked how old he would say the black man was, he stated "I have no idea" (1126).

Over objection, the prosecutor was also permitted to prove that Feebles had made a prior out-of-court identification of the appellant on July 10, 1967 (1145-1217). This testimony will be discussed in Point II, *infra.*

Howard Fox was a cab driver on April 2, 1967 (1536). At 1:30 p.m., some 14 hours before the crime, he picked up two men, one white and one Negro, on Park Avenue and Seventy-sixth Street (1537). The Negro man was carrying a blue windbreaker and wearing a blue polo shirt and white trousers (1538). He could not recall anything else about the man's appearance (1538). He dropped the men off at Twelfth Street and Fifth Avenue (1540), some 11 blocks away from the eventual scene of the crime. Fox stated the white man was carrying a camera case when he entered the cab (1540), although at the prior trial Fox testified he

had not observed either man carrying anything when they entered (1558).[8] Fox noticed the bag on the seat (1540) but did not know what happened to it when the men got out (1541). Nothing about the bag attracted his attention (1578). He couldn't recall when he first told the police about it (1580-82). Fox identified the appellant as the black passenger (1545).

Fox stated he observed the two passengers for perhaps two minutes (1566); that he worked six days a week, carrying about 35 fares a day; and would not be able to identify all his rides in any given week (1666).

On April 3, 1967, Fox had described the black man as about 5'9" and 160 lbs. (A98). He had arrived at this height because he was 5'9" and the man was approximately his same size (A98). He thought the man was about 21 to 23 years old (A99).

On redirect, the prosecutor offered to prove that prior to trial, when Fox was called to the police station, he saw the appellant sitting in the squad room and identified him and to further prove that when Fox looked at the appellant, the appellant moved his head (1586-89). Over defense objection (1588-91) and motion for a mistrial (1630-31), Fox was permitted to give this testimony which is discussed in Points II and V *infra*.

Lieutenant Walter J. Stone testified that he was personally involved in all stages of the Kroll homicide investigation (1794).

On May 17, 1967, the appellant was questioned in the station house concerning the case (1797), but was not arrested for the homicide (1798).

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8. The other testimony concerning a bag (Peo.'s Ex. 21) is contained in Point V.

On August 7, 1967, Stone attempted to locate the appellant. When Maynard returned his call that evening, Stone told him to come in the next day (1812). The next day Stone spoke to the appellant's attorney (1813). Stone next saw Maynard when he was brought back from Germany on March 19, 1968 (1814). Stone learned from Maynard's attorney that he had gone to Europe (1847).

On cross, Stone testified that on the morning of April 3rd, he interviewed Crist who described the perpetrator as 5'10" tall, wearing dark clothes and about 18-20 years old (A106). Crist could give practically no description of the white person (A107).

Stone interviewed Feebles that day, and was told the person was 5'10" to 6' tall, broad shoulders, 18-20 years old with dark clothing (A108-09). The white person was shorter and had sandy hair that popped up and down when he ran (1829). According to Stone's notes, Feebles told him the black man had a very dark complexion (A112).

Three weeks later, Stone interviewed Morris, who said the man was 5'8" to 5'9" tall, 18-20 years old, and wore an Afro hair cut and looked like Martin Luther King (A110-11).

The prosecution then rested (1869).

The only prosecution witness who testified at the first trial but not at the second, was **Irving Gelfand**, who died prior to its commencement. This testimony is part of the appellate record on the identification issue, as those minutes were considered by the trial judge below as the equivalent of a pre-trial *Wade* hearing. Gelfand's testimony on the identification issue is summarized here.

Gelfand was the manager of a Village night club located on West 3rd Street and Sixth Avenue (F427-28). At

4:30 a.m. he was leaving the club and saw Crist and the first black man (Barnhart) Crist fought with that night (F428). Gelfand re-entered his club. When he came out again, he saw Kroll pull over in his car and speak to Crist (F430). Gelfand began to walk to West 4th Street (F430). He saw Kroll's car turn onto West 4th, saw Kroll jump out and approach the two men (F431). Gelfand then saw the black man take something from under his coat and shoot Kroll (F431-32).

Gelfand testified he was 6 or 7 feet away from the man who fired the shot (F435):

> "Q. Now, Mr. Gelfand, I would like you to look around this courtroom and tell the jury at this time if you see within this courtroom the man, that you say you saw shoot the marine. A. I cannot say that positively.
>
> Q. Well. A. I only say there is a slight—somewhat of a resemblance, but I cannot definitely say that this is absolutely the man that done it."

The appellant was alone in a police station room when the police showed him to Gelfand for identification (AF630). This occurred on May 17, 1967 (AF632). Afterwards Gelfand was shown a group of photos containing a photo of the appellant, which he picked out because it resembled the man whom he had just been shown (AF631). Gelfand testified (AF632):

> "Q. After you saw him they gave you the photographs to pick out and you saw photographs amongst those that you picked out? A. That's correct.
>
> Q. And right now under oath you can't positively state that that is the man that you saw six feet away from you do the shooting? A. I didn't say it at that time and I still say I am not a hundred per cent sure."

Defense Motions at the Close of the Prosecution's Case

A series of motions were argued and denied at the end of the prosecution's case (1870-85) and will be discussed *infra.*

The Defense

Detective Albert Hanast testified that he was involved in the Kroll homicide investigation from April 3, 1967 when he arrived at the scene and interviewed by-standers (1939).

Hanast interviewed Feebles who told him, contrary to his trial testimony, that he turned in his seat and saw the marine fall, after the shot gun blast (1945-46). Feebles estimated Kroll's assailant to be 19 or 20 years old (1946).

Hanast also interviewed Fox who had described the Negro he picked up in his cab as about 22 years old, 5'9" tall, broad shoulders, bushy type hair, dressed in a blue polo shirt and windbreaker and a little on the "faggy side" (1959-60).

James Barnhart testified he was 49 years old, a union member and worked as a waiter at McGowen's Restaurant on April 3.

Barnhart worked until 3 a.m. then went to a deli on 6th Avenue for a sandwich (2002). He observed a sailor (Crist) going out (2003). Crist looked like he was under the influence of alcohol (2015). When Barnhart left the deli, he saw Crist on the sidewalk drinking beer. Crist started to stamp his feet (2020). When he did it a second time, Barnhart started to run (2020). Crist chased him to the Purple Onion where Bahnhart fell (2021). As he was trying to get up, Crist swung twice at him and missed (2007). A policeman came over, and Barnhart asked him to arrest Crist, but the policeman refused because Crist had not actually hit him (2022). The policeman and Crist had a conversa-

tion which Barnhart overheard (2007-08). The substance of the conversation was proffered out of the presence of the jury and an objection sustained. See Point XII (3).

Detective Edward O'Brien became involved in the homicide investigation on April 3 (2028). He interviewed Crist about 5 a.m. at the Sixth Squad (2030). Crist was (2032):

> "highly excited, almost in shock. He did have the smell of alcohol on his breath when I was speaking to him."

O'Brien could smell the alcohol on Crist's breath at a foot and a half away (2033). O'Brien made no notes indicating Crist gave him a description of the perpetrator (2035).

Soon afterward, O'Brien interviewed Feebles, who told him he was in a taxi on Sixth Avenue and saw the marine fall after he was shot (A125-27).[9] Feebles described the man who did the shooting as 18-20 years old, 5'10" to 6' tall, tapered body, blue windbreaker and armed with a shot gun (2045).

O'Brien also spoke to Fox who described a taxi passenger as black, 22 years old, bushy hair, broad shoulders, zippered blue windbreaker, 5'9" tall (2039-40). Fox did not say anything about the man's companion carrying a camera case (2041).

Mary Domenica Quinn, the appellant's ex-wife, was separated from him prior to April of 1967 (2052-53).

On April 3, she met Maynard on 6th Avenue and 38th Street (2054), at approximately 9:15-9:25 a.m. (2056). The meeting was by prior appointment, as she had a court appearance that morning (2054). She was very anxious about it and called her mother's home on April 2, to speak to the

9. Feebles had denied making this statement to O'Brien (1074).

appellant about the court case (2055). They agreed to meet at 9:00 a.m. since court convened at 9:30 (2055) but Maynard was late and didn't arrive until 9:15 or 9:25 (2056-57). They "fairly flew" down the drive and arrived after the judge was on the bench (2057).

On cross, Mary stated she had an independent recollection of contacting the appellant at her mother's home on April 2 (2067). She was asked whether at the prior trial she stated that she could have called him at her mother's, but wasn't sure (2068-69). She did recall giving those answers (2069).

The court, sustaining the prosecutor's objection, refused to permit the defense to ask her why she previously gave the inconsistent testimony (2070-71).

Michael Dillon Quinn, Mary's brother (2072), testified that on Sunday, April 2, he and Maynard stayed the night at the home of his mother, Elizabeth Quinn, in Queens. His brother Patrick, his brother-in-law Richard Moran and his mother Elizabeth Quinn were also present (2118). Quinn recalled arriving at his mother's with Maynard in the afternoon in a rented car, and also recalled that after dinner, the appellant and Patrick played chess until about 2 a.m. (2139-40). Michael slept in his old room (2141) and Maynard slept on the living room couch (2141).

They left his mother's home about 8:45 a.m. on April 3 (2141). The appellant dropped Michael at his office at Sixth Avenue between 36th and 37th Streets (2142).

Michael stated he had to recall the particular weekend some seven weeks later when he was arrested by the police and first learned of the Kroll shooting (2145).[10] He thought

10. He was not permitted to testify concerning the police interrogation of him on May 17 (2110-11).

about it many other times and had a number of conversations with his family (2144). He later stated that he fixed the date by having recalled hearing his mother and Maynard speak about a pot of flowers the appellant had given her the preceding weekend, on Easter Sunday (2151). He and Maynard were partners in a business venture and he also recollected the date because he posted a letter to register the trademark of their shop on Monday, April 3 (2153).

Michael testified that on April 29, 1967, he and Maynard drove to Orlando, Florida, and then to Miami (2114). Michael visited his former wife and child and Maynard visited his grandmother (2115). The entire trip lasted a week (2116).

Michael continued to see the appellant during August of 1967. Either in August or September he saw Maynard off for Europe at Kennedy Airport (2119). They corresponded while Maynard was in Europe (2119-20).

Michael Quinn was cross-examined as to statements given by him prior to this trial.[11]

When Michael was asked by defense counsel at the first trial whether he recalled where he and Maynard were on April 2-3, 1967, Michael answered "I don't at this time" (F879-91). He refused, however, to deny under oath that Maynard was not at his mother's on April 2 and 3 (F880, F891).

At the first trial Michael admitted signing the February 6 affidavit (see fn. 11) and testified stating that he thought it was true when he signed it, and that he had not changed his mind, but "now I'm sure of this" (F880). Because of

11. At the first trial, Michael Quinn was called by the defense as an alibi witness, as after the appellant was indicted, he, Elizabeth and Patrick Quinn had submitted affidavits executed in early 1968, stating that Maynard was with them at the Quinn home on April 2-3, 1967.

Assistant District Attorney Gallina's objections, Michael was not permitted to state whether he swore falsely on the date he signed the February 6 affidavit (F907). Michael also testified he told the police that he and the appellant did not commit the homicide, that this was the truth then "and it still is the truth" (F885).

Michael testified at the first trial that he and his fiancee had been held in civil jail for two weeks about a month before that trial. He stated he was questioned by Gallina a number of times while he was held in jail and executed a stenographically transcribed statement at Gallina's request. After he executed the statement, he was released. Michael testified that he knew Gallina wanted him to disavow his February 6 affidavit (F891). When asked "can you tell us what the express reason was for changing [your] story," Michael was not permitted to answer because the court sustained Gallina's objection (F910-11).

At the present trial, the prosecutor impeached Michael's testimony that the incidents with the letter and the flower pot refreshed his recollection by showing that at the prior trial, these incidents did not (2153-59). Michael admitted the inconsistencies and he asked to explain (2154, 2159). The court directed him not to do so until redirect (2154, 2159).

When asked if he had ever given other inconsistent statements, Michaed stated "I was forced to lie" (2166-69).

When asked about the May 8, 1969 statement he gave to Gallina while confined in jail, Michael said that this was the statement in which he was forced to lie (2194). He stated his first trial testimony was not true, because, "I was forced to be vague about something I knew more definitely about * * *" (A128). At the first trial, he was forced

to stretch whatever small doubt he might have had about Maynard's being with him, so that even though he was 99% positive, he was forced to say he was not absolutely positive (2210). At this trial, because he had an opportunity to review the facts, he was even more positive (A131).

On redirect Michael testified that when he was arrested and first brought to Gallina's office in 1969, he gave Gallina the same statement that he made on the witness stand at this trial (2277-78). When he made the statement, Gallina had him committed to jail on $100,000 bond, and also committed his fiancee, Giselle Nicole, to jail on $75,000 bond (2278-79).

Michael and Giselle were kept in jail for two weeks and were interviewed by Gallina about 7 times (2279-80). During this period and until the May 8 statement given to Gallina to secure his release, Michael answered all questions in the same way he testified at this trial (2281). On May 8, he changed his story because Gallina told him that Giselle would be deported and that he would be kept in jail until Christmas (2282). When he changed his statement, Gallina promised to take care of an auto larceny charge that had been pending for 3 years (2282). Michael stated that when he testified at the first trial he was still in fear because Gallina "was going to deport Giselle if I didn't" (2300).

After Michael had finished testifying, the trial court cleared the courtroom (2316). The judge stated that Michael had committed perjury on the stand (A134-35), and ordered a member of the indictment bureau whom the judge had brought into the courtroom, to "present these proceedings to the grand jury for immediate indictment" (A137). Defense counsel objected and the objection was overruled (A138). This episode is treated in Point XI.

Giselle Quinn, wife of Michael Quinn (2334), testified she was German and had lived in the U.S. for about 10 years as a permanent resident (2335).

Giselle spoke to Assistant District Attorney Ruskin in the fall of 1967 (2342-45) and had no contact with the authorities until the spring of 1969, when two detectives arrested her and Michael at their apartment (2346).

Defense counsel asked about her conversation with Gallina, and the prosecutor objected (2349-50). Defense counsel made an offer of proof which was rejected (2350-52). This is discussed in Point VII (2).

Giselle testified that after her conversation with Gallina, she was committed to civil jail (2353-54). She wasn't sure at the time why she was being held (2355).

Giselle testified that she was taken to Gallina's office every day, but was not permitted to recount the conversations that took place (2356-57). Gallina had her speak to an immigration officer named Swift in his office one day, but she was not permitted to testify as to what conversations took place (2357).

On cross, Giselle testified that she had no idea where Maynard was on April 2-3, 1967 (2365).

Mrs. Kathleen Elizabeth Moran, a graduate of Queens College, was employed by the Prudential Insurance Company (2370). On April 2, 1967, she was unmarried and lived with her mother Elizabeth Quinn in Woodside, Queens (2369-71). On that day she was at home with her fiancee, Richard Moran, her brothers Michael and Patrick, her mother and Maynard. They had dinner together (2372). Patrick, Michael and the appellant were there when she went to sleep about 11:30 p.m. (2373). Kathleen testified

that early in the morning of April 3 she went into the living room and saw the appellant asleep on the couch (2383).

Kathleen first considered her whereabouts on the night of April 2, sometime in May of 1967, after 2 detectives visited her mother and asked about Michael's whereabouts that weekend (2373). She recalled that Michael and the appellant were at the Quinn home that Sunday (2379). She fixed the date because she recalled buying a red coat and a chartreuse suit for Easter. She wore the red coat on Easter Sunday and she wore the chartreuse suit, with a skirt that was considered short at that time, on the Sunday after Easter (April 2) and both Michael and the appellant commented on the skirt length (2382). The appellant thought that her legs were too chunky for such a short skirt.

She next thought about the matter in March of 1969, when two detectives took her, her mother, her brother Patrick and her husband to Gallina's office (2385-86).[12]

Kathleen testified that she gave Gallina a statement that her brother Michael and the appellant were at her mother's home the Sunday night and Monday morning of the murder (2392).

On cross, Kathleen testified that she spend Sundays during the spring of 1969 at her mother's, and that Maynard was there on Easter Sunday and on Christmas (2393). She was practically positive that except for Christmas night, he never stayed over any night except Sunday, April 2 (2400).

Patrick S. Quinn, a college graduate and the owner of a bar, testified he lived with his mother in Queens (2436). On Sunday, April 2, 1967 he was at home and played chess with the appellant (2439). He stayed up until 3 or 4

12. She was questioned by Gallina; he showed her a bag (Peo.'s Ex. 21) and told her it was found at the scene of the crime and had the appellant's fingerprints on it (2387). She was not permitted to testify what else Gallina told her about the bag (2387-91). She stated the she had never before seen the bag (2391).

a.m. Both Michael Quinn and the appellant were with him the entire time (2440). He awoke the next morning about 8:30 (2441) and left the house about 10 minutes to 9 (2442). The appellant was asleep on the sofa when he left (2443).

Like Michael, Patrick was cross examined about prior statements.

Patrick had executed an affidavit on January 23, 1968, stating that the appellant was at the Quinn home on the night of April 2-3. He was called as a defense alibi witness at the first trial, and in contradiction to the affidavit, had testified that he was "not sure" whether the appellant was there that night (F1014).

Defense counsel at the first trial tried to establish a time sequence as to when these doubts arose. Patrick stated he was sure of the date when he signed the affidavit on January 23, 1968 (F1047). He was sure he remembered this accurately the first time he was brought to Gallina's office (F1067).[13]

When asked at the first trial if he had any independent recollection where Maynard was on the morning of April 3, Patrick stated, "I can't answer it yes or no" (F1079).

At the present trial Patrick testified he was subpoenaed to the District Attorney's office in March of 1969 (2453). When he was brought there, he was questioned for an entire day by Gallina (2455). His mother and his sister Kathy were also questioned on that day (2456).

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13. Patrick had testified that the *second* time he went down to Gallina's office, he wasn't sure (F1067). His doubts arose because he was told that Maynard met Mary Quinn in court in New York at 8:30 a.m. on April 3, and if this were true, then he could not have been sleeping on the Quinn couch at 8:45 a.m. (F1054-57). Patrick testified he had not learned about "this court business" until a month before the first trial (F1057). He first expressed doubts to his family (F1063). He next expressed these doubts in a statement given to Gallina on May 16, 1967, upon Michael's release from jail.

He was subpoenaed again by Gallina in May of 1969 (2456-57).

On cross, Patrick was asked whether he had any conversation with Mary Quinn prior to the first trial and he testified that he did not (2519). He stated that his sister did not tell him she met the appellant at 8:30 but that Gallina told him that fact (2523). Patrick testified that he had believed Gallina, until his sister told him something different afterwards (2524). Patrick stated that his sister did not meet Maynard at 8:30; she met him about 9:15 (2526). Patrick stated that Mary's prior trial testimony did not refresh his recollection and that it was not what she told him (2528).

When asked about the statement he gave Gallina on May 16, 1969, Patrick stated (2531):

> "To my mind it was true * * * But it wasn't the truth * * * it wasn't the truth because the facts were different. Gallina had given me false facts."

On redirect, Patrick testified he never had any doubts about Maynard's whereabouts up to March of 1969, when he first spoke to Gallina and that he never expressed any doubts prior to that time (2549). In March of 1969, when Gallina first questioned him, he told Gallina that he had no doubts that Maynard was at the Quinn home on April 2-3, 1967 (2558-59). He only changed his statement because Gallina kept insisting he was wrong,[14] and the May 16

14. "Mr. Gallina tried to convince me, number one, that Mr. Maynard was guilty. And number two, that Mr. Maynard was not at my house on that day. He said that Mary had met [Maynard] at eight thirty that morning, and that it was impossible for me to have seen him at my home on that day when I left for work * * * so he kept on—you know—insisting that he couldn't have been there. And he wanted me to say he wasn't there. I said I couldn't say that. So finally we came to the conclusion—he wanted me to sign a statement. So the only thing I could say was I am not sure, because he kept on insisting that this is what Mary said. He went over it for two hours. He kept on going over it again." (2553-54)

statement he gave to Gallina only recorded a small part of their conversation (2253).

Mrs. Elizabeth Quinn testified that she was at her home in Queens on April 2, 1967 (2561). Her children, Patrick, Michael and Kathy, were with her, as was the appellant (2562). They stayed thru dinner (2562) and until she retired about 11 p.m. (2562-64). She saw Maynard in her home the next morning about 7:45 sleeping on the sofa (2564). At about 8:30 or 8:45, the appellant and Michael left together (2565).

Mrs. Quinn first considered the events in question in May of 1967, when three detectives came to her home (2566). They told her Maynard was being held, but they weren't interested in her son (2569). She looked at her calendar, saw that Easter Sunday was the week before April 2, remembered that Michael and Maynard had brought her a plant for Easter, and that the plant bloomed the next weekend when they came over again (2569).

Mrs. Quinn testified that the next time she thought about the date was in February of 1968, when she signed an affidavit (Def. Ex. BB) (2573).

In March of 1969, she was handed a grand jury subpoena (Def. Ex. CC) and had to accompany two detectives to Gallina's office (2574-77), where (2585):

> "[Gallina] wanted to know if I recalled April 2, 1967, and that was 2 years back. I said 'yes' and I did. He wanted to know who was in my home that day, what they did, if they stayed over. I told him who was in my home: Patrick, Michael, Mr. Maynard, Kathy. We had dinner, watched TV, played games; and came to bedtime, around 11 o'clock or so, I retired. They were still watching TV, playing games. Mr. Maynard stayed over my home April 2nd. He left Monday morning, April 3."

Gallina also showed her a bag (Peo. Ex. 21) and told her it was dropped at the scene of the crime and that appellant's fingerprints were on it (2585).

Gallina did not embody her interview in a written statement (2586).

The next time Mrs. Quinn thought about the weekend of April 2, was in April of 1969, when she learned that Michael and his fiancee Giselle were in jail (2587-88). She was not allowed to see them (2588). When Michael was released two weeks later he told her Gallina wanted to see her, so she went again to Gallina's office (2589). Gallina then told her that Michael had changed his testimony (2590-91). She became upset and confused, and gave Gallina a statement (2591).

She testified that she now had no doubts as to where Maynard was on the night of April 2-3 (2592).

On cross, Mrs. Quinn was asked about the May 13, 1969 statement to Gallina (2617-20). She acknowledged making the statement and when asked if the statement were true, testified (2621):

> "A. It was due to pressure put upon me, that that came to my mind, and this is why the statement was signed.
>
> The Court: You said that, and it has been recorded. But will you answer the question please. Was what you said in your statement true or not true?
>
> The Witness: It was true at the time under the condition I was in."

She was continually pressed by the prosecutor and by the court to state whether or not her prior testimony was true[14a] and each time stated that she was upset and confused

14a. Her son, Michael, had already been threatened by the trial judge with a perjury indictment for admitting his testimony at the first trial was false.

when she gave the answers because of the pressure Gallina put on her and his threats that her son would be kept in jail and that his wife (then his fiancee) would be deported (2620-30).

Mrs. Quinn was impeached in another respect, which is discussed in Point XII (3)

William Maynard, Jr., testified that between 1959 and 1966 he took about 4 trips to Europe in connection with his business activities (2668). He also traveled to see his grandmother, Mrs. Pratt, in Florida on the average of 3-4 times a year (2672).

The appellant testified he spent the night of April 2-3 at the Quinn home (2688). On the morning of April 3, he drove Michael to work and met Mary at Sixth Avenue and 38th Street (2689). Mary had called him the evening before to arrange for him to meet her (2689-90).

Prior to May 17, 1967, Maynard had no knowledge that Kroll had been shot (2692). On that day he was arrested on another charge and questioned by the police (2692-94). The appellant, after initial refusal (2694) was permitted to state he told the police he thought he was at his in-law's house on April 2-3 (2752).

On May 18, 1967, the appellant was charged with stealing his partner's coat and with auto theft (2694). He was not charged with the homicide (2695).

Maynard testified he drove to Florida with Michael Quinn in early spring. They first stopped in Orlando to see Quinn's former wife and child and then they stayed in Miami for a week visiting appellant's grandmother (2696). He went to Europe in August, 1967 and was arrested in Germany on the instant charge in October. The appellant's

testimony as to the two trips is summarized in Point XV (5).

The appellant denied that he had anything at all to do with the death of Sergeant Kroll on April 3, 1967 (2721).

On cross, Maynard was asked what caused him to remember the weekend of April 2, and he stated that he recalled having changed the lock on his boutique on April 1 (2754) and that he recalled the incident with Kathy's skirt and also recalled that the Easter plant he brought to Mrs. Quinn the week before had bloomed (2758).

The appellant was asked whether Mary was present in the Quinn household on April 2, and answered that she was not (2769). At the prior trial he testified she was there (2769-72). On redirect, he attempted to explain how he came to understand that his testimony at the first trial in this respect was not correct (2812). The court did not permit Maynard to prove that before the first trial he never claimed Mary as an alibi witness, even though the prosecutor had attacked the appellant's testimony at the present trial as a recent fabrication (2772-73). This disallowed proof is summarized in Point XIV, as are other aspects of the appellant's testimony.

Dr. Irene G. Pratt, Maynard's grandmother (2827), testified that he lived with her in Florida from a very early age (2832). Her grandson and Michael Quinn visited her in 1967 (2835). While they were in Miami they visited her relatives and went to church with her and also rode around the city. Dr. Pratt also was a character witness and testified that appellant's reputation in Miami for peacefulness and non-violence was good (2841).

William Styron, the distinguished author and Pulitzer Prize winner, was also called as a character witness and

testified that he was acquainted with the appellant's reputation for peacefulness and non-violence both in New York City and in Paris (2849). He testified that:

> "I would say that in this community, that he was considered of exemplary character and of totally non-violent personality in every respect." (2850)

Charles Levy was called as the final defense witness but was only permitted to identify himself as a lighting consultant (2851). The court demanded an offer of proof, and the witness was not permitted to testify. The offer of proof is summarized in Point III.

Rebuttal

Gino Gallina, a former assistant district attorney, testified he took over the Maynard prosecution in the spring of 1968 (A151).

Over objection that Gallina could not testify concerning the investigation of other persons (A154), Gallina was permitted to do this (A152-53). Over objection (A153) he was permitted to state his conclusions concerning Giselle Nicole Quinn (A154).

Over objection, Gallina was permitted to testify as to the steps he took to find Giselle, to his conclusion that she was in hiding (A158-59), and that Michael was in hiding (A168, A193, A301).[15]

At a bench conference, the court stated that Gallina could not give his opinion as to the character of the acts he described (A158-60). However, when defense counsel, in the jury's presence, asked that Gallina's opinions be

15. The defense later offered proof that Michael was making regular court appearances at 100 Centre Street as a defendant during the time Gallina claimed Michael concealed himself from the proper authorities, but the judge refused to permit counsel to impeach Gallina with this proof, page 95, n. 59, *infra.*

stricken from the record, that the jury be instructed to disregard them, and that Gallina be directed not to give his opinions (A161), the court refused to so instruct (A161).

On direct, over objection (A194), Gallina testified that "pursuant to his responsibilities as a D.A." he interviewed the Quinn family (A195). He ordered detectives to serve them with Grand Jury subpoenas as this is an "ordinary and usual practice" (A195).[16]

Gallina ordered the subpoenas served without prior notice and instructed that the family members were not to be permitted to speak to one another (A196-97).[17]

On cross, Gallina acknowledged that the indictment against Maynard had been returned on November 1, 1967 (A311). When asked whether a grand jury was sitting to reconsider the Maynard indictment in March of 1969 when he first interviewed the Quinns (A311), Gallina stated that there "was a continuous grand jury sitting" (A311) and that he had an obligation to investigate any evidence pointing to Maynard's innocence and ask the grand jury to reconsider the indictment (A311-13).

On direct, Gallina testified that after these grand jury subpoenas were served, Patrick, Elizabeth, and Kathleen

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16. "Whenever you are given notice by defense counsel * * * there is an alibi going to be proposed at trial, the prosecutor, the D.A. as an investigator has an absolute right at law and probably a moral obligation also * * *.

Mr. Steel: Objection, your honor.
The Court: Overruled.

* * * in protecting both the People's interests and the defendant's interests, to question the alibi witnesses, and to present that evidence in the grand jury, in rectification of any wrongful indictment, if that evidence proves to be well founded and proves to be truthful. And I followed that course of conduct." (A125-26)

17. When asked if this was an orthodox procedure, Gallina stated over objection, that it was "the only common sense procedure" and is "the procedure we follow all the time in the D.A.'s office." (A197-98)

Quinn, and Richard Moran were brought to his office. Over objection that Moran had not testified as a witness (A199, A201), Gallina was permitted to recount the entire conversation between them (A199-207).

Gallina testified he then spoke to Patrick Quinn who told him he did not believe Michael was hiding and also stated that the alibi affidavit he signed was true, but of course there was some doubt in his mind as anybody might have doubt (A209). Patrick insisted that it was the truth (A209). Patrick also asked that his mother not be told that Maynard and Mary Quinn were married (A212).

Gallina testified that he spoke to Kathy Quinn that same day and Kathy said her affidavit was true but she was not certain (A212).

Gallina testified he had a short conversation with Elizabeth Quinn that same day in which he assured her they were not looking for her son for murder and he told her to reconsider her affidavit in that light (A215).

Gallina also testified that when he spoke to Elizabeth the first time. he showed her the camera bag (Peo.'s Ex. 21) and stated to her (A217):

> "And I also discussed the bag with her, I said, * * * 'if you are not telling the truth as to the alibi and it does come up that there are fingerprints of somebody on the bag, and these fingerprints prove that your alibi is a lie, your alibi to William Maynard is a lie, then you will be in a very poor position.' "

When he said this, Gallina was aware that there were no fingerprints on the bag or any of its contents (A218).

Gallina testified that after these conversations, he "released" the Quinns and told them he would not put them

into the Grand Jury because their statements were "somewhat inconsistent with their affidavits" (A215).

About a month after this (on April 25th) Michael Quinn and Giselle were "apprehended" and he spoke to them and to the other members of the Quinn family "on a good number of subsequent occasions" (A217). He spoke to Giselle and Michael some 14 times between April 25 and their release from custody two weeks later (A217).

Gallina told Michael he suspected he was with Maynard but that he didn't intend to arrest Michael because he didn't have any evidence. Michael was "quite concerned about that" (A218).

Michael was also "quite concerned" about what was going to happen to Giselle. Gallina assured him nothing would happen to her (A219).

Gallina testified, over defense objection (A221-22), he told Michael that he intended to hold him as a material witness because he overheard conversations in which Quinn thought he was being sought for murder (A226). Gallina also told Quinn that he knew Giselle was a prostitute and Quinn admitted this (A227).

Gallina asked him about the truthfulness of his alibi statement and Quinn said it was true (A227).

Gallina stated he discussed the case with Michael for a long time (A229) telling him of all the prosecution witnesses (A230), and when Quinn insisted that an act like murder wasn't in Maynard's nature, because "he is a gentle guy," then Gallina went into the Morrocan conviction and all the other unsavory facts in Maynard's background to convince him that Maynard was a violent man (A231-35). Gallina testified he told Quinn that he believed

Maynard was Kroll's killer and that Quinn concocted the alibi to protect himself (A234).

In the course of this discussion with Michael Quinn, Gallina also discussed Giselle Nicole with him (A235).[18]

At the end of this conversation, Gallina told Michael to reconsider his alibi affidavit in light of all they had discussed and to discuss all these matters with his family (A235).

Gallina stated on cross, that Immigration Officer Swift was in his office together with Michael and Giselle, and Swift spoke to Giselle in his presence (A317). Gallina also stated that Michael expressed concern to him about the possibility that Giselle would be deported (A317-18).[19]

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18. "I also discussed Gisele [*sic*] Nicole with him. That was another primary topic. And he wanted to know about Gisele Nicole, what her position was. And I told him not only were we looking for Gisele Nicole as a witness * * * but during the time of our investigation we had learned that Gisele Nicole had been involved in these other activities, the fact that she hadn't registered, the fact that she was involved in prostitution, the fact that she had aided a felon, a person accused of murder, to flee the country—

Mr. Steel: I object to the word 'fact' in all of those three—
The Witness: That is what I said.
The Court: Objection is overruled.

A. (continuing) And I said that for that reason we have an interest in holding her in civil jail. He said, 'Please why don't you let her go and I will stay in the civil jail.' I said 'we cannot' and I said, "The second reason, the Federal authorities are involved, and they are concerned about this matter because of various violations of Federal statute she might be guilty of.'

And he asked me if he could do anything in order to aid Giselle, and I said, 'There isn't anything you can do except to tell us the truth. And the only thing that we could do—and I am going to ask him to do that in the presence of us all, is to ask Gisele Nicole to tell the truth. If she tells us the truth'—And he had now spoken to me for awhile—'I will then indicate to the Federal authorities in the traditional fashion, that she has cooperated, and told the truth, and let them take that into consideration as to whether or not they are going to act on her case or not.' And he said he would think about all these things, he needed time to think, and he needed time to speak to the rest of his family." (A235-36)

19. Gallina spoke with Michael for at least ten hours while he was in custody (A320). Neither Michael nor Giselle were represented by counsel during the discussions (A318).

Gallina also stated that he told Giselle that he had spoken to Swift (A241). According to Gallina, Giselle:

> "wanted to know at that time what her position would be with Immigration and I told her she was in violation of various federal rules and regulations and or statutes * * * and I laid that out for her, but I didn't know what would happen on that level" (A246).

Gallina said he

> "indicated to [Giselle] that if she would tell us the truth * * * I would bring that information to the attention of the federal authorities and they would always take that into consideration as all authorities do in any such case" (A246).

On cross, Gallina stated that either he or Swift told Giselle that one of the options the Immigration Department had was to deport her, and Gallina also told her that if she told the truth "I would indicate to the Department of Immigration that she was cooperating, she was not hostile, she was no longer having the attitude she had previously, that she was cooperating" (A390-91). Gallina told Giselle that her cooperation was something that the authorities "would take into consideration when they have an administrative option" (A392).

Gallina stressed to Michael and Giselle that he would not arrest or prosecute Michael for the murder even if he later learned that Michael was involved (A248). Gallina also stressed this to Patrick (A251), and wanted him to communicate it to the other Quinns (A253). Patrick agreed, saying "he didn't like William Maynard anyhow" (A253).

Michael then called Gallina from jail and agreed to give him the sworn statement to negate his prior affidavit (A254-

60).[20] Michael made this statement (Peo.'s Ex. 79) while he was still in custody. He and Giselle were released after it was signed (A378-79), upon Gallina's recommendation (A388).

After taking this statement, Gallina told Michael to speak to the rest of his family and tell them what a foolish thing it was for them to persist in their testimony now that Michael had changed his (A261). He also told Giselle that he got an OK from Immigration to release her if she co-operated (A263). Gallina urged her to speak to the Quinn family and urge them to "rectify the situation that they had placed themselves in" (A264).

After Michael was released, Michael approached Gallina and began to discuss "that auto larceny matter with me" (A281). Gallina promised that since he was cooperative, "we will make known to the court your cooperation as a valued witness" (A281).

Before Michael was released, Elizabeth Quinn was called to Gallina's office and Gallina had Michael tell his mother, in Gallina's presence, that Michael had changed his statement (A268).

After Michael told her this, Elizabeth was asked whether she signed the original affidavit because Michael told her to or because she believed it was true (A268). Elizabeth stated she had *not* signed the affidavit because Michael asked her to but she signed it because she believed that the appellant had been at her home that night (A268-69).[21]

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20. "and we sat down—we brought in a stenographer—I asked him the same questions in essence, but in a shorter fashion, that we had discussed for days on end, and that he subsequently swore to that before a notary public" (A260).

21. She had recalled the situation with the potted plant but Gallina told her it was impossible for the potted plant to have bloomed the week after Easter because "the florists usually have these things

Gallina believed he gave Elizabeth an opportunity to speak to her son alone, then she was willing to sign the sworn statement (Peo.'s Ex. 84) "which would in essence be in opposition to a previous sworn statement" (A270).

Before Patrick Quinn gave him a sworn statement, Gallina assured him his brother had immunity and would not be arrested (A271). Gallina arranged for Patrick to speak to Michael in private (A271-72).

Gallina and Patrick also had a conversation about the time Maynard left the Quinn household on the weekend in question but Gallina could not remember too much about that conversation except that it had to do with Mary Quinn's court case (A272).

On cross, Gallina testified he knew that if the Quinns testified for the appellant at the first trial, "no question about it, it would not aid the People's position" in the case (A298).

On cross-examination, Gallina was asked whether the District Attorney's office has power to hold a person as a material witness who was a witness for the defense and not the prosecution; however, he did not answer the question as the court sustained the prosecutor's objection (A366).

Gallina testified that when he committed Michael to jail as a material witness he did not anticipate that Michael would be a prosecution witness (A368).

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blooming on Easter and not a week or two later" (A269). Elizabeth was still "fairly positive" in her own mind that Maynard had stayed over that night (A269-70). Gallina then told Elizabeth that even though she might be certain about the weekend the plant bloomed, could she be sure the appellant stayed overnight and she said "I don't know. I retire fairly early and when I left that day they were watching TV and I presumed he stayed overnight" (A270).

The court refused to let Gallina state whether alibi witnesses who didn't want to answer a prosecutor's questions were required to do so. The court refused to let Gallina state whether a defense attorney had an absolute right to take prosecution witnesses and put them in civil jail until they talk to him (A382-83). The court stated that this was a highly improper question, and told the jury to disregard it (A383).

Defense attempts to impeach Gallina with prior bad acts and by reputation evidence were disallowed. This is discussed in Point XIII (c).

After Gallina's testimony on direct, the defense moved for a mistrial on the ground that he had been permitted to testify far beyond the law of evidence so that it was impossible to have a fair trial (A288-89). The court denied the motion.

Melvin Ruskin, former assistant district attorney, was called to establish that he took a statement from Michael Quinn (Peo.'s Ex. 80) (3265-66).

Ruskin stated that he thought Michael had told him that he dropped the appellant off at work about 9 a.m. on Monday morning, April 3 (3276-77) and that something about a car was mentioned (3277). The statement he took from Michael was unsworn and Michael did not read the statement after it was transcribed (3278).

The prosecutor offered into evidence five statements which he claimed were inconsistent with the testimony of the various alibi witnesses,[22] which were received into evidence over objection (3288-91). Defense counsel asked for a cautionary instruction on the purpose for which this evi-

22. Made by Patrick, Michael and Elizabeth Quinn to Gallina and by Michael to Ruskin (3295-96).

dence was received (3293), which was denied (3293-95). See Point XV (6).

The prosecutor next called a police officer, **Edward Cunningham**, to establish the fact that the apartment of John Von Means was robbed on April 1, 1967 (2865), over defense objection (2866-67). This is discussed in Point XIII (5).

John Von Means III testified that he was a fashion designer and had been convicted of receiving stolen goods (2882). In the spring of 1967 he lived on 10th Street and University Place (2882). He stated that a burglary occurred on a Saturday night in March or April and he had reported it to the police (2883-84).

According to Von Means, the following day at 5:30 or 6 o'clock he saw the appellant at his hotel (2885). Von Means stated that appellant came to obtain the keys to a boutique they had once owned together (2886). Von Means denied knowing that the lock on the store had already been changed (2887, 2901). This is discussed in Point XIII (5). Von Means said he saw Michael Quinn sitting outside on a car fender (2888).

On cross, the witness stated he and the appellant had gone into business some time in 1967 (2892). The appellant supplied the capital to get the business started and Von Means was to take care of the creative end (2893-94). By March, 1967, Von Means had not created any designs, although the appellant had bought the fabrics and the machinery (2894). In March of 1967, the appellant and Von Means had a dispute over the operation of the business (2895).

By April 1, 1967, Von Means had not been in the boutique for several weeks (2899), and he was angry and upset

at the appellant for terminating their partnership (2902). In the aftermath of the split up, he accused the appellant of being implicated in a robbery and having stolen his coat (2902-05). Von Means had also tried to buy the shop from the appellant on the day appellant was arrested (2909-17). After this, Von Means took over the shop without paying the appellant anything (2907-08). Von Means denied that he participated with the police in arranging for the appellant's arrest (2910) however, Lieutenant Stone testified that the arrest was arranged through Von Means (2940). He remained in control of the boutique for several months and then moved to a larger store (2917).

Lieutenant Walter J. Stone was recalled for the purpose of testifying, over objection, about his interview with Michael Quinn on May 17, 1967 (2920-32). Stone referred to the notes taken by another officer which were not a verbatim account of the interrogation (2926).

Stone testified Quinn never told him he was in Greenwich Village on April 2-3 (2948, 2930). Stone stated that Quinn said if he took a cab from 76th Street to the Village on April 2, he would have remembered it (2948, 2929). Quinn stated he was not at Von Means' apartment on April 3 (2929) and that he did not own the canvas case or throw it away on Washington Place (2931). Quinn also stated he had gone to Florida to visit his ex-wife (2932).

Surrebuttal

The defense attempted to call **Paul Chevigny, Esq.** to testify to the poor character and reputation of Mr. Gallina in the legal community (3305-13). The court refused to let the witness take the stand (3313-14).

The court refused to let the manager of the Park Plaza Hotel (where Michael and Giselle lived for 6 months prior

to their arrest as material witnesses) testify that Michael was registered in his own name, kept regular hours, and was not hiding in his room during this period and that Giselle was not pursuing a business of prostitution in the hotel (3314-24).

The defense offered a certified transcript of Michael Quinn's April 7, 1969, appearance at 100 Centre Street (17 days prior to his arrest as a material witness who had concealed his whereabouts for over a year) but the court rejected it because "it proves nothing at all" (3321).

Defense counsel then unsuccessfully sought to introduce into evidence certain statements (e.g. Crist grand jury minutes, 3325-26) by prosecution witnesses which were prior inconsistent statements (3324-29). See Point XIII (2).

The defense then rested.

Defense Motions After Both Sides Rested

The defense unsuccessfully renewed all prior motions and additionally moved to dismiss on the ground of a failure to prove guilt beyond a reasonable doubt (3336-37).

A number of defense requests to charge were submitted and they are reproduced at A640 *et seq.* The trial court's rulings on the requests is found at A460-62.

The Verdict

The jury retired to deliberate at 2:15 p.m. on December 7 (3843). The next evening they announced they were deadlocked (3856) and were ordered to continue deliberation. The following afternoon, they returned with a verdict of manslaughter.

ARGUMENT

POINT I

Appellant's rights to due process and a fair trial were violated by precluding him from proving that the police forged his signature on a waiver of rights form. The error was compounded by the prosecutor's summation.

At the first trial, Lieutenant Stone and two detectives testified, under oath, that on May 17, 1967, they saw the appellant sign the form waiving his Fifth and Sixth Amendment rights, which was received into evidence at the first trial (F183) and then withdrawn (F196). The form had been in the exclusive custody of the police (F183-84).[23]

Before this trial began, defense counsel in the *Huntley* and *Wade* motions alleged that the waiver form was examined by Russell D. Osborn, of Osborn Associates, Document Examiners, who compared the signature upon it with other signatures of the appellant and that Osborn "has preliminarily concluded that the defendant did not sign Peo. Ex. 4, but in fact, some other person did" (affidavit of counsel in support of *Huntley* motion, p. 5).[24]

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23. Stone twice testified that he saw the appellant sign the form. Detective Hanast also twice stated the appellant signed the form in his presence (AF625-26).

The appellant's statement, taken on May 17, was contained only in the handwritten notes of a police officer. They were not taken down verbatim; were unsigned and never reduced to typewritten form. The appellant allegedly told the police he thought he was at his in-laws house on the night in question, that he did not take a taxi to the Village that Sunday, but that it was possible he might have been in the Village.

24. Defense counsel offered to obtain an affidavit from Osborn corroborating this allegation if the trial court felt it was necessary (85).

If Osborn were correct, then Stone, O'Brien and Hanast perjured themselves at the first trial.

Counsel urged the court to litigate the forgery issue because (42-3):

> "I can't conceive of a greater cloud over both the investigative and the judicial process for a court to allow a trial to proceed and statements to be introduced against the defendant after a claim has been made that police testimony is perjured * * * [moreover] the same police officers who were involved in the *Huntley* hearing were the police officers involved in the out of court identifications. In other words, they are the very officers that conducted the investigation, that conducted the show-ups, the line-ups and the showing of pictures.
>
> If this testimony is determined unreliable on a *Huntley* hearing, obviously that taints what went on in the *Wade* hearing, and that has to be redone also."

The court denied the *Wade* and *Huntley* motions in a written decision, which contained no comment on the forgery issue (A11).

At the trial when Stone was called as a prosecution witness, defense counsel tried to cross-examine him on the forged waiver of rights signature (A113). The prosecutor objected on the ground that the State did not intend to offer the alleged statement (A113-14).

The court ruled that since the prosecutor did not intend to introduce the statement:

> "this now becomes academic, and Mr. Steel, I think should not question the propriety of any statements that you are not going to introduce * * *" (A116).

The court did state that if the alleged statement was used on rebuttal, "we'll have to review it again"; however,

the alleged statement was not used,[25] and counsel excepted (A117).

If appellant's signature on the waiver of rights form were forged, as the defense expert believed, then the integrity of the entire police investigation was open to question. If the police were prepared to produce a forged document for introduction into evidence and perjure themselves as to its execution, then the reliability of all the evidence which sifted through the hands of these men was open to doubt.

Suppression of evidence by the police denies a defendant his right to due process and a fair trial. *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Alcorta* v. *Texas,* 355 U.S. 28 (1957); *Giles* v. *Maryland,* 386 U.S. 66 (1967). The fabrication of evidence, *ipso facto,* denies the accused these same constitutional rights. *Miller* v. *Pate,* 386 U.S. 1 (1967).

Moreover, if evidence has been fabricated and testimony perjured, these facts cannot be hidden. The defendant has a right to have the jury consider the way that some of the evidence came into being in order to determine the reliability of othe other evidence which the state produced. Wigmore states:

> "It has always been understood—the inference, indeed is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication * * * of evidence * * * and all similar conduct, is receivable

25. As stated above, in the *Wade* motions papers, a demand was made for a pre-trial hearing so that the veracity of the officers *vis-a-vis* the identification procedures could be challenged, but the motion was denied. Although "mini" *voir dires* were held as to several witnesses who participated in pre-trial identifications in which Stone or Hanast or O'Brien were involved, the police were not called to testify despite defense counsel's repeated request. Thus, the forgery issue was not litigated in that context either.

> against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference does not apply itself necessarily to any fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause."
>
> Wigmore, *On Evidence* (3d ed.) Vol. II §277, p. 120.
>
> In accord: Richardson, *On Evidence* (9th Ed.), §91, p. 64.

The defense below did challenge the integrity of the police investigation in this case, as well as the methods used by the former prosecutor to obtain statements from defense witnesses prior to the first trial (see Point VII). After successfully preventing defense counsel from litigating the forgery issue, at any juncture, the prosecutor then made this argument to the jury in summation (3612-14):

> "Now, this is very important in connection with the police. If the police, and I ask you to consider this carefully—if the police set out to frame Mr. Maynard, if that was their intention, there is an easy, simple way * * * *If the police are prepared to lie, to commit perjury how simple it would be for them to come into this court and say he admitted it.* But *they didn't do that,* because that is not the fact * * *" (emphasis added).

Stone was described as the man "with sufficient integrity and honesty" to assume a position of trust in the police department, and the prosecutor stated (3614):

> "* * * I ask you did that man, Lieutenant Stone, take that stand and wilfully commit perjury, did that man engineer Dennis Morris into making an identification, and Michael Feebles, because it would have to be him or one of the officers acting under his direction, it would have to be because he was definitely in charge; he is that kind of man."

A prosecutor may strike hard blows, but not foul ones. *Berger* v. *United States,* 295 U. S. 78 (1955). The prosecutor could make the above argument only because he joined with the trial court in precluding the appellant from litigating the forgery question and the concomitant question of perjured testimony. Once these issues were out of the case, then the appellant was prevented from challenging the way in which Stone, and the men under his direction, conducted the investigation, and the reliability of the evidence they obtained as a result of the methods they used. The prosecutor could then argue, as he did, that Stone did not fabricate a confession, *ergo* Stone did not suggest identifications. The defense could not argue, as it had good cause to suspect, that Stone and his detectives were all parties to forgery and perjury, and that the identifications of the appellant were secured by the same police officers who perjured themselves on the waiver of rights question.

The dissenting opinion below holds that appellant was entitled to a hearing and new trial on the basis of this assignment of error (A8). The majority opinion dismissed this, and all other assignments of error save appellant's Point III, as "without merit" (A2). The position taken by the dissent is supported by the record and by the unanimous weight of precedent and should be adopted by this Court.

The judgment of conviction must be reversed on the ground specified herein and the case remanded for a hearing and new trial.

POINT II

The evidence is insufficient as a matter of law to prove guilt beyond a reasonable doubt and to show that the identifications were not procured or affected by improper pre-trial methods. Alternatively, it was error to decide the independent source question without a full hearing. The court further erred in refusing requested cautionary identification instructions.

The prosecution's case stood or fell upon the eyewitness identification testimony. The other evidence which the prosecution mustered was like the proverbial "tale told by an idiot, full of sound and fury, signifying nothing".

In addition to the eye witnesses, there was the camera bag, not found at the scene and not seen in the possession of the perpetrators (Point IV); the so-called evidence of flight (Point XV (5)); the testimony of Fox, a cab driver, who claimed to have taken the appellant to the Village fifteen hours before the crime, and the testimony of Stephen Berman that a person other than appellant acted suspiciously after the crime was committed (Point IX (14)). Assuming all this other evidence was admissible, it was insufficient as a matter of law without the eyewitness testimony to prove guilt beyond a reasonable doubt.

We submit that the identifications by Morris, Crist and Feebles were not shown to have an independent basis and were tainted as a matter of law by improper police procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate appellant's right to due process. *People* v. *Gonzalez,* 27 N.Y.2d 53 (1970); *People* v. *Damon,* 24 N.Y. 2d 256, 261 (1969).

Moreover, each identification was the result of suggestive elements arising from the conduct of the police at the pre-trial identification proceedings which created a very substantial likelihood that the witnesses would identify the appellant whether or not he was the perpetrator. *Foster*

v. *California,* 394 U.S. 440 (1969); *Neil* v. *Biggers,* 409 U.S. 188 (1973).

Assuming *arguendo* that the Court does not find the evidence insufficient or tainted as a matter of law, then it was error to deny appellant's motion for a full pre-trial hearing on identification. *People* v. *Ganci,* 27 N.Y.2d 418 (1971); *People* v. *Harrington,* 31 N.Y.2d 785 (1972).

We also contend that the trial court committed reversible error in failing to give the requested cautionary identification instructions, given the facts of this case. *People* v. *Montesanto,* 236 N.Y. 369 (1923); *People* v. *Diaz,* 8 AD 2d 732 (2d Dept. 1959).

(1) Robert Crist

Of the three eye witnesses, Crist had the only real contact with Kroll's assailant. However, his physical ability to perceive and recollect this man was not established.

Crist had been up since the morning of April 2 and had been drinking since 9 p.m. that evening, some 7½ hours before he saw the assailant (689, 690). It was night, and the degree of street lighting was vigorously disputed (Point III). Crist admitted he was probably intoxicated when the crime occurred (696). At the prior trial and before the Grand Jury, he stated that he was drunk (A26-27). Crist was described as acting "wildly" (1339) and "erratically" (1310) and as making "all kinds of gestures" (1339). Detective O'Brien could still smell alcohol on Crist's breath an hour after the shooting from a foot and a half away (A123-24).

Crist was able to remember nothing else about the weekend in question (A28-32, 923). He also had no recollection of what happened after he arrived at the police station (A33) and no independent recollection of the faces of per-

sons he spoke to that night and he did not remember what any police officer he saw that night looked like (A33-34).

Crist testified there was nothing distinctive about the face of Kroll's black assailant (A37-38). Crist also thought he was taller than the black man (A35-36) and that the black man was very close to his own age (A42), or about 18-22 years old (859, 860, A39-40). The appellant was taller than Crist (A46-47) and was 11 years older.

Crist saw the appellant in the flesh on May 17, 1967, in the Sixth Squad (A48). This was the same date that Irving Gelfand refused to identify the appellant as the man he saw shoot Kroll, even after he was shown the appellant at the Sixth Squad in a one-man showup (AF630-32). Crist was also shown photographs of the appellant on three or four occasions *after* he saw the appellant in the Sixth Squad (AF628-29). Gelfand had also testified that after he had been shown the appellant in person, he was asked to look at photographs containing the appellant's picture and stated that he could pick appellant's picture out of the photos because it resembled the man he had just been shown (AF631). The officers participating in these pre-trial identification procedures were the same men who swore that the appellant signed the waiver of rights form, which the defense fingerprint expert stated was forged (Point I).

After this in-person confrontation with appellant and after having seen appellant's photos, Crist still could not state that the appellant was the man he saw shoot Kroll.

When Crist testified before the Grand Jury in October of 1967, he was shown the appellant's photograph. Crist was asked "do you recollect the man in the picture", and answered, "No, I don't" (A23). Crist merely stated, "he bears a strong resemblance to the colored man, the second

one I met near the corner of Sixth Avenue and Third Street" (A24). In response to the question "You can't be sure if that is the man", Crist stated "No, I can't" (A24).

Despite Crist's drunkenness, his inability to recollect anything about the events before and after the shooting, his inability to recollect anything distinctive about the assailant's features, his initial description of Kroll's assailant which did not fit the appellant, and his inability, before and at the Grand Jury, to be sure that appellant was Kroll's assailant, although he had seen appellant in the flesh and had seen photographs of him, Crist maintained at the trial that he was positive that the appellant, and no other person, was the man who shot Kroll.

Drunkenness is a factor which casts substantial doubt upon one's ability to make an accurate identification, as is the person's inability to recollect the events before and after the crime. *People* v. *Horan,* 28 AD 2d 562 (2d Dept. 1967).

The facts that Crist's original description varied materially from the appellant's actual appearance and that Crist was not sure that the appellant was Kroll's assailant even after he saw the appellant in person and in photographs are both factors which cast substantial doubt upon Crist's in-court identification (*People* v. *Davino,* 284 N.Y. 486, 487-88 (1940); *People* v. *Gerace,* 254 App. Div. 135 (4th Dept. 1938), and which the Supreme Court held must be considered in evaluating the likelihood of misidentification. *Neil* v. *Biggers, supra,* 409 U.S. at 199.

The way in which the pre-trial identification procedures were conducted contains "the possibilities of suggestion leading to the selection" of the appellant by Crist. *People* v. *Robinson,* 37 AD 2d 944 (1st Dept. 1971). The record

is barren of any facts demonstrating how and why Crist overcame his initial doubt, which existed as late as October, 1967, that appellant was the man he saw on April 3, 1967. Hence it should be presumed, as it was in *People* v. *Cassidy*, 160 App. Div. 651, 656-57 (2d Dept. 1914), that:

> "* * * his original doubt * * * was dissipated without any apparent reason, and his final certainty, for aught that appears, must have been the result of reflection alone upon the same circumstances which were not sufficient for his identification at police headquarters * * * ."

Applying the criteria of *Neil* v. *Biggers, supra,* each factor which must be considered in evaluating the likelihood of misidentification was negatively present. Crist's opportunity to view the criminal was nullified by his drunkenness; his prior description did not correspond to appellant; he had a high level of uncertainty at the initial corporeal and photo confrontations; six weeks had elapsed between the crime and the first viewing and more substantial time elapsed before the other viewings. All these circumstances add up to an identification unreliable as a matter of law.

In the event that this Court rejects our argument that Crist did not have the ability and hence did not make an accurate and reliable identification as a matter of law, then we submit that it was error to receive his testimony on another, alternative ground.

Once it became clear at trial that Crist had failed to make positive identification of the appellant as late as October of 1967, then defense counsel asked for and was refused, a *voir dire* to determine why Crist was able to make the positive in-court identification (912-13).[26] The record is thus barren of any proof that the in-court identification was not the product of undue suggestion by the police. We

26. The appellant's motion for a pre-trial *Wade* hearing had been denied.

feel that the reasons for Crist's change of mind "are all too apparent to permit what amounts to speculation as to whether the in-court identification had an independent basis" (*People* v. *Robinson, supra*). However, in the event this Court does not accept this contention, we submit that the court below committed reversible error in failing to hold a hearing to determine this issue. *People* v. *Damon, supra.*

(2) Dennis Morris

Dennis Morris had been in and out of bars the night of April 2-3, collecting deposit bottles to cash for drinks (1274-75). From a distance of 20 feet, he saw the black man in profile while there were quite a few people blocking his view (A73-74). When the black man walked past Morris, he saw the man's face for a second or two (A75-77). Morris was 50 feet away from the shooting when it occurred (1380). As we have noted, the lighting conditions on that April night were in dispute (Point III).

Morris' opportunity to perceive and recognize Kroll's assailant, whom he had never before seen, whom he saw at close range for only a few seconds and whom he otherwise saw from distances of ¼ to ½ a city block at 4 a.m., was extremely limited.

It is apparent from Morris' initial description of Kroll's assailant, that he was not describing the appellant.

Morris was 6′ tall and he told the police that the black man was 5′8″ or 5′9″ tall (A79). The appellant is 6′1″ tall. Morris told the police the black man was 18-22 years old (A79). Appellant was 31. Morris, who was black, said the black man looked like Martin Luther King (A81). It is obvious that when asked to state which prominent person the appellant resembles, one's response would be Harry Belefonte, and not Martin Luther King. See Def.'s Ex.

G1 and F2. In fact, the appellant so little resembles the late Dr. King that Morris' ultimate identification of him as Kroll's killer becomes suspect and should be accepted only with great caution. See Wall, *Eye Witness Identification in Criminal Cases,* pp. 99-100.

When the police methods used to secure Morris' identification are added to the insubstantial observation and the wrong description, then it is clear that the suggestive elements arising from the police conduct created a very substantial likelihood that Morris would identify the appellant whether or not he was the perpetrator of the crime. As was stated in *Wade* v. *United States,* 388 U.S. 218, 229 (1967);

> "* * * the dangers for the suspect are particularly grave *when the witness' opportunity for observation was insubstantial, and thus his suspectibility to suggestion the greatest.*" (Emphasis in the original.)

Morris testified that he picked the appellant out of a lineup on April 22, 1969, a few days before the first trial (1479-83).

Before he saw the appellant in that lineup, he was shown the appellant's picture by the police or the prosecution on three occasions.

On the first occasion (August 2, 1967), Lieutenant Stone gave Morris 9 pictures. Out of the 9, only 2 corresponded to the physical traits[27] Morris testified he was looking for (A85, A87) and both photos were of the appellant (A82-87). Morris thought that each picture "could be the guy" but wanted to see him in person (A90, 1464) because he still wasn't sure (A91).

Thus, Morris was not sure on August 2, from looking at the pictures, whether the appellant was Kroll's assailant

27. *i.e.,* that Kroll's assailant wore his hair in an Afro type cut (A87) and did not have a moustache (A82) or beard (A84).

(A91). He further stated that the similarity between the two photos of the appellant suggested to him that he should concentrate on the two pictures (A92).

Before Morris' Grand Jury appearance (October, 1967), he was shown another group of 9 pictures (A88). The appellant's picture was among the 9; it showed him wearing the same distinctive high neck jacket he wore in one of the pictures Morris was shown on August 2 (A95). This suggestion through identity of clothing assisted Morris' recognition of the appellant's picture (A95). Though he still had some hesitation, Morris was now "pretty sure" this was the man (A94).

Morris was shown the picture of appellant in the high neck jacket for the third time when he went before the Grand Jury and he made his identification from this photo (A96-97), although he had initially stated he could not be sure unless he saw the suspect in person.

Two years later, when Morris went to the lineup a week before the first trial, "common sense" told him he had been summoned to identify the person he was going to testify against (1522); and he picked out the appellant. He wasn't sure that Gallina had not shown him a picture of the appellant before the lineup (1524).

Morris had an extremely limited opportunity to see the black man. Compare *Simmons* v. *United States,* 390 U.S. 377, 385 (1968), where the robbery took place in a well lighted bank and five witnesses saw the defendant for periods up to five minutes.

Like Crist, the initial description Morris gave did not fit the appellant. Like Crist, Morris was not sure the appellant was Kroll's assailant even when the police first drew his attention to the appellant on August 3, by placing 2

pictures of him together with 7 others who obviously were not suspects in the case. These photographs clearly and improperly emphasized the appellant's picture. *United States ex rel. Rivera* v. *McKendrick,* 448 F. 2d 30, 33 (2 Cir. 1971).

After this improper emphasis, Morris only became sure in his identification when he was twice more shown the appellant's picture—in which the appellant was wearing the same distinctive high neck jacket Morris saw in the first group of photographs. This repetitious showing of the picture was the only thing which moved Morris from being unsure of his identification to making a positive identification. He never saw the appellant, in person, before his Grand Jury appearance. Thus Morris made an identification from photographs, although his previously stated position was that he could not do this.[28] In a remarkably similar case, the Court of Appeals for the District of Columbia held that there was a very substantial likelihood of irreparable misidentification due to suggestive identification procedures like those employed here, when considered with the discrepancies in the original description, and held the in-court identification inadmissible. *United States* v. *Sanders,* 479 F. 2d 1193 (D.C. Cir., 1973).

The precise danger of misidentification through the use of suggestive photographic identification procedures upon

28. *Simmons* v. *United States, supra,* 390 U.S. at 383-4, teaches:

"It must be recognized that improper employment of photographs by police may cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures * * * there is some danger that the witness may make an incorrect identification. This danger will be increased if the police * * * show him the picture of several persons among which the photograph of a single individual recurs or in some way emphasized * * * the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or court room identification."

one whose opportunity to observe the criminal was limited occurred in this case. Taken together, the circumstances under which Morris initially saw the perpetrator and those under which he finally overcame his doubt and made the identification of the appellant, leaves no doubt that both his courtroom identification and the lineup and photo identifications he testified to were all based upon the impermissibly suggestive photographic identification techniques employed by the police and that the out-of-court identifications testified to,[29] as well as the in-court identification, should have been suppressed because they were unreliable as a matter of law and had been obtained in a manner contrary to due process.

(3) Michael Feebles

Feebles, who changed his job as often as he changed his testimony, claimed he was standing on the corner of Sixth Avenue and West 3rd Street looking south and trying to get a cab for his 10-speed bicycle and his friend Jaime (972, 966). He had worked for 12 hours before the incident in question (1028-29). He then saw an argument at a place where no one else had seen it,[30] to the *north* of him, on Sixth Avenue (972-74, A57-58).

Feebles actually observed this argument for "maybe a half-a-minute, maybe less" and during this ½ minute, his vision was sometimes blocked (A62). He also didn't pay much attention to the argument (A62).

Feebles got into a cab when Kroll's car stopped and picked up Crist. Where Feebles sat in the cab was a matter of some uncertainty to him. He variously testified that he

29. Under the rule of *Gilbert* v. *California,* 388 U.S. 263 (1967).

30. Both other eye witnesses testified it took place on West 3rd Street, in front of the Purple Onion.

was in the inside front seat, with the 10-speed bicycle in the back (F449, 1053-54) and in the curb-side rear seat (978). Where the bicycle was if Feebles was in the rear curb-side seat is a matter for some speculation.

Feebles insisted that all the lanes on Sixth Avenue were filled with heavy traffic that 4:30 a.m. (1062-64). No one else saw this traffic (818, 819; 587-88). This heavy traffic was the reason his cab moved very slowly up Sixth Avenue, so that after Kroll picked up Crist, and after the fatal shot was fired, Feebles' cab was still only at Sixth Avenue and West Fourth Street. Hence, because of this heavy and slow-moving traffic at 4:30 a.m., Feebles was able, according to his testimony, to see Kroll's assailant running alongside the cab even though the cab was proceeding north at the same rate as the other traffic.

Feebles' testimony as to what else he saw from the cab was a matter of some confusion. He variously claimed to have not even looked east on West Fourth Street as the cab passed (1973); to have seen a tall male with a shiny metallic object in his hand on West Fourth Street (A66); to have seen the Marine fall dead on West Fourth Street after the shotgun blast (1945-46).

At any rate, Feebles claimed he saw the faces of the two men who ran past the cab faster than the cab was going because of the heavy traffic, for a second or two (AF 636-37).

Thus Feebles, who saw most things differently than the other witnesses, saw Kroll's assailant for half-a-minute or less, from a distance of 20 feet while his vision was blocked and when he wasn't paying particular attention, and perhaps saw him again from the window of a moving cab for a second or two.

Feebles' recollection of what the man looked like was vague. Feebles thought he was "sort of tall", "not heavily built", with broad shoulders. He didn't really notice anything else about him (A51-52). He did notice that the man wore an Afro (A54). He also told Lieutenant Stone the man was 19 to 20 years old (A68).

In addition to making an in-court identification, Feebles also testified that he saw the appellant at the courthouse on July 10, 1967 by chance (1189) and spontaneously recognized and identified him at that time. The appellant was not arrested for the murder on July 10, 1967.

The July 10 identification was obtained in the following manner: Sometime after the crime was committed Stone gave Feebles a group of pictures. Feebles saw a picture of the appellant but did not pick it out immediately as he was "not quite sure" (AF 633). He went through again and picked out the picture (AF 634).[31]

Before Feebles went to the courthouse on July 10, 1967, Lieutenant Stone had told him he was "supposed to go down to see the defendant to give a positive identification of the defendant" (AF 635, A70). Feebles came to the courthouse with the purpose of identifying the man he had seen in the photograph (AF 639).

As with Morris, Feebles' opportunity to observe Kroll's assailant was extremely limited. The first half-minute observation was from a distance, with a blocked view and when he wasn't paying much attention. The second one or two second observation was through the window of a moving car.[32]

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31. These pictures were never produced, though defense counsel requested them in his pre-trial *Wade* motion.

32. Presumably this observation was made when the suspect was near the bank, and hence the excluded testimony by the defense lighting expert (Point III) as to the inability of a person to see clearly the features of a dark person who is in front of lighted windows was obviously of great importance to the defense.

Irving Gelfand, who saw the suspect on the street when Kroll got out of his car and who was standing 6 or 7 feet away from Kroll's assailant when the fatal shot was fired (F435), could not identify the appellant either in the flesh or from pictures as the man who pulled the trigger. Yet Feebles, who saw the suspect for less than half-a-minute under adverse conditions and then for a second or two, again under adverse conditions, was able to make, first, an unsure and hesitant identification from one photograph and then a certain identification from that photograph. Feebles was certain as to his identification although he was uncertain, evasive, and contradictory, about every other fact he testified to.

The value of Feebles' identification testimony was well characterized in *People* v. *Cassidy, supra,* 160 App. Div. at 660:

> "But [the witness] does not impress us as one scrupulous to cling to an original doubt, but rather as ready to disregard it in order to strengthen his statements, as inclined to be positive rather than accurate, as apt to leap to certainty rather than to count his steps, as susceptible to suggestion, and when assured by others of a fact, ready to affirm that it exists, casting aside dubiety. His positivity is not of strength, but of weakness."

Feebles testified not only to his in-court identification, but also as to a prior pre-trial identification of the appellant. This courthouse confrontation of July 10 was not a chance encounter. Feebles was told to come to the court house to make a positive identification of the defendant and he went to identify the man whose picture he had previously seen in the police station—a tactic condemned in *People* v. *Rahming,* 26 NY 2d 411, 416 (1970).

"Many accidental identifications, though seemingly spontaneous, are the result of staged encounters by the police." 62 J. Crim. L. 363, 368 (1971). The commentator goes on to state that, "The fact that the witness accidentally 'bumped into' the suspect should perhaps itself arouse suspicion." This kind of spontaneous encounter is "such a well-known police technique that it has a name in police jargon—the 'Oklahoma show-up'." Wall, *supra,* p. 48 n. 95; *United States* v. *Wade, supra,* 388 U.S. at 234.

Feebles' testimony as to both identifications should have been excluded on due process grounds.

As with Crist, each factor deemed significant on the question of reliability of the identification was negatively present: the opportunity to observe was limited; Feebles was admittedly not paying much attention to the incident;[33] his prior description was inaccurate to a dangerous degree; he was uncertain initially and he was subjected to police procedures to secure a positive identification which were suggestive and which created the substantial likelihood of mis-identification.

Alternatively, the record was inadequate to make this determination and a hearing should have been held below on the taint question.

Feebles had testified he came down to the court house to identify the man he saw in the photograph. The group of photographs from which Feebles said he picked the appellant's picture were never produced, although defense counsel requested them in the pre-trial *Wade* motion. It is impossible to tell whether

33. This is especially significant as Feebles' testimony in all respects other than the identification—as to the location of the argument, as to the traffic conditions, as to what he saw on West 4th Street, as to where he sat in the cab—was in total contradiction both internally and with the facts as testified to by other witnesses.

"those photographs were all of men who resembled [the defendant] or whether the photograph of [the defendant] was in some way emphasized * * *" (*United States ex rel. Rivera* v. *McKendrick, supra,* 448 F. 2d at 33.)

Stone, who showed the photographs to Feebles, also showed them to Morris. The group of photographs shown Morris improperly emphasized the two pictures of the appellant. Since the Morris photographic identification was so highly suggestive, there is no reason to believe that this one was any better.[34]

Feebles' opportunity to observe the suspect was, at best, severely limited. He was subjected to some kind of photographic identification parade of unknown suggestibility. After he picked out the appellant's photograph, hesitantly at first and then unhesitantly, he came down to the court house at police request to identify the man he saw in the photo. *People* v. *Rahming, supra.* It is impossible to determine whether Feebles' ultimate in-court identification had an independent basis in fact or was tainted by the prior procedures so as to deny the appellant due process of law. As in *United States ex rel. Rivera, supra,* 448 F. 2d at 35:

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34. Judge Sobel, in his article in 38 Brooklyn L. Rev. 26, 302 (1971), observes:

"* * * it is commonplace police conduct to have the witness make a photo identification before the lineup. A lineup, however fair, has little value after photo viewing."

Wall, in his book on eye witness identification, also states that:

"* * * where a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party, but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say, 'That's the man that did it', what he may actually mean is 'That's the man whose photograph I identified.'" Wall, *Eye Witness Identification, supra,* at p. 68.

> "In short, there is a very substantial risk that the in-court identification * * * was based not on [the witness's recollection of the suspect] but upon the [pretrial] identification which in turn was made more suggestive by the prior use of photographs."

As in *Rivera,* the record is inadequate to make this determination, hence a hearing should be directed if Feebles' identification testimony is not excluded on due process grounds.

(4) Howard Fox

Fox testified that at 1:30 p.m. on April 2, 14 hours before the crime, the appellant was a passenger in his cab and he dropped him in the Village. He had observed his passenger for perhaps 2 minutes (1566).

The initial description Fox gave of his passenger did not fit the appellant. Fox said the man was his own height, 5'9" (A98), and was 21-23 years old (A99).

Fox's testimony, at best, had marginal value. Even if his identification were correct, it did not establish that the appellant was in the Village 14 hours later when the crime was committed. Nor did it establish that the appellant was at Von Means' apartment in the Village at 5 p.m., some 12 hours before the crime. At most, it contradicted appellant's denial that he came to the Village any time that Sunday, and if believed could have been utilized by the jury if they decided to apply the "false in one, false in all" maxim.

In addition to proving that appellant moved his head when Fox saw him on May 17, 1967 (see Point V), the prosecutor further proved that Fox's identification that night was produced by the same kind of unnecessarily suggestive practices which the police used on Morris, Crist, Feebles and Gelfand.

May 17 was the night that the police summoned Gelfand and Crist to the police station to view the appellant. Gelfand testified that he had been shown the appellant when the appellant was alone in a room at the station house (AF 632).

Fox was then brought into a room where there were 7 or 8 people, and he knew 3 or 4 of them (1639). The appellant was the only Negro present, outside of a Negro police officer (identified as such by the witness (1648)) who was 10-12 years older than the appellant (1640, 1641). A tourist or camera bag was also visible (1609). When Fox told Stone that he recognized the appellant, neither Stone nor any other police officer made any notes or police records of any kind of that identification (1600-02) and the appellant was released the next day.

The show-up was not accidental. The police had asked Fox to come to the station house and had brought him to the room where the appellant was the only Negro other than an older Negro police officer. The show-up was not justified by exigent circumstances. The appellant had been arrested and was in custody on another charge. Fox's initial opportunity to observe the passenger in his cab had been limited and the description Fox gave did not fit the appellant. If the police had been interested in determining whether Gelfand, Crist and Fox would recognize the appellant in neutral circumstances they could have put him in a lineup that night. Instead they utilized the show-up procedure.

The Supreme Court stated in *Stovall* v. *Denno,* 388 U.S. 239, 302 (1967):

> "The practice of showing suspects singly to persons for the purpose of identification, and not as a part of a line up, has been widely condemned."

The identification procedure utilized in this instance was not, as was the show-up in *Stovall,* predicated upon "the need for immediate action and with the knowledge that [the witness] could not visit the jail", 388 U.S. at 302. That Fox's identification resulting from the show-up was of no worth is demonstrated by the fact that the police did not even bother to note it down or to hold the appellant after it was made. Under the totality of circumstances, including Fox's limited opportunity to observe the man and his initial misdescription, the identification he made as a result of the show-up was unreliable as a matter of law.

(5) The identification evidence was tainted by the improper identification practices as a matter of law and the total evidence was insufficient, as a matter of law, to prove guilt beyond a reasonable doubt.

Not one of the three eye witnesses, Crist, Morris and Feebles, had a good opportunity to perceive and recollect Kroll's assailant. Crist was drunk and had no memory of the events before and after the crime. Morris and Feebles saw the black man for only a few seconds—either from a distance or with impaired visibility. Not one of the three gave an initial description of Kroll's assailant which fitted the appellant. Crist had doubt that appellant was the man he saw even after seeing him in the flesh and seeing his pictures. Morris was not sure that appellant was the man when he was shown appellant's pictures under highly suggestive circumstances, and he never saw the appellant in person before he made a positive identification from the same pictures. Feebles had an initial doubt when he saw the appellant's picture, and only became totally convinced after he saw the man in the picture at the "Oklahoma show-up". In contrast, Gelfand, who was shown the appellant in the flesh and in pictures, refused to state he was the man.

Gelfand was the only witness whose physical capacity to observe was not impaired and who stood a few feet away from the killer when the shot was fired.

There were no fingerprints or other concrete evidence tying the appellant to the crime. Another man had confessed to it (Point VI). Other witnesses whom the prosecutor never called gave descriptions of the killer which did not fit the appellant (Point X). The police, who secured the identifications, were not over-scrupulous in producing other evidence to be used against the appellant (Point I). The appellant had a plausible alibi until Mr. Gallina decided to take justice into his own hands and jail and coerce the defense witnesses before the first trial (Points VII and VIII).

The only person whom the prosecution could find to dispute part of the alibi was a man who bore a grudge against the appellant and who had no independent recollection as to when the appellant came to his apartment to collect the keys to their store (Point XIII).

And this present trial was not a model of prosecutorial forensic fairness (Point IX) or free from substantial other error (see *infra*).

The defense below was mistaken identity and the prosecution's case rested on the credibility of the witnesses and the accuracy of their identifications. As in *People* v. *Damon, supra,* 24 N.Y.2d at 261, the opportunity for observation by the witnesses "while more than momentary, was not so substantial that we can say, as a matter of law, the in-court identifications were not tainted by the improper [practices]." The practices used were "so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process

of law." *Stovall* v. *Denno, supra,* 388 U.S. at 302. For these reasons, the judgment of conviction should be reversed.

(6) Alternatively, under the facts of this case, it was error for the trial court to refuse to give the cautionary instruction on identification requested by the defense.

Defense counsel requested the court to give a detailed instruction on the question of identification.[35]

The court ruled that as to Request VIII, it was covered by the main charge and otherwise denied (A461) and as to Request IX, it was denied altogether (A461).

In its charge, the court merely stated in general language that in determining the issue, the jury should consider "the witness' capacity to observe, under the particular circumstances of the instant case, and the ability of

35. VIII. As to eyewitness identification:

The prosecutor introduced the testimony of three witnesses, who identified the defendant as the perpetrator of the crime. In evaluating this testimony you must consider the following factors in determining the reliability of the identification evidence:

(1) The nature and quality of the lighting at the scene of the crime; (2) Whether the witnesses were intoxicated or fatigued; (3) The amount of time the witnesses had to observe the perpetrator of the crime; (4) Whether the identification was made under conditions of stress and fear; (5) Whether the descriptions originally given by the witnesses to the police were different from the actual physical characterstics of the defendant; (6) Whether a considerable period of time lapsed between the witnesses' view of the criminal and their identification of the defendant; (7) Whether the police employed any means to obtain evidence of identification which were unduly suggestive or otherwise prejudicial to the defendant; (8) Whether the fact that the witnesses and the person identified were of different racial groups had an adverse effect upon the identification.

IX. As to the inherent dangers in eyewitness identification:

I must caution you that evidence as to identity based upon personal impression, however bona fide, is not infallible and should be received with caution.

the witness to state the results of such observation" (A 482-83). The court also stated generally that the jury should consider the physical conditions existing at the scene, the lighting and the opportunity of the witnesses to observe (A487). He did charge that unduly suggestive identification procedures would cause a rejection of the evidence (A485-86).

Each of the eight specific conditions listed in Request VIII were present as evidentiary facts in this case. Each one is considered a "danger signal" which "should give warning that the identification may be erroneous even though the method by which it was obtained was a proper one". Wall, *Eye Witness Identification, supra,* at p. 90; cf. *Neil* v. *Biggers, supra.* The jury was never informed of this despite a proper defense request.

In *People* v. *Montesanto, supra,* 236 N.Y. at 406-407, the trial court merely alluded generally to the fact that an identifying witness, who knew the defendant, failed to identify him on prior occasions although defense counsel requested a specific instruction as to the effect of this evidence. This Court reversed the conviction, holding:

> "This was an entirely insufficient presentation to the jury of the vital question upon which the life of the defendant depended."

The conviction in this case should be reversed on the same ground.

Moreover, a large number of the danger signals were present below and when added to the potential of undue suggestibility that existed, the cautionary instruction as to the inherent dangers in eye witness identification which was requested in Request IX, should have been given.

In *People* v. *Diaz, supra,* 8 AD 2d 732, the court reversed a conviction because, under the circumstances of the identi-

fication, the court should have instructed the jury to be cautious before accepting the evidence of identity.[36] In accord: *United States* v. *Barber,* 442 F.2d 517, 525 (3 Cir, 1970), holding that such a charge is necessary where any one of the major elements of reliability is absent.

Since identification was the crucial issue in this case and since the identification evidence was weak and open to grave doubt, it was reversible error for the court below to refuse to give the requested instructions, and the conviction should be reversed on this ground.

POINT III

It was reversible error to preclude the defense from calling a lighting expert to rebut the prosecution's expert and lay lighting witnesses.

The lighting at the scene was vigorously at issue. The prosecution was permitted to show that the street lighting was not only adequate, but was twice the amount normal for city streets and was sufficient to enable persons to identify other persons, read newspapers and paint pictures.

The defense argued misidentification. The crime was committed at night. The defense claimed that the street lighting was poor, and hence the prosecution witnesses could not have seen Kroll's assailant with the clarity they claimed. The defense was precluded from rebutting the prosecution testimony on this issue.

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36. This case was followed in *People* v. *Martinez, supra,* 28 AD 2d 913, where the court stated that even though the defendant's requested charge was "seriously deficient" it should have elicited some "cautionary instructions to the jury as to the circumstances under which the identifications were made." In accord: *Commonwealth* v. *Kloiber,* 106 A 2d 820, 827 (N.J. 1954) and *Commonwealth* v. *Wilkerson,* 203 A 2d 235, 237 (N.J. 1964). Many cases in other jurisdictions are also in accord. Wall, *supra,* at 196-198.

Since no rebuttal was permitted, the prosecutor could claim in summation that the crime took place on a well lighted street, aiding his witnesses to make accurate identifications. The defense could not make any contrary argument because the jury never heard its evidence.

A defendant "may not be deprived of the right to summon to his aid witnesses who, if believed, may offer proof to negate the State's evidence or to support his defense." *United States* v. *Seeger,* 180 F. Supp. 467 (SDNY, 1960). The court below denied this right to the appellant. This was prejudicial error.

Moreover, it is axiomatic that where a trial court permits a prosecutor to offer a certain kind of evidence on a material issue, the court must admit the same kind of defense evidence in disproof.[37]

The facts pertaining to the lighting issue are:

The second prosecution witness, Irving Weinstein, an expert in street lighting (411), testified *on direct,*[38] as to the kind of lighting at the scene of the crime (415) and as to the amount of light emitted from the various light fixtures (416, 419). Weinstein testified *on direct*[38] that as the result of tests he took in May, 1960, he concluded that the average light in the area was 1.5 foot-candle (423-26). Weinstein concluded and stated *on direct*[38] that, given such

37. See *People* v. *Dewey,* 23 AD 2d 960 (4th Dept.), reversing a trial court, which permitted evidence from a State expert on the trajectory and flights of bullets, and refused to permit defense expert testimony on the same subject; and *People* v. *Jackson,* 10 NY 2d 510, 513-14 (1962), reversing a trial court which refused to permit the defense expert to state whether the defendant understood the nature and quality of his acts, and then permitted the prosecution expert to give this same testimony and where, as here, the prosecutor, in summation, stressed this evidence.

38. The majority decision in the Appellate Division states, quite incorrectly, that the "so called expert testimony [by Weinstein] * * * was testimony, elicited *for the first time during defendant's cross-examination* * * *" (emphasis added). The decision to affirm is entirely predicated on this erroneous assumption of fact.

lighting, one with 20-20 vision could read the small print of a newspaper with difficulty (A16).

Weinstein stated, *on direct*[38] over defense objection, that the lighting on Sixth Avenue and West Fourth Street was twice "the standard set as the proper standard of the City of New York for lighting of streets" (A17-18).

On cross, Weinstein admitted he used a mathematical formula, not a light meter reading, to calculate the amount of foot-candles (462). He admitted that the light meter reading was difficult to take and that "the needle [on the light meter] barely moved" (468). On redirect, he stated he had a reasonable degree of professional certainty that his mathematical calculation was reliable.

Weinstein testified *on direct,*[38] the lighting from a playground on Sixth Avenue contributed to the lighting on the west side of the street, since

> "you can see better because you get a light—they [the playground lights] offer a light background and illuminated background against which you can see a person or any object." (A15)

On cross, he adhered to his opinion that this "silhouette lighting" made it easier to see faces and features (452, 458, 473).

In answer to a hypothetical question *on direct,*[38] Weinstein gave the opinion that if windows of a bank on the southeast corner of West Fourth and Sixth Avenue were lit,"[39] that the bank light "would aid in visual observation

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38. The majority decision in the Appellate Division states, quite incorrectly, that the "so called expert testimony [by Weinstein] * * * was testimony, elicited *for the first time during defendant's cross-examination* * * *" (emphasis added). The decision to affirm is entirely predicated on this erroneous assumption of fact.

39. The prosecution later called *Edward Powers,* the branch administrator of the Banker's Federal Savings and Loan Association—at Sixth Avenue and West Fourth Street—to give evidence that the bank lights were on during the night in question.

because you could see objects against that illuminated background'' (A19).

Although the prosecution expert was permitted to give this testimony, when **Charles Levy**, a lighting consultant, was called by the defense, he was only permitted to state his name, address and occupation (2951). The trial court refused to permit Levy to give any testimony at all.[40]

The prosecutor objected to having the witness testify, either as to the results of any tests made or to contradict his expert (2854-56). Defense counsel stated that the prosecution expert had given expert testimony on this same subject (2856).

The court ruled that Levy could not testify (2857):

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40. In support of Levy's testimony, the defense made the following offer of proof (2852-54):

> *Mr. Steel*: Well, I will go down in order, if I can.
>
> He is going to testify with regard to whether or not a mathematical formula to determine foot-candles of given bulbs is more or less accurate in meter reading. He will testify that meter readings are by far the more accurate way of measuring light. He will testify that if you use a formula such as the formula Mr. Weinstein used you get up to fifty per cent error possibility, due to the fact that lights are dirty, they depreciate constantly.
>
> He will further testify that silhouette lighting is a negative factor in making an identification; that is, if you have lighting such as lighting that has been testified to here in this court, in a bank, behind a figure, the effect of that lighting is that it's more difficult to see the features of a given person in that regard.
>
> The witness will also testify that October 25, 1970 at 4:00 a.m. in the morning, he did go down to * * *
>
> * * *
>
> he did go down to the site, and did—standing in the corner of Third Street, observe the bank on the other side of * * * Fourth Street with the lighting on, as testified to by the bank manager, did observe people in front of the bank and in theory as well as practice the bank made it much more difficult to make an identification.
>
> He will testify that any reading of up to 1.5 foot-candles is an extremely low level of light; and at that level of light, persons have extreme difficulty in making accurate identifications. And he will further testify that at low levels of lighting it is more difficult to see the details on dark objects, of dark people, as compared to light objects or light people."

> "The Court: * * * the offer is rejected. To let this man express any opinion as an expert as to what anybody else could or did see three years ago is to put him in the position of the jury, and I will not let him give an opinion on that. All the offer of proof is rejected, and the man is going to be invited to step down."

This ruling was made despite the fact the court had permitted two other prosecution witnesses, who were not eyewitnesses, to give their opinions, *on direct examination,*[41] to what people could see on the night in question before the defense called Levy as a witness.

Patrolman Gardella had testified that he was familiar with the lighting at the scene (653-54):

> "(Mr. Sawyer): What would your opinion be as to the state of the lighting in that area on the morning of April 3, 1967?
>
> A. I would say the lighting was fair. You could see other people in the area right next to you. You could read a newspaper. On occasion, twice a year, they have an art show * * *."

This art show became a matter of testimony, *on direct.*[41] Over objection, Gardella stated that artists on Sixth Avenue between West 3rd and West 4th Streets paint pictures there at midnight using only street light illumination (653-56).

The prosecutor was also permitted to elicit an opinion on the lighting in the area from Patrolman Dowd *on direct examination* (565).[41]

Both Dowd and Gardella testified on cross that their opinions were predicated on the existence of certain flood lights which the prosecutor was forced to concede did not exist on April 2, 1967 (610, 668).

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41. The majority opinion below ignores the fact that these lay witnesses were permitted to give this opinion evidence on direct.

In marshaling the evidence, the court never told the jury that Dowd's and Gardella's testimony as to the lighting was based upon conceded mistakes of fact about the lighting, and that the jury should take these mistakes into account when assessing the reliability of their testimony and opinions on the lighting conditions existing in 1967 (A501-3).

The prosecutor, in summation, stated that Weinstein's testimony established that his witnesses' identifications were made on a "well lighted street" (A455-57), stressing the testimony that the lighting was "double the standard for the City at the time" (A457).

The court charged the jury that in determining the accuracy of the identifications, the jury "should consider * * * the lighting conditions * * *" (A487).

Thus, the prosecution had the benefit of unrebutted testimony from Weinstein, the expert, and from Dowd and Gardella that the lighting at the scene of the crime was 1.5 foot-candles; that it was double the New York City standard; that it provided a curtain of light facilitating identification; and that given this amount of light, a person could read a newspaper, paint a picture, or recognize another person at a distance of twenty feet.

The defense expert would have rebutted virtually all of the prosecution's lighting testimony.

Weinstein stated the area was illuminated by 1.5 foot-candles and had arrived at this figure by a mathematic formula because he could not get a meter reading. Levy would have testified that the mathematical formula used was subject to a 50% possibility of error, and that a meter reading, which it was too dark for Weinstein to obtain, was the accurate means of measuring light (2852).

Levy would have testified that Weinstein's "silhouette lighting" did not make it easier to see a person's features,

and in fact made it more difficult to see the features of a dark person standing in front of such an illuminated background (2853).

Levy would have testified—contrary to Dowd's and Gardella's testimony that the level of light was sufficient for another person to read a newspaper, paint a picture, or recognize another person at twenty feet away—that any light level of up to 1.5 foot-candles was extremely low and that at this low level of light, it is more difficult to see the details on dark objects, or dark people, as compared to light objects or light people (2854).

The judge refused to let Levy express his opinion on what anybody else could see three years before, but he had no compunction about permitting testimony from prosecution witnesses that persons on April 3, 1967 could read newspapers, paint pictures, and recognize people at twenty feet. The judge also restated these lay opinions even though they were premised on the concededly mistaken assumption that flood lights actually existed on April 3, 1967 to illuminate the area.

The court denied "the possibility of knowledge" by an expert, while admitting lay opinions from non-experts who made mistaken assumptions of fact about the physical condition of the lighting. In excluding expert opinion upon a subject where "certain and accurate results are difficult to reach and upon which most persons' opinions will be merely notional and conjectural," the court accorded to the non-experts the "exclusive privilege of guessing." This is "obnoxious to the modern principle of receiving whatever light can be thrown upon the issue by competent persons and leaving their credit to the jury." Wigmore, *On Evidence* (3rd Ed.), §662, Vol. II, pp. 775-6.

The ability of the prosecution witnesses to make accurate identifications at 4:30 a.m. on a city street was

directly in issue. The prosecutor, *on direct,* was permitted to prove through three witnesses that the street was sufficiently well lit to permit newspaper reading, picture painting, and recognition of other persons at twenty feet. The majority opinion below is predicated upon a misunderstanding of the record and is entitled to no weight. This dissent correctly held that "* * * this was error of such a nature as to deprive defendant of a fair trial and, alone, mandates a reversal" (A4). It was reversible error to deny the defense the opportunity to offer testimony directly contradicting the prosecution evidence in order to cast doubt upon the accuracy of the eye witness identification.[42]

POINT IV

It was error to admit physical exhibits in evidence over objection they were not properly connected. This error was compounded by the prosecutor's improper argument.

A tan plastic bag (Peo.'s Ex. 21) and its contents (Peo.'s Ex. 40),[43] were admitted into evidence over objection that their relation to the crime had not been established (A104-05). The importance of the bag was stressed by the prose-

42. This was not the only error which contributed to the illusion that the scene was well-lighted. People's Exhibit 1, the diagram of the scene, was admitted over objection (358, 363), even though the lighting apparatus were drawn larger than scale (358, 363). The engineer authenticating the diagram admitted that this caused the lights to appear substantially larger than they were (358, 363), and that if drawn to scale, the lights would have been represented by marks "a little bit larger than a pin prick" (377). The jury saw the diagram every day for weeks, even though the size of the lights was exaggerated.

Diagrams are "not admissible into evidence without proof of their accuracy and correctness by the person making them. * * *" Richardson, *Modern Scientific Evidence,* §20.5, p. 476, hence counsel's objection was well taken and the diagram should have been excluded unless redrawn to scale.

43. Consisting of a washcloth, toothbrush, a metal aspirin box, a flashlight, a piece of rope or twine, and a piece of wire.

cutor both in his opening and summation (339-40, 3515, 3583, 3590, 3650). Opening, the prosecutor referred to the bag as "highly significant in this case because it provides a solid link of evidence in this case" tying the defendant to the murder of Sergeant Kroll (339); and in summation the jury was told the bag "points an accusing finger at that man (indicating defendant) at that defendant" (3515).

The prosecution never established that the bag was in the possession of any person involved in the homicide. It had no relevance to the commission of the crime, and its evidentiary value, if any, was so slight and its prejudicial effect so great that a reversal is required because it was received in evidence. The dissenting opinion below agreed that there was no proper foundation for introduction of this evidence and its receipt into evidence was error (A6).

No item of real evidence can be received unless a proper foundation has been laid for its admission.[44] When the offer implies a personal connection with an object, "that connection must be made to appear * * * else the whole fails." Wigmore, *supra,* §2129, p. 564. This is especially so "when a corporeal object is produced as proving something" for there is a "general mental tendency * * * to assume, on sight of the object, all else that is implied in the case about it. The sight of it seems to prove all the rest." Wigmore, *supra,* §2129, p. 565.[45]

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44. "Objects or things offered in evidence do not generally identify themselves. Accordingly the demonstrative evidence must first be authenticated by testimony of a witness who testifies to facts showing that the object has some connection with the case which makes it relevant." McCormick, *On Evidence,* §179, p. 384; Richardson, *On Evidence* (9th Ed.) §128, p. 101.

45. Wigmore gives the following, very appropriate, example of this:

> "Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand when Doe is proved

The prosecution sought to prove that the appellant shot Sergeant Kroll through the testimony of three eye witnesses, whose ability to make an accurate identification was hotly contested. No murder weapon or other tangible physical evidence was ever found. The prosecutor relied upon the bag to provide the "solid link of evidence in this case tying the [appellant] to the murder."

The bag did not identify itself as an object having an inherent connection or relevance to the shooting, as, for instance, a bag containing a crowbar might to a burglary case. It was not relevant because it bore the appellant's fingerprints, or because it was found near the body and contained personal items traceable to the appellant, or because it looked like an item the appellant possessed at the scene, which was later found in his possession. See *People* v. *Miller,* 17 NY2d 559 (1966).

Peo.'s Ex. 21 was a camera type bag or tourist type bag, which many people ordinarily carry, and which did not particularly call attention to itself (1577-78). Fifteen hours before the crime, Fox, the taxi driver, allegedly saw a bag "something like" (1555) Peo.'s Ex. 21, in the possession of an unidentified white man whom he said was with the appellant.

Neither Crist nor Morris, two eyewitnesses, ever saw the black man or the white accomplice with Peo.'s Ex. 21, or for that matter, carrying *anything* at all (1408; 851, 852, 894).

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to have lost the horse, that it still remains to be proved that Roe took it; the missing element can clearly be kept separate as an additional requirement.

But if the witness to the theft were to have a horse brought into the courtroom, and to point it out triumphantly, 'If you doubt me, there is the very horse,' this would go a great way to persuade the jury of the rest of the assertion and to ignore the weakness of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder." Wigmore, *supra,* §2129, p. 565.

Feebles, the third eyewitness, who saw a variety of things that night, said he saw the unidentified white accomplice throw away "an object" on Washington Place. No attempt was made to prove this unidentified white accomplice was the unidentified white man Fox saw some fifteen hours earlier. Feebles could only state that this "object" was "a bag or paper bag". On redirect, in response to specific questions, he testified that when the object was thrown he did not see what it was, couldn't tell its color, and thought that it could have been a bag or a shopping bag—in fact it "could have been anything" (1129).

Feebles testified this thing was thrown into the street, and that he was present later that morning when a tan plastic bag was found on the street beneath a car (1004, 1086). In constrast, Crist, who had never seen the bag before, testified that he found a bag "similar to" Peo.'s Ex. 21 (839) "down into the steps leading into the basement of a building". He did not remember where he found it but though it was 2 or 3 blocks from the scene of the crime.

Detective Ernest Sperduto, the prosecution fingerprint expert, found no latent prints on the bag or its contents, although he examined it the same day it was found and although surfaces on the bag and certain of its contents had good surfaces for holding latent prints for months (1708-12).

The prosecutor had sought to question Detective Joseph Cordes, his ballistics expert, about the uses to which such a bag might be put assuming that a certain type of gun had been used in the killing, but the court refused to allow any of this (1762).

Thus, Crist found a bag he had never seen. Feebles, the only witness who saw a "thing" being thrown away by the

unidentified white accomplice, could not even say Peo.'s Ex. 21 looked like that "thing". Feebles saw some "thing" thrown on the street; Crist found the bag on the steps to a basement. Fifteen hours before, Fox had seen some unidentified white man with a nondescript camera type case, which looked "something like" Peo.'s Ex. 21. No fingerprints were found on the bag.

The appellant denied that the bag was his and none of his witnesses ever saw it before Gallina showed it to them prior to the first trial.

The prosecution sought to establish that the appellant was in the cab and was at the scene of the crime. The one tangible piece of evidence it could muster "to point an accusing finger" at the appellant was Peo.'s Ex. 21. There was not the slightest bit of proof to show that Peo.'s Ex. 21 was the object Feebles saw being thrown on Washington Place. There is not the slightest proof that the bag found by Crist on the basement steps of a building was the same bag which Fox saw fifteen hours before. See, *People* v. *Kinney,* 202 NY 394-96 (1911).

In his opening, the prosecutor claimed he would prove that Feebles saw the white man drop "a brown camera type case with a strap"; that this same brown camera case had been seen by Fox inside appellants' cab "a bare fifteen hours" before the crime and that this same case had been recovered by the police after the crime (339-40). The proof at trial established none of this.

Despite this, and over specific objections, the prosecutor in summation was allowed to suggest to the jury that the shotgun used in the homicide might have been carried in this bag, because the gun, which was never recovered, could be broken into small enough pieces to fit and then "assembled quickly and fired" (3505).

This case is no different than *People* v. *Hetenyi,* 277 AD 310 (4th Dept., 1950), aff'd 301 NY 757 (1950), reversing a conviction because of improper receipt of a gun holster into evidence and because of the district attorney's improper references to this evidence in summation.[46]

This case is, in fact, stronger than *Hetenyi,* first, because there was no evidence that a bag similar to Peo.'s Ex. 21 was ever in the appellant's possession; second, because there was no evidence that Peo.'s Ex. 21 was the "object" Feebles saw on April 3.

The prosecutor used the bag in summation precisely as the horse was used in Wigmore's example—as produced, therefore as proving all else that is implied in the case about it. Wigmore, *supra,* §2129, p. 565. He told the jury Feebles saw (3583):

> "two persons running, the defendant running hard, and the white man, they went by his cab * * *. They went around Washington Place and Michael Feebles got out of his cab and he followed, and he *saw something,* an object, a paper bag, what difference does it make, *thrown at a certain point, and when* he came back *this bag was at that certain point.*" (emphasis added)

In Wigmore's words, if you doubt him, here is the very horse. The prosecutor's using the bag to bolster Feebles testimony this way was doubly misleading because the evidence did not even establish that Peo.'s Ex. 21 was found "at that certain point." Feebles said it was, but Crist, who found it, said it was on the steps leading to the basement of a building.

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46. In *Hetenyi,* the defendant was charged with murder and the holster was found next to the body. A prosecution witness testified that the holster was similar to one he had earlier seen in the defendant's possession. There was evidence the holster could accommodate the type of gun (never recovered) used in the killing. The prosecutor argued these facts made clear that the defendant possessed the holster "and that without question it includes the gun."

The prosecutor used the bag to bolster Fox's testimony in precisely the same manner (3590-91):

> "and not only does [Fox] put [the appellant] in a cab, he puts him in a cab with a white person, *with this bag, which was thrown away or dropped by the defendant* or his white companion." (emphasis added)

Now it is not only, 'if you doubt him, here is the very bag'—but, 'here is the very bag which Fox saw, which the defendant dropped'. The evidence cannot, under any stretch of the imagination, justify the prosecutor's statements. Fox did not say Peo. Ex. 21 was the bag he saw, he said it looked "something like" the bag but he did not know if it was the one (1578). No one testified that "this bag" was dropped by the white accomplice and no one *ever* said they saw it dropped by the appellant. Although the prosecutor has a right to comment on the evidence, he has no right to "go beyond the evidence", *People* v. *Fielding,* 158 NY 542, 547 (1899). Since he did so in this case, it should be reversed, especially since this was not an isolated instance of forensic misconduct. (See also Points I, V, IX).

POINT V

It was prejudicial error to receive an alleged admission by conduct over defense objection.

The prosecutor offered to prove Howard Fox would testify that when he saw the appellant in the police station a few months after the crime, Fox recognized the appellant and when the appellant saw Fox look at him, the appellant "then turned his head" (1588). The prosecutor offered this not only as evidence of a prior identification, but also "as an admission by conduct of the [appellant], because I claim that in looking at this man, [the appellant] in effect

recognized him and turned away" (1588). It was received over defense objection.[47]

The conduct proved at trial was that when Fox came into the room the appellant looked at Fox, Fox looked at the appellant, and the appellant turned his head to the left (A100). Fox didn't know why the appellant turned his head (A101).

This exchange of glances by the appellant and Fox, months after the crime, was not especially dramatic or portentious, as, for instance, was the conduct of the defendant in *People* v. *Olasan,* 49 PI 146 (Phillipine Islands, 1926). In *Olasan,* an Igornot Indian was charged with murder. He was shown to have been present at a family feast on dog and chicken the night after the deceased was killed, the feast being one traditionally used to celebrate the death of an enemy.

The evidence of the defendant's conduct in *Olasan* was admitted as probative on the issue of consciousness of guilt. The evidence of the defendant's conduct in this case should have been excluded on the ground that it was not probative of anything.[48] Refusal to exclude it was error.

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47. A *voir dire* was held on the offer, at which Fox stated (A100):

> "Well, I saw [the appellant] sitting by the window and I looked at him and he turned a little bit. *I don't know if it was to avoid seeing me or what* * * *" (emphasis added).

After the *voir dire,* defense counsel moved to exclude Fox's testimony and for a mistrial, and the court denied the motions (1630-31).

48. See, Maupassant, Guy de, "The Piece of String," *Collected Short Stories,* translated by Roger Colet, Penguin Classics (1971), where a frugal French peasant at a fair saw a small piece of string on the ground, picked it up and pocketed it, reflecting "that anything which might come in useful was worth picking up," and then felt a bit shamefaced, so "pretended to go on looking for something on the ground which he couldn't find." A black wallet containing 500 francs was lost and the peasant, on the basis of the conduct described, was accused of picking up the wallet and then continuing to hunt "about in the mud for some time to see whether some coin might not have fallen out."

On the basis of the "bit of string" in this case, the prosecutor made the following argument to the jury (3595-96):

> "And there comes a time when [Fox] goes into the station house, and I will deal with this later, *but it is so important, I will emphasize it now,* and he sees the defendant, and what does the defendant do?
>
> Like that. He sees the defendant and what does the defendant do? He turns his head.
>
> * * * when you add this fact to all the other facts in the case it is just another piece of evidence that ties this defendant to the murder of Sergeant Kroll, *because you see what happened* not only did Mr. Fox identify [the appellant], [*the appellant*] *identified Mr. Fox—recognized Mr. Fox,* that this is the guy that was in the cab. He turns his head." (emphasis added)

This argument had no basis of fact, as Fox had stated that he did not know why the appellant had turned his head. Similar, but less egregious conduct by a prosecutor was held improper in *People* v. *Messapella,* 19 AD 2d 729, 730 (2d Dept., 1963).[49]

In view of the fact that this was not the only instance of improper summation by the prosecutor in this case (see Points I, IV and IX), this error cannot be deemed harmless.

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49. Where the prosecutor stated that two eyewitnesses to the crime were "frightened and harried" although there was no justification in the record for such a statement. In *People* v. *Williams,* 29 AD 2d 780 (2d Dept., 1968), it was held prejudicial error for a police officer to make "a conclusionary statement describing the defendant's behavior when he was walking rapidly down the street to the effect that he looked 'like he wanted to get away from some place.'" The error here is even more egregious than in *Williams,* because the prosecutor below was not a witness to the exchange of glances between Fox and the appellant, but made himself an unsworn witness in summation as to the meaning of this behavior.

The dissenting opinion below, holding that both the trial court's ruling admitting the "evidence" and the prosecutor's summation "were improper and error prejudicial to defendant" (A5), should be adopted by this Court.

POINT VI

It was reversible error and a denial of due process for the court below to preclude proof that another person confessed to the Kroll homicide.

In the spring of 1970, Adrian Connor, a prison inmate, confessed that he fired the shot which killed Michael Kroll. The confession was transcribed by the prison warden and later amended in writing by Connor himself. It was lucid and coherent,[50] and the facts stated by Connor corresponded to the evidence presented below concerning the circumstances of the crime. The confession was not turned over

50. In February of 1970, Connor asked for an interview with the warden in the presence of the Catholic Chaplain to confess to murder. The warden took notes of this, and Connor stated that in March or April of 1967 he was in the Village on a Saturday or Sunday night. He saw a fight involving two fellows and a policeman led one away. When Connor tried to pass by the other man, he would not let him pass and told him that he had already knocked one sucker on his ass and wouldn't mind knocking another one. They had an argument and then Connor's buddy pulled him away. As Connor and his friend were walking on West 4th Street, a car came up and almost ran them down. Two men came out of the car—one of them was the man who had been fighting on West 3rd Street.

In this statement Connor claimed that someone whom he didn't see fired at the man. However, on March 2, 1970, Connor again wrote to the warden and said that he shot the man with a shotgun and then took a plane to Miami the next day.

Connor's confessions were turned over to defense counsel (Def.'s Ex. AA for Identification). The court then appointed a Legal Aid Society lawyer to represent Connor (1898).

After the attorney spoke to Connor, he asked that Connor be examined psychiatrically (1907). The attorney also stated that Connor would refuse to testify and would invoke his Fifth Amendment privilege against self-incrimination (1912).

The court ruled that defense counsel had no right to call a witness who would invoke the Fifth Amendment privilege (1912).

to defense counsel until November, even though the prosecutor was aware of it in April (1887).

Despite repeated defense requests, the court below refused to direct the prosecutor to state whether he had information as to Connor's whereabouts on April 2 (1987-89, 2471-72).[51]

The trial court refused to allow the defense to call Connor as a witness although an *ex parte* examination of him by two Bellevue psychiatrists, ordered by the court (1918), showed that he was sane and capable of participating in the proceeding.[52]

Connor, however, testified out of the presence of the jury (2482). The judge asked him whether he would refuse to testify on Fifth Amendment grounds. He answered yes (2483). Defense counsel was permitted to ask Connor whether he confessed to the Kroll homicide (2484) and Connor again invoked the privilege (2485). The court excused the witness (2485) because it would be "improper and illegal" for him to invoke the privilege before the jury (2483-84). Defense counsel objected, citing *People* v. *Brown,* 26 NY 2d 88 (1970) (2485). The court overruled the objection (2485).

51. The trial court also denied defense requests for Connor's yellow sheet, a mug shot and full description of him, and any information the prosecutor may have had concerning his mental condition on the dates of his confession (1986-87).

52. It should be noted that the psychiatrists judged Connor to be competent to stand trial, the test of sanity for defendants (Code Crim. Proc. §622). This is a far higher standard of competence than required for a witness. See, *Aguilar* v. *State,* 279 AD 103 (3d Dept. 1951) where it was held reversible error for the trial court to exclude the testimony of three witnesses who were inmates in a state mental institution. The court held (279 AD at 104):

> "The capacity of an adult witness is presumed, and to exclude a witness on the ground of mental incapacity, the existence of the capacity must be made to appear * * * a commitment to a mental institution or an adjudication of incompetency does not render a witness incompetent as a matter of law. * * *"

The trial court then refused to permit Connor's written confession into evidence[53] and refused to permit defense counsel to subpoena the warden despite repeated defense citation to *People* v. *Brown, supra* at 93, holding that declarations against penal interest of third parties who "will not testify and cannot be compelled to testify because of a constitutional privilege" are admissible in evidence. The *Brown* holding is now one of constitutional magnitude. *Chambers* v. *Mississippi,* 410 US 284 (1973).

Under *Brown* and *Chambers* the jury had a right to hear that Connor confessed to the crime for which the appellant was being tried, as this evidence was relevant, material and admissible on the question of the appellant's guilt, and appellant had a due process right to present it.[54]

The position of the prosecutor apparently was that Connor's confession could not be received because two Bellevue psychiatrists had concluded that it was "totally and completely without substance" (2492-95).[55] The trial court expressed happiness to have this finding made part of the record, stating "it fortifies my action in sending this man back to Attica" (2495).

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53. Although defense counsel had a right to have the rejected evidence marked for identification and to have it identified for the record as the same document turned over to him by the prosecutor (*People* v. *Santorelli,* 228 AD 2d 705 (2d Dept., 1930)), the court held him in summary contempt for attempting to have the evidence so identified.

54. This is not a case where the police badgered a declarant to confess to a crime and where the confession was finally made in a manner devoid of any sincerity. *People* v. *Donahue,* 23 N.Y.2d 1002 (1969). Connor confessed to the Warden in the presence of a Catholic priest. He had confessed to no other crime, had never asked for reward or benefit and repeated the confession to another person (see n. 57, *infra*) after he was found competent. There was no publicity about the crime when he confessed and he gave details only the killer could know.

55. The prosecutor had neglected to read into the record that portion of the report which found Connor sane and capable of participating in the proceedings.

Both the prosecutor and the court felt that since the psychiatrists did not believe Connor's confession, the jury should not hear it. This is a total misconception of law.

First, the psychiatrist's report was improperly received over objection that the psychiatrists were not witnesses subject to cross examination. The Appellate Division, Second Department so held in *People ex rel. Daniels* v. *Johnston,* 28 AD2d 999 (2 Dept., 1967).

However, even assuming that the psychiatrists had been witnesses, their opinions as to Connor's *veracity,* as opposed to his mental competence, were totally inadmissible and irrelevant, and this Court so held in *People* v. *Williams,* 6 NY2d 18 (1959).[56]

The *Williams* case did not announce a startlingly new principle of law, and its applicability to this case is clear. *"The trier of fact determines the weight of a declaration against evidence."* Fisch, *New York Evidence* (1965), §903, p. 448. In accord, *United States* v. *Glenn,* 473 F.2d 191 (D.C. Cir., 1972), where the court ruled a dying declaration admissible despite the fact the declarant was an alcoholic and blood tests showed him intoxicated at the time the declaration was made, holding that these factors went to the weight, not the admissibility, of the statement. Moreover, in ruling on the *admissibility* of evidence, the trial judge cannot exclude evidence (even where he is the trier of fact) on the ground that "he would give no weight to

56. In *Williams,* the defense offered to prove, through live psychiatric testimony, that a prosecution witness lied and because of narcotics addiction was not worthy of belief. The trial court rejected it because "this witness could not pass upon the credibility of another witness * * * that was solely for the jury to determine." 6 NY 2d at 22-3. This Court affirmed, holding that the credibility of any witness "was a conclusion to be drawn solely by the jury" and an opinion on the veracity of the witness "was exclusively in their province to render." 6 NY 2d at 23.

the testimony of these witnesses, and therefore it was useless." *Aguilar* v. *State, supra,* 279 AD at 104.

The utility or uselessness of any piece of *admissible* evidence is a jury question. This elementary point of law "upon [which] there can be no doubt" (*People* v. *Williams, supra,* 6 NY2d at 23) was more honored in the breach than in the observance at this trial. In instance after instance, the prosecutor tampered with or usurped outright the jury's function of deciding the weight and credibility of evidence.

The accuracy and reliability of the eye witness identifications, hence the strength of the state's case was nonexistent (see Point II). The defense alibi witnesses may have tipped the scale in the appellant's favor. Gallina, at the first trial, was not content to permit the jury to determine the credibility of these witnesses, so he conducted his own *ex parte* inquisition to nail down the testimony *he* thought the jury should hear (see Point VII).

The prosecutor below possessed evidence which *he* decided was not exculpatory, even though it was inconsistent with testimony given by his witnesses. He did not turn it over to defense counsel when there was a reasonable possibility that it could be put to use (see Point X). Thus the jury never heard anything about it to spoil the symmetry of the prosecutor's case.

The prosecutor decided that Connor's confession was a figment of Connor's imagination and hence the jury should not hear it. He was not competent to determine the credibility or the weight of this or any other evidence which was admissible at trial—the jury and the jury alone had a right to determine the believability and the weight of such evidence.

Connor's written confession should have been permitted into evidence under *People* v. *Brown, supra.* Once it was introduced, the prosecutor had a right to explain or qualify it by other evidence tending to destroy its probative force (Fisch, *supra,* §903, p. 448).

The jury would then have to determine its veracity and weight. Neither the prosecutor nor the trial judge had the power to withhold the confession from the jury simply because they had decided *they* did not believe it.

The excluded evidence was material, probative and admissible on the issue of appellant's guilt. Since it was improperly excluded from evidence at his trial for murder, his right to due process was denied and the judgment below must be reversed.[57]

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57. Appellant also moved for a new trial pursuant to Code Crim. Proc. §465 upon newly discovered evidence as to Connor and upon the affidavits of counsel and Alfred J. Gary.

Gary stated that on December 14, 1970, when he was returned to prison from the Tombs he was handcuffed to Connor. Connor told him that the appellant could not have committeed the crime "because I did it." Connor stated that he did not know how the appellant could have been convicted because "he did not even look like me."

Gary was shown the composite drawing of the man who killed Kroll (Def.'s Ex. E) and stated that it bore an extremely close resemblance to Connor.

Counsel's affidavit stated he interviewed the Deputy Warden and the Catholic Chaplain who heard Connor's confession. To their knowledge Connor had confessed to no other crimes while he was at Attica, and when making his confession Connor never asked for any reward or benefit.

According to counsel's affidavit, there was no publicity about the Kroll homicide during the months of February and March 1970, when Connor confessed.

The motion was denied without opinion on February 4, 1971.

POINT VII

The prior inconsistent statements from defense witnesses were obtained by fraud, coercion and improper inducements. They were inherently unreliable and should have been excluded at the trial below on the court's own initiative, or at the least, the trial court should have instructed the jury as to their proper use, as the defense requested.

Three defense witnesses at the trial below stated they had been coerced by former Assistant District Attorney Gallina into giving false or inaccurate statements prior to and at the first trial. These statements were used at the trial below as prior inconsistent statements to impeach their testimony and were introduced into evidence (3295-96). Gallina was called as a prosecution rebuttal witness. He did not refute the factual allegations these witnesses made as to his treatment of them. He merely testified as to his "motivation" in doing the various acts the defense witnesses had described.

Gallina's admissions as to his conduct prior to the first trial raises these questions: *first,* in the light of Gallina's conduct, could the prosecution at the second trial utilize the statements Gallina procured from these witnesses for impeachment purposes and, *second,* if these statements could be used for impeachment, did the court below properly instruct the jury on this matter.

We submit that the admitted methods Gallina used to secure these statements rendered them untrustworthy as a matter of law and hence they could not be used for impeachment purposes because the prejudice inherent in their use was far greater than their probative value. Given the fact that Gallina's conduct was "contrary to law and his authority, and that court process was used as a tool wrong-

fully to detain and interrogate defense witnesses" (Dissenting opinion, A9), the court below should have excluded the tainted statements on its own motion, to protect the integrity of the judicial process.

We further submit that even if these statements could be used for impeachment purposes, the court below improperly refused to instruct the jury to disregard them if they were found to be coerced, despite a defense request, and that a new trial must be ordered for this reason.

(a) When Gallina said he did in order to obtain the statements from the Quinns.

Gallina admitted that he caused Michael Quinn to be held in jail as a material witness even though (3201):

> "I never anticipated making him a prosecution witness. I just wanted to determine the truth as to the alibi. He never was a prosecution witness. I never called him as a prosecution witness. He was always a defense witness."[58]

In the *Practice Commentary* to the Criminal Procedure Law, §620.20, it is stated:

> "Subdivision 1 [of the new law] works an important substantive change in the law. *Formerly, only a witness for the people could be adjudicated a 'material witness'* and steps taken to assure his required attendance. The CPL extends such adjudication to one who

58. The prosecutor argued below that Gallina's conduct was legal because Gallina said, at one point, he reasonably expected to call Michael Quinn as a prosecution witness (App. Div., Brief, p. 110). This explanation conflicts with the record facts and the rest of Gallina's testimony. Gallina knew, on the day he jailed Quinn, that the latter was listed as an alibi witness; that Qunn executed an alibi affidavit; that Quinn verbally confirmed his affidavit a month before he was committed as a material witness and that Quinn repeated his statement in support of the alibi when Gallina arrested him. Gallina could hardly have believed that Quinn would be called as a prosecution witness when he jailed him.

> may be a 'material witness' for the defense." (emphasis added)

Gallina had no authority to arrest and detain Michael as a material witness. He perpetuated a fraud in invoking the court process for this purpose.

The record below also proves that, contrary to his sworn testimony, Gallina had no cause to believe that Michael and Giselle Quinn were concealing themselves in order to avoid being witnesses at the forthcoming trial. The record further proves that the prosecutor at this trial deliberately kept this fact from the jury.

Gallina testified he had caused an intensive search to be made for Michael and Giselle Quinn for a year before they were "apprehended" on April 25, 1969 (A301). Yet between March 25, 1968 and March 25, 1969, the following things had occurred:

(1) The defense bill of particulars listing Michael Quinn as an alibi witness was filed on April 22, 1968 (Def. Ex. GG for Ident.).

(2) On April 5, 1968, Michael Quinn appeared at 100 Centre Street and pleaded not guilty on Ind. No. 4305-67 and had bail fixed in the amount of $5,000. That indictment named as defendants both Michael Quinn *and* William Maynard, appellant in this case.

(3) Michael Quinn and William Maynard appeared at 100 Centre Street on this indictment on the following dates (Def. Ex. KK for Ident.):

May 7, 1968
October 7, 1968
October 21, 1968
November 15, 1968

January 7, 1969
January 21, 1969
February 19, 1969
February 24, 1969
April 7, 1969

The minuutes of February 18, 1969 and of April 7, 1969, verified that Michael Quinn appeared in person on at least those two dates and that the appellant also appeared in person (Def. Ex. LL and OO for Indent.).

It boggles the imagination to believe that Mr. Gallina was not aware of these appearances, especially since the appellant was Michael Quinn's co-defendant in the case. Yet, the prosecutor at the trial below deliberately prevented the jury from being apprised of these facts. He objected to Gallina's being asked in any fashion whether he knew of these ten appearances, the last of which occurred a scant two weeks before Gallina had Michael Quinn arrested upon Gallina's representation to the court that Michael had been concealing himself from the authorities for over a year.[59]

As was stated in *People* v. *Walsh,* 262 NY 140, 150 (1933):

59. Gallina stated on cross that he had looked for Michael for a year before he located him on April 25, 1969 (A301). No questions about Michael's nine court appearances during this period were allowed, on the ground of no foundation (A302). When the foundation was laid (A302-03), the trial court still refused to allow the impeaching questions (A305). When Gallina admitted having some knowledge of charges pending against Michael, the court refused to let the defense ask Gallina whether the police he assigned to find Michael ever told him that Michael was making regular court appearances at 100 Centre Street during the time Gallina could not locate him (A306). Defense counsel offered certified copies of two of the nine court appearances to show that Michael was personally at 100 Centre Street on those days, February 18, 1969 and April 7, 1969 (A356-57). The last was a scant 18 days before Gallina had him arrested as one who had concealed himself from the proper authorities for more than a year. Defense counsel was not permitted to impeach Gallina with this evidence, and the jury never heard any of it.

> "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting the accused parties on the testimony of untrustworthy persons."

This was not the only disallowed proof which would have put the lie to Gallina's testimony. The defense was also precluded from proving, through the manager and business records of the Park Plaza Hotel, that Michael Quinn had registered at the hotel under his own name, had lived there for six months, and had kept regular hours, came and went normally, and was not hiding in his room (3316).

Thus, even if Gallina had the authority to commit a *defense* witness to jail as a material witness (and he had no such authority under Code Crim. Proc §618-b), the commitment was illegal because the excluded proof showed that Michael "had made no attempt to avoid his duty to give testimony if called upon." *Matter of Prestisiacomo,* 234 App. Div. 300 (4th Dept. 1932).

It has been recognized that the privilege granted to a prosecutor by Code Crim. Proc. §618-b is abused if used as a "ruse" to hold and interrogate a prospective defendant. *People ex rel. Van Der Beek* v. *McCloskey,* 18 AD 2d 205 (1st Dept. 1963). Gallina had no authority to hold Michael Quinn as a material witness. His conduct in this respect was illegal, and was a ruse to permit him to interrogate a defense witness in a manner which the law did not permit. The justification he gave on the witness stand for his conduct was not candid. The prosecutor below concealed this lack of candor from the jury by interposing objections to the evidence which would have impeached Gallina and by vouching for Gallina's integrity in his summation (A435-36).

The record does not stop with this.

Gallina admitted that before Michael Quinn gave him the May 8 and May 22 statements, Gallina promised Michael Quinn immunity from prosecution even if he later learned that Michael was involved in the Kroll homicide (A248). Gallina admitted that before Michael gave him the May 8 and May 22 statements, Gallina promised Michael and Giselle that he would inform the Immigration Department of their cooperation, and that this cooperation was something the Immigration officials would take into account in deciding whether or not to deport Giselle (A235-36). Gallina admitted that before Michael gave the May 22 statement, he promised Michael to "make known to the court your cooperation as a valued witness" in the automobile larceny prosecution then pending against Michael (A281). Gallina revealed none of this at the first trial.[60]

In *People* v. *Savvides,* 1 NY2d 554, 557 (1956), this Court held:

> "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

In *People* v. *Mangi,* 10 NY2d 86 (1961), where the assistant district attorney promised that a witness's coopera-

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60. At the first trial, Michael was asked whether Gallina had made any promises or whether he was coerced by Gallina, and Michael denied this (F889-90, 908, 910). Gallina was in the courtroom when Michael gave this answer and Gallina made no effort to set the record straight even though he knew Michael's answer was inaccurate. In fact, Gallina argued to the jury at the first trial (F1436-37):

> "* * * Michael Quinn said I was never made any promises in any fashion to get me to sign anything, and he said the only thing Mr. Gallina ever told me is 'he wanted the truth.' He also testified, Michael Quinn, that he was not in fear of the police, he is not coerced into making the statements in any fashion whatsoever. * * *"

Gallina characterized the defense attempt to show Michael was promised consideration and threatened in order to change his story as "more smoke screen, more schmear, more straw men being thrown up" (F1437).

tion "would be called to the court's attention at the proper time" but did not acquaint the jury with this fact when the witness testified, this Court held:

> "In evaluating the crucial testimony of [the witness] and his wife, the jury should have been informed not only that [the witness] hoped to gain leniency by testifying adversely to the appellant, but that he had been promised by the District Attorney's office that its prestige would be brought to bear upon the court for the obvious purpose of gaining a lighter sentence."

Gallina importuned Michael Quinn to lie under oath concerning the non-existence of threats and promises. When Michael testified at the first trial denying the existence of threats and promises, Gallina knew that he *had* made promises to Michael Quinn, and that he *had* illegally arrested Michael Quinn and had threatened to deport Giselle Quinn in order to force him to change his testimony. He made no effort to correct the false impression the jury gained from Michael's denials of promises and threats, despite his obligation under *Savvides* and *Mangi.*

At the trial below the prosecutor used Michael's denials of promises and coercion at the first trial to impeach him (2258-63, 2242), and the trial judge castigated Michael for not going to "any judge, any district attorney, or public official" to tell them that he had been forced to lie under oath[61] (A132-33). Yet when Gallina testified that he had made the promises and threats, the court never took Gallina to task for having violated his affirmative obligation under *Savvides* and *Mangi,* to disclose these facts at the first trial, and never set the record straight before the jury. The prosecutor in summation glossed over the effect of

61. The trial court in fact directed the district attorney's office to obtain a perjury indictment at the conclusion of Michael's testimony (see Point XI).

Gallina's concealment by piously telling the jury that "Mr. Gallina's skills as an investigator are not the issue in this case" (A434).

The court, in marshaling the evidence, not only neglected to instruct the jury on the legal effect of Gallina's conduct but utterly failed to mention any of Gallina's admitted promises given to induce Michael to change his testimony at the first trial (see Point XV (7)).

The record does not stop here.

In the initial interviews Gallina had with Elizabeth, Patrick, and Kathleen Quinn in March of 1969, each of them told him that their alibi affidavits were true and that the appellant, William Maynard, was at the Quinn home on April 2-3, 1967 when Sergeant Kroll was shot and killed.

In the initial interview with Michael Quinn on April 25, Michael told him that the alibi affidavit he signed was true.

Kathleen Quinn never gave Gallina a statement denying that the appellant was at her mother's home on the night in question. She told Gallina in 1969, as she swore at this trial, that the appellant was there on the night of April 2 and the morning of April 3.

Since Mr. Gallina continually stated that his only object in questioning the Quinns was to arrive at the truth concerning the alibi, it is perplexing in terms of his stated motivation that he did not insist that defense counsel call Kathleen Quinn at the first trial, so that the jury could hear and evaluate her testimony.[62]

62. Cf. *People* v. *Schainuck,* 286 NY 161, 165-6 (1941), where this Court stated:

> "If there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show it is unworthy of credence, the defense should be given the benefit of it."

When Gallina had this information, we believe and we submit that his "absolute right at law and probably [his] moral obligations also" (A195) to question the defense alibi witnesses was fulfilled and had ended.[63] We submit that his further interrogation of them for the self-admitted purpose of destroying the appellant's alibi was contrary to law and ethics and beyond the scope of his function as a prosecuting attorney.

In 1888, in *Gandy* v. *State,* 24 Neb. 716, 40 NW 302 (1888), the Supreme Court of Nebraska was confronted with a case where a prosecuting attorney had persuaded defense witnesses not to testify at the defendant's trial. The court stated (at 304):

> "A prosecuting officer has no more right to attempt to dissuade the witnesses of the party accused of a crime from testifying that he would to induce them to leave the state. It will not do to say, as an excuse, that the witnesses would have testified to what was untrue. The jury is to determine the credibility of the witnesses, and a proper cross-examination of a witness will almost invariably test the truth of his statements."

We submit that this statement of the prosecutor's function is as valid today as it was 84 years ago. The law gave a prosecutor the pre-trial right of discovery in cases where the defense of alibi was interposed;[64] it did not give him

63. The prosecutor's power to interview alibi witnesses is not explictly bestowed by statute and in *People* v. *Rakiec,* 289 NY 306, 308 (1942), this Court stated that former Code of Crim. Proc. 295-e was enacted merely to enable the prosecutor "to learn something about those witnesses" in the same way that he was able to learn something about a defendant, i.e. by fingerprinting and investigation before trial. Under the view taken in the *Rakiec* case, Gallina exceeded the grant of authority bestowed by the statute even by interrogating the witness.

64. As the statute contained no reciprocal discovery rights for the appellant, it was undoubtedly unconstitutional under *Wardius* v. *Oregon,* 37 L.Ed 2d 82 (1973).

the right to conduct an *ex parte* inquisition with himself as inquisitor and judge and jury, and to harass, badger, threaten, and promise favors to defense alibi witnesses in order to make their stories conform to his notion of the truth. Mr. Gallina was not at the scene of the crime on April 3 when Crist had his argument with the black man and when Sergeant Kroll was shot. He might believe that his witnesses were telling the truth and that the defense alibi witnesses were mistaken, but his personal belief was irrelevant. This was the ultimate issue of the jury to decide and when he interposed himself between the witnesses and the jury as the truth-determiner, he denied to the appellant the due process of the law.

In *Bray* v. *Peyton,* 429 F2d 500 (4th Cir. 1970), the prosecuting attorney illegally arrested one of four defense witnesses who were willing to give testimony in the defendant's favor. As a result, three of the witnesses refused to testify for the defendant. The court of appeals in granting a writ of habeas corpus and ordering a new trial held (429 F2d at 501):

> "Thus, there exists strong probability that jailing of one of Bray's witnesses robbed him of his only defense * * * Even if not deliberate, the prosecuting official obviously obstructed the defendant's offer of exculpative proof. A blow to our adversary trial system, it was inherently prejudicial."

In accord: *U.S.* v. *Smith,* 478 F2d 976, 978 (D.C. Cir. 1973), where the court reversed a conviction, holding "[a] prosecutor may impeach a witness in court but he may not intimidate him—in or out of court."

(b) The statements which Gallina obtained from the Quinns as a result of his unlawful and harassing *ex parte* interrogation were inherently untrustworthy and their use and introduction into evidence for impeachment purposes should have been prohibited as a matter of law on the court's own initiative.

Gallina admitted that at their first interviews each of the Quinns stated that the appellant was at the Quinn home on April 2-3. Gallina admitted that they changed their statements only after he had worked on them for a two to three week period. The Quinns each testified under oath at this trial that their initial recollection was correct and that the inconsistent sworn statements and their first trial testimony was false and was given only because of the pressure Gallina put upon them to change their testimony.

We submit that the prior statements of the Quinns were obtained under circumstances which rendered them unreliable and hence inadmissible as a matter of law, and that their use and introduction into evidence violated appellant's right to due process of law and a fair trial.

Wigmore states that generally speaking, coercion of a witness goes only to the weight of his testimony and the truthfulness of his testimony, given the coercion, is a jury question. Wigmore, *On Evidence, supra,* Vol. III, §815, pp. 289-90. This is the New York rule *provided* that a witness "asserts that his testimony at the trial is truthful." *People* v. *Portelli,* 15 NY2d 235, 239 (1965).

Wigmore further states that in "criminal cases, the prosecution should be precluded from impeaching a witness by proof of a *coerced statement inconsistent with his testimony.*" Wigmore, *supra,* Vol. III, §815 at p. 290, n. 3 (emphasis added). There is no New York case in point.

The Wigmore statement is the rule in California, where the California Supreme Court held in *People* v. *Underwood,* 37 Cal. Rptr. 313, 319, 389 P2d 937, 943 (1964):

> "The same policy considerations which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary statement given as the result of pressures exerted by the police. Such a statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crimes."[65]

In this case, the trustworthiness of the impeaching evidence did not satisfy legal standards. The threats to Giselle and the promises to Michael as well as their illegal and unauthorized detention, were all circumstances which would have rendered Michael's statements inadmissible at common law, where the only test was whether the methods used to extract a statement would produce an inherently unreliable admission.[66]

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65. This view of the law on impeachment is supported by the recent Supreme Court case of *Harris* v. *New York,* 401 U.S. 222 (1971) where the Court permitted impeachment of a defendant by an admission taken in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), on the ground that such an admission, though in technical violation of the law, was not unreliable. In *Harris,* the Court was careful to state that such impeachment was proper "provided of course that the *trustworthiness* of the [impeaching] evidence satisfies legal standards." 401 U.S. at 224.

66. Prof. Wigmore, who was a vigorous opponent of the exclusionary rule, believed that a confession of guilt should be excluded only when it would have been excluded at common law. He states (Wigmore, *supra,* Vol. III, §822, n. 1, p. 329):

> "[The law] can take note of certain objective circumstances as leading with high probability to falsities. The circumstances which thus call for the rejection of a confession are usually described as involving a promise or a threat."

Elizabeth's and Patrick's statements fare no better. Gallina made it plain to both of them that Michael would receive favorable treatment and the threat to deport Michael's fiancee removed only when they gave Gallina the statements he wanted. This kind of threat to a relative is traditionally something which precludes use of a statement so obtained from a defendant. See *Lynumn* v. *Illinois,* 372 US 528 (1963); *Columbe* v. *Connecticut,* 367 US 568, 630-31 (1961); 80 ALR 2d 1428.

Gallina also violated the law when he falsely implied to Elizabeth that the appellant's fingerprints were on the brown plastic bag (A414). Gallina admitted he knew, when he made this statement, that there were no fingerprints on the bag or any of its contents (A415).

Former Penal Law §2442 reads as follows:

> "A person who * * * knowingly makes or exhibits any false statement, representation, token or writing to any witness or person about to be called as a witness * * * with the intent to affect the testimony of such witness, is guilty of misdemeanor."

Gallina's conduct in this respect cannot be reconciled with the clear direction of this provision of the law, and should not be condoned by this Court.

The testimony Gallina gave as to how he got Elizabeth Quinn to change her statement and become his witness cannot be reconciled with a search for the truth. Gallina got her to say that she could not be sure Maynard was at her home overnight because she retired early, and though the appellant was there when she retired, she merely "presumed" he stayed overnight (A270). This was the height of sophistry.

Given this unshaken recollection on Elizabeth's part, it was totally improper of Gallina to accept her sworn statement "which would in essence be in opposition to a previous sworn statement" (A270) which she only agreed to give after Gallina had her speak with Michael. If Gallina's real interest was in ascertaining the truth, then he could not have accepted her sworn statement denying knowledge of the appellant's whereabouts on April 2-3, because he knew, on the basis of his questioning of her, that she believed the appellant was at her home on that night when she went to sleep at 11 o'clock.

The Quinns were not a bunch of gangsters. There was never any suggestion that the appellant, who was in custody in Germany when they swore to the alibi affidavits, coerced or induced the Quinns to make the statements in his behalf. If Gallina believed that these people would perjure themselves at trial to supply an alibi for a man whom Patrick disliked (A253), Mary Quinn was divorcing and who was married to Elizabeth's daughter without her knowledge and approval (A212) then the trial was the only forum for him to demonstrate the falsity of their statements.

Gallina tampered with the truth when he obtained statements from these defense witnesses by pressure and fraud. The only effective[67] means to rectify the wrong he did would have been to exclude the statements from the trial below on the ground that they were obtained by methods conducive only to procuring untrustworthy testimony, and had no probative force whatsoever.

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67. The commentators recognize that when prior inconsistent statements are admitted for the nominal purpose of impeachment, that they are universally used by juries as substantive evidence. See, e.g., Fisch, *On New York Evidence,* §481, p. 281.

(c) Assuming that the Quinns' prior statements were properly in evidence, despite the fact that they were coerced, the trial court improperly denied defense requests for instructions in this regard, and the judgment must be reversed on this ground.

At the least, whether or not Gallina's conduct prior to the first trial coerced the Quinns into giving false testimoney was a jury question. *People* v. *Portelli, supra;* Wigmore, *supra,* Vol. IIIA, §1044, p. 1062, and cases cited therein; Fisch, *supra,* §478, p. 278; *People* v. *Glennan,* 175 NY 45, 52 (1903).

In *People* v. *Underwood, supra,* 389 P2d 937, 943, the California Supreme Court stated:

> "* * * the trial court did not instruct the jury to disregard [the witness'] extrajudicial statements or suggest that the question of voluntariness could affect the consideration of those statements. Instead, the jury was instructed *without qualification* that it was permissible to consider prior inconsistent statements of a witness for purposes of testing his credibility. Although this instruction is, of course, correct in the usual case * * * it should not have been given here without qualification in view of the evidence that [the witness'] prior statements were involuntary."

In this case, the Quinns testified that their prior statements were outright lies or were inaccurate. They testified as to the circumstances under which the prior statements were obtained. Gallina's testimony as to the circumstances corroborated their testimony in virtually every respect.

The theory of the defense was that the Quinns' prior statements to Gallina and at the first trial had been given under duress and hence were incompetent as impeaching

statements. Defense counsel asked the trial court for a detailed instruction on this matter.[68]

The trial court refused to give the instruction requested by the defense to reflect the evidence of duress, and instead merely stated to the jury, without qualification, that the prior statements of the witnesses were to be considered on the issue of the witness' credibility (A480-81).

> "The defendant in a criminal case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous." *U.S.* v. *Ude,* 435 F2d 774, 776 (5th Cir. 1967.)

In accord: *People* v. *Steel,* 26 NY2d 526, 529 (1970).

As the dissenting opinion below holds, the trial court's failure to give the requested instruction was error as a matter of law (A10). The error was material and prejudicial. Without the requested instruction, the jury could not give the witness' explanation for the inconsistencies any consideration. Even if they believed the explanations,

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68. VI. As to prior inconsistent statements * * *

Michael Quinn testified that he gave the prior statement because the prosecutor forced him to lie at a prior proceeding by threatening to hold him in civil jail and to deport his fiancee Giselle Nichol. Elizabeth Quinn testified that her prior statements were given because of the pressure put upon her by the jailing of her son and the threat to deport his fiancee. Patrick Quinn testified that his prior statements were given because the District Attorney misrepresented a material fact.

It is for you to decide whether or not the testimony these witnesses gave upon the witness stand in this case is to be believed. If you believe the witnesses' explanation that the prior statements were made under duress or because they had been confused or misled, the prior statements have no value for the sole purpose for which they could be introduced—that purpose being to impeach the witnesses' credibility. If you disbelieve the Quinns' explanation for their prior statements, then you may consider their inconsistent statements in determining whether or not they are truthful witnesses.

under the court's instructions, the statements still had value for impeachment purposes. The court's action was arbitrary and without foundation in law and denied appellant due process and a fair trial as the jury was permitted to use the prior statements as evidence of inconsistencies without first determining if they were voluntary. The conviction must be reversed on this basis.

POINT VIII

The court below permitted former Assistant District Attorney Gallina to testify far beyond the scope of proper rebuttal; it permitted him to give highly prejudicial testimony of limited admissibility without any limiting instructions as to the use of the testimony; and it erroneously denied the appellant the right to cross-examine him on prior similar acts of misconduct and the right to introduce evidence of his poor reputation for the integrity in the legal community.

We submit that the testimony of Gino Gallina was improper in two respects. *First,* his motivation was not at issue in this case. The only issue was whether or not he performed the various acts testified to by the defense alibi witnesses. Therefore, all of Gallina's testimony on his motivation was properly objected to (A199-201) and should have been rejected. *Second,* even assuming that Gallina's motivation was in issue, he was permitted to testify to matters which had only tangential relevance to his motivation, and which were totally improper and highly prejudicial in all other respects. Although this testimony, at most, was admissible only for a limited purpose, the trial court refused to give any limiting instructions regarding its use, despite a defense request. This was reversible error.

We further submit that the trial court, having ruled that Gallina's integrity as a prosecutor was at issue, then improperly limited defense cross-examination on his prior bad acts, and further improperly denied to the defense the right to introduce reputation evidence on Gallina's poor reputation in the legal community for fairness and integrity.

(a) Once Gallina admitted doing the acts testified to by the defense witnesses, then his motivation for acting in an illegal manner was irrelevant.

Gallina never denied doing any of the things the alibi witnesses claimed he did to them. He attempted to justify his conduct because it stemmed from his personal belief that the appellant was guilty and that the alibi witnesses were mistaken.

We submit that Gallina's subjective motivation was beside the point. The only testimony which would have been legally competent from him in rebuttal would have been to deny his misconduct. Since he did not deny the acts, the remainder of his testimony was incompetent and served only to prejudice the jury and deny the appellant a fair trial.[69]

If the commission of an act, regardless of intent, is illegal or unsactioned, then evidence of intent may not be legal or unsanctioned, then evidence of intent may not be received. See, Fisch, *New York Evidence,* §242, p. 135, n. 99.

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69. *Cf. People* v. *Colascione,* 22 NY 2d 65, 72 (1968), where, without legal reason, a detective was permitted to testify as to what had been told him by third parties and this Court held:

> "* * * the backbone of the People's case was thus sought to be bolstered before the jury by the narrative of a government officer offered in a form which could be taken by the jury as something he himself knew to be true. * * * It is difficult to avoid the conclusion that it was prejudicial as well as erroneous and that it sought to add the prestige of the government official to accomplice testimony and to the prosecution's theory of the case on a vital matter."

If, for example, the defense witnesses had claimed that Gallina tortured them and that they gave false testimony as a result of his actions, Gallina could not take the witness stand and after admitting the torture, seek to justify his conduct by detailing the police investigation of the case and by testifying that this investigation led him to believe the appellant was a violent, guilty murderer, and that the witnesses were prostitutes and liars.

In the analogous situation where bias is imputed to a witness, Wigmore states that the witness cannot admit the bias and try to show that it was justified by the opponent's conduct.

> "The offer is improper in two ways, first, because it does not at all explain away, but concedes that the hostility exists, and secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man." Wigmore, *On Evidence,* Vol. IIIA, §952, pp. 799-800.

This is precisely what the prosecutor did in the trial below. He knew or should have known that Gallina would not deny the conduct attributed to him by the defense witnesses. Despite this he put Gallina on the stand and elicited from him every imaginable kind of hearsay and personal conjecture, under the nominal guise of ascertaining the basis for Gallina's illegal conduct. Cf. *People* v. *Lewis,* 18 AD2d 277, 279-80 (4th Dept., 1963). Gallina was given free reign to testify to hearsay upon triple hearsay[70];

70. For example, Gallina testified at one point that he "personally" learned that the Chief of Detectives in Hamburg told Detective Schilling that Giselle told her parents that she was in hiding (A163-64).

to represent his opinion as fact[71]; "to engage in every fantasy in his mind and put that on the record in front of the jury" (A289). As the dissent below held, "Gallina's testimony was prejudicial and denied defendant a fair trial" (A10). The defense moved for a mistrial after Gallina's direct examination upon this basis and the court below committed reversible error by denying the motion.

(b) Assuming that Gallina could testify as to his motivation in doing the conceded acts, the trial court erred in failing to give a requested limiting instruction.

Assuming that Gallina could testify as to his motivation, as opposed to his conduct, the prosecutor, through his questions of Gallina continually elicited improper and highly prejudicial testimony, and the trial court below utterly failed to keep Gallina's testimony within proper bounds, or to instruct the jury as to the limited function of this testimony despite explicit defense requests.

Gallina began his testimony by volunteering his opinions and personal conclusions as to ultimate issues in the case. He stated repeatedly that the witnesses were concealing themselves and that the appellant had fled the country in order to avoid arrest (A154, A156, A193) even though the issue of flight and the question as to whether the witness were in hiding were both jury questions.

The trial court, at a bench conference early in Gallina's testimony, instructed him to testify only as to the facts and not to give his opinion as to the character of the acts de-

71. For example, "* * * during our investigation we learned * * * the fact that she hadn't registered, the fact she was involved in prostitution, the fact that she aided a felon, a person accused of murder, to flee the country", and when defense counsel objected to the use of the word "fact", the court overruled the objection and Gallina continued his answer (A235).

scribed (A157-61). However, the salutary effect of this ruling was lost when the trial court refused, upon defense request, to order Gallina's opinion testimony stricken from the record and refused to direct the jury to disregard it (A161). Gallina continued to give his opinions and conclusions without any attempt by the trial court to curtail this, despite repeated defense objections.

In a similar situation in *People* v. *Wolf,* 183 NY 464, 472 (1906), this Court held:

> "The trial judge allowed and sanctioned continuous departures from the law by the assistant district attorney, although he should have known it was his duty to prevent them, even on his own motion * * * It was also his duty not only to warn the district attorney to desist, but also, if he continued, to rebuke him and punish him for contempt if necessary to prevent further infraction of the law."

Gallina was permitted to testify that his investigation showed that the appellant was a violent man (A231-34). The rule has long been that "the court will not permit a stranger sent out by an adverse party" to testify as to the result of his inquiry into the defendant's reputation and character. *People* v. *Loris,* 131 AD 127, 129 (2d Dept., 1909). It is an elemental matter of proof that, "Reputation is the opinion which *associates or other members of the community* have formed about an individual * * *." Fisch, *New York Evidence, supra,* §179, p. 95.

Gallina was permitted to state that his witnesses had identified the appellant as Kroll's killer (A250-51, A231). Section 393-b of the former Code of Criminal Procedure did not permit anyone other than the witness making the

identification to testify to the fact that an identification was made by the witness. Fisch, *supra,* §490, p. 287.

Gallina was permitted to state that he believed the appellant was guilty of the crime (A234), and that the evidence left no doubt that the appellant was guilty (A250-51). It has long been the law in this State that "opinions of counsel as to the merits of the case should not be stated to the jury," Richardson, *On Evidence, supra,* §402, p. 399 and cases cited therein. The error in this case was particularly egregious since Gallina made his statement from the witness stand, and not merely as a partisan making an overvigorous summation to the jury.

The prosecutor below was permitted to elicit page after page of hearsay testimony[72] from Gallina as to his conversations with Richard Moran (A199-207) over defense objections that Moran had not testified as a witness at either trial (A199, A201) and then to refer to this testimony in his summation for the truth of the matter stated (see Point IX(2)). This was a hearsay violation of the grossest kind. Fisch, *supra,* §758, p. 384. If the prosecutor believed that Moran would have testified as Gallina stated, then the prosecutor should have called him as a witness.

Gallina is an attorney, and undoubtedly is familiar with the law of evidence. While the kind of systematic miscon-

72. Gallina was permitted to state that Moran told him that he refused to answer how often Maynard came to the Quinn house because he didn't want to get involved (A202). Gallina said that Moran said the appellant had not slept at the Quinn household since Christmas of 1966 and that Mary Quinn was in fear of the appellant (A204). Gallina said that Moran said that Michael Quinn had asked him to sign an affidavit like the other Quinn family members had signed and that Moran said he refused to (A205).

Gallina said that Moran said that Michael told him that he should sign the affidavit because it was important for the appellant to be protected in order to protect him (A207).

duct in testifying might be condoned if the witness were a layman:

> "These tactics are to be severely condemned on the part of [an] employee of the State of New York, testifying in a court of justice, and especially when that particular witness happens to be an attorney and counselor at law." *People* v. *Robinson,* 273 N.Y. 438 (1937).

In the *Robinson* case, the witness in question volunteered the single statement that, when he examined the books of the defendant's corporation with respect to the account of the complaining witness, "that was one of the larcenies uncovered" (273 N.Y. at 444). The trial court immediately instructed the jury to disregard the statement. This Court held that this admonition to disregard the evidence was insufficient in light of the witness' position and professional status and in light of the prejudicial nature of the statement, and hence the only effective protection was the grant of a mistrial.

In this case the court below not only refused to instruct the jury to disregard Gallina's opinions when Gallina was testifying (A161), the court also refused to charge the jury (A461) as the defense requested (Request VII) that:

> "* * * the jury may not consider [Gallina's] testimony as evidence on any factual matters in the case pertaining to the guilt or innocence of the defendant."

The court also refused to charge (A461) pursuant to defense request (Request VII) that Gallina's testimony was:

> "* * * relevant only upon the credibility of the Quinns' testimony that they were coerced by him at a prior proceeding into disavowing the presence of the defendant at Elizabeth Quinn's home on April 2 & 3, 1967."

Evidence offered for one purpose will not be excluded because inadmissible for another. But, if such evidence is admitted and counsel requests it, a limiting instruction must be given. *People* v. *Mleczko,* 306 NY 223, 227 (1954)[73]; Fisch, *On New York Evidence, supra,* §16, p. 7 and cases cited in notes 6 and 7.

The trial court erred as a matter of law in refusing to give the limiting instructions asked for by defense counsel and the error was substantial, material and prejudicial and deprived the appellant of a fair trial.

(c) The trial court erred in barring defense cross-examination of Gallina as to prior bad acts and in refusing to permit defense witnesses to testify as to Gallina's poor reputation for integrity and fairness in the legal community.

During cross, defense counsel attempted to ask Gallina whether he had, in the past, coerced witnesses and defendants in the criminal courts in his capacity as assistant district attorney (A419, A427). Defense counsel submitted affidavits from two attorneys swearing that Gallina had engaged in this conduct[74] upon named occasions in order to establish his good faith in asking the impeaching questions (A418-21). *People* v. *Kass,* 25 NY 2d 123, 126 (1969). The trial court refused to permit any cross-examination on this (A427).

Gallina could be questioned as to wrongful acts even though he was not prosecuted for them (*People* v. *Shivers,*

73. "In short, the receipt of the evidence referred to, its emphatic reiteration by the prosecutor and the court's refusal to instruct as requested * * * constituted a series of errors capable of working incalculable harm upon the defendant, errors so basic and substantial as to defy evaluation."

74. Both occurrences amounted to wilful violation of a defendant's constitutional rights. See *Lassiter* v. *Turner,* 423 F.2d 897 (4th Cir. 1970); and *Bray* v. *Peyton,* 429 F.2d 500 (4th Cir. 1970).

21 NY 2d 118, 122 (1967)) provided that the question is "asked * * * in good faith, that is to say, if [counsel] had some reasonable basis for believing the truth of the things he was asking about." *People* v. *Alamo,* 23 NY 2d 630, 633 (1969). In accord, *People* v. *Donovan,* 35 AD 2d 934 (1st Dept, 1970).

Moreover, Gallina's misconduct was especially relevant on the issue of whether he was as the prosecutor claimed in summation "part of that tradition" which existed "in the office of Mr. Hogan, and that is to do justice to the accused as well as the community" (A435-36). Having interjected Gallina's motivation and integrity into the case, the prosecutor should not have prevented the jury from hearing Gallina's answer to the questions directed to his prior acts of official misconduct. See *People* v. *Schwartzman,* 24 NY 2d 241, 249-50 (1969).

On rebuttal, the defense called a member of the New York Bar to testify to Gallina's poor reputation for fairness and integrity in the legal community (3305-13).[75] Sustaining the prosecutor's objection that this evidence was collateral, the court refused to let the witness take the stand (3313-14).

Generally speaking, a witness can only be impeached by testimony as to his traits of truth and veracity, not

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75. Such testimony undoubtedly came as no surprise to the prosecution, as soon thereafter Mr. Gallina was the subject of grand jury investigation by his office as to whether he, as defense counsel, coerced a prosecution witness to falsify his testimony.

In *People* v. *Zincand,* Ind. No. 2251-72, the indictment reads:

> "Additionally, the Grand Jury sought to determine how certain individuals, including a certain attorney retained by a forementioned underworld figure, had obtained the address of, and physically located the said 15-year-old boy, and secured a change in the potential testimony of the boy with respect to the said attorney's client."

In open court, before Supreme Court Justice Murtagh, ADA Conboy identified Gallina as the "certain attorney" mentioned in this indictment.

general bad moral character. Fisch, *supra,* §452, p. 259. However, in this case, the prosecutor put Gallina's integrity in issue and the trial court, over continual defense objection, permitted Gallina the greatest latitude in vouching for his own integrity.

> "When facts not properly admissible are received, the opponent may present evidence to disprove or rebut the material admitted without losing the benefit of his objection, and the proponent may not complain that the court committed error by permitting the adversary to do so." Fisch, *supra,* §21, p. 12, and cases cited.

Since the prosecution vouched for his witness's integrity in summation, his objection to allowing a defense reputation witness to rebut this asserted integrity was improper. *People* v. *Walsh, supra,* 262 NY at 150.

The trial court was also asked (Request VII) but refused (A461) to instruct the jury that Gallina was:

> "an interested witness in that he has been charged with illegal conduct, and has an interest in not only protecting his professional reputation, but also in protecting himself against criminal charges."

In *People* v. *Rossi,* 270 AD 624, 629-30 (3rd Dept. 1946), where an assistant district attorney took the stand to refute the defendant's testimony concerning the taking of his confession, and where the trial court refused to give an interested witness charge, the Appellate Division held:

> "We think this was a perfectly proper request and it was error to refuse it. * * * When an attorney abandons the role of advocate and assumes the role of a witness he should be treated like any other witness. There can be no question but that the Assistant District Attorney was an interested witness in this case. The major part of its preparation had evidently been in his hands * * * the jury were quite apt to be inclined in any event to give great weight to his testimony as a public official, and the refusal of the court to charge as

requested practically placed a seal of verity on his evidence. It is needless to add that this was highly prejudicial to the appellant."

In sum, Gallina's testimony as to his benign motivation was irrelevant and should have been excluded once he admitted the acts attributed to him by the defense witnesses. Alternatively, the judge should have charged the jury as to the limited use of this testimony and erred in refusing to do so and in denying the defense mistrial motion. The court below also erred in barring cross-examination of Gallina on prior bad acts and in refusing to admit defense reputation evidence offered in disproof of Gallina's asserted integrity. The court further erred in failing to charge that Gallina was an interested witness. These errors were material and prejudicial and require the reversal of the judgment below.

POINT IX

The appellant's right to a fair trial and due process of law were violated by the systematic misconduct of the assistant district attorney during summation.

During summation the prosecutor indulged in systematic misstatements of fact, argument of facts not in the record, improper use of evidence which had been admitted for limited purposes or which had been excluded entirely, vouchsafing witnesses and other kinds of misconduct which have been uniformly condemned by the courts. See, e.g., *Berger* v. *U.S.*, 295 US 78 (1935); *People* v. *Van Aken,* 217 NY 532 (1916); *People* v. *Lovello,* 1 NY 2d 436 (1956); *People* v. *Griffin,* 29 NY 2d 91 (1971). After specific defense objections to various misstatements, the trial court twice admonished counsel not to interrupt the prosecutor (3505, 3543). At the close of the summation, instead of listening to specific points of objection, the court below gave defense counsel an exception to the entire summation (3667-68).

An application for a new trial based upon errors in the summation was denied (Sentence Min. p. 4).

The errors in the summation are discussed seriatim:

(1)

The prosecutor was permitted to state (A435-36):

> "and speaking of tradition, there is a tradition in the office of Mr. Hogan, and that is to do justice to the accused as well as to the community * * *
>
> Mr. Steel: Objection, your honor.
>
> The Court: Overruled.
>
> Mr. Sawyer: And this is as strong a tradition as I can tell you. And Mr. Gallina was a part of that tradition."

The prosecutor was permitted to personally vouch for the integrity and veracity of his witness and to place the veracity and honor of the District Attorney's office behind that witness. In *People* v. *Lovello, supra,* 1 NY 2d at 439, this Court condemned this kind of conduct, as did the courts in *People* v. *McHugh,* 20 AD 2d 770, 771 (1st Dept. 1964) and *People* v. *Smith,* 26 AD 2d 588 (2nd Dept. 1966).[76]

Moreover, the statement by the prosecutor below was less than candid, because he had successfully prevented the defense from impeaching Gallina with prior acts of official misconduct and with testimony that Gallina's reputation was far different than this portrait of him as a prosecutor who was part of the finest tradition of Hogan's office (see Point XIII(c)).

In *People* v. *Lane,* 10 NY 2d 347, 354 (1961), the prosecutor had objected to testimony on coercion of a witness

76. Where the court reversed a conviction in a situation virtually identical to this one, where the prosecutor in summation placed the veracity and position of a fellow assistant district attorney in issue in summation by telling them that his colleague "was an honorable member of the profession" and would have the duty to disclose certain facts to the jury if they existed.

and then argued in summation that the witness was not coerced and therefore the jury should find the others were similarly well-treated. This Court held that it was "clearly prejudicial" for the district attorney to make this argument "after succeeding in preventing testimony on that subject."

The application for a new trial made at sentencing was based specifically upon this ground (Sent. Min. p. 4).

(2)

The prosecutor argued that there was "positive evidence that Michael Quinn was the architect of the alibi" (A437)—which came from Gallina and from Richard Moran and "this evidence from that source, Mr. Richard Moran, is undisputed in this case" (A437).

Richard Moran was never called as a witness. Gallina's testimony as to his conversation with Richard Moran was hearsay and was received over defense objection. It was nominally offered on the issue of Gallina's motivation and not for the truth of the matter stated. It could not be considered for the truth of the matter stated. See *People* v. *Lombard,* 4 AD 2d 666, 671 (1st Dept. 1957).[77]

The new trial motion was also based upon this improper use of hearsay (Sent. Min. p. 5).

(3)

The prosecutor stated that there was evidence that:

> "Michael Quinn and William Maynard at a certain point had a relationship which, as *Mr. Gallina told you*

77. Where a conviction was reversed when the prosecutor referred to the out-of-court statement of a co-defendant which was admitted into evidence as an admission against the co-defendant. The court held that the prosecutor has no "warrant to introduce into his summation matter which the jury has no right to consider in determining the guilt or innocence of the defendant."

> none of the Quinn family could understand * * * but Michael Quinn had this certain kind of relationship with the defendant.
>
> We will never know the full extent of the relationship * * * *in a trial such as this only certain things can be proved.*" (emphasis added) (A438)

Gallina's testimony as to this "certain relationship" was hearsay, received over objection, and was nominally limited to the issue of Gallina's motivation and not introduced for the truth of the matter stated.

Not content to argue hearsay as fact, the prosecutor then told the jury that the full extent of this hearsay relationship would never be known because only certain things could be proved in a trial such as this. This kind of argument was condemned in *People* v. *Meyer,* 14 AD 2d 241, 243 (1st Dept., 1961) and in *Kitchell* v. *United States,* 354 F2d 715 (7th Cir. 1970).

(4)

The prosecutor next insinuated to the jury that Michael Quinn was the other man in the murder (A438-40) and Michael Quinn:

> "may well fear and only he and one other know, that certain evidence as yet unknown or as yet unavailable or legally inadmissible will turn up that may incriminate him" (A440).

Thus, according to the prosecutor, Michael Quinn's fear gave him "a huge motive to put himself elsewhere" (A441).

There is no evidence at all that Michael Quinn was involved in the homicide; or that certain legally inadmissible evidence existed to incriminate Michael Quinn; or that Michael Quinn was in fear that it would.

A prosecutor may not assume facts not in evidence and communicate his baseless assumptions to the jury. The prosecutor was wrongfully attempting "to lodge in the

minds of the jury the idea that evidence, which as a matter of fact did not exist," indicated a well-determined plan by Michael Quinn to fabricate an alibi for himself and the appellant in order to save himself from a murder prosecution. *People* v. *Esposito,* 224 NY 370, 375 (1918).

(5)

The prosecutor stated that the difference in Michael's testimony at the prior trial and this one was due to the fact that at the first trial Michael understood he had legal immunity from the murder charge, but after the first trial, Michael Quinn spoke to attorneys and:

> "they *have no doubt* advised him that no one may receive legal immunity for murder; the law does not permit it. One never receives legal immunity for murder, and I suspect that *that revelation* had its impact and *explains* why Michael Quinn again feels bound to come in and support this defendant." (A442) (emphasis added)

There was no evidence that Michael Quinn ever consulted an attorney about immunity; no evidence that an attorney ever told Michael Quinn that immunity could not be conferred; and no evidence that this non-existent "revelation" had any impact on Michael Quinn. (See A133 for Michael's actual testimony on consulting an attorney.)

There was not one iota of evidence in the record to support this argument and it was grossly improper. The new trial motion was also predicated upon this impropriety (Sent. Min. p. 6).

(6)

The prosecutor also argued that Elizabeth Quinn's testimony that Maynard was at her home could not be believed because she had told defense counsel only three weeks before the trial that she was not sure Maynard was there that

weekend (A444).[78] He made this argument after successfully keeping defense counsel from introducing the entire prior statement given to the defense by Elizabeth Quinn.[79] See Point XII (3).

Defense counsel had given the *entire* prior statement to the prosecutor pursuant to his obligation under *People* v. *Damon, supra,* 24 NY 2d 256, and the prosecutor undoubtedly had read it all. It was less than candid of the prosecutor to extract one statement from the interview out of context. It was less than candid for him to prevent the defense on redirect from presenting the entire content of the statement to the jury. Having created this distortion, "by preventing testimony on that subject" it was "clearly prejudicial" for him to capitalize in his summation on the distortion of fact he created, and to argue in this fashion. *People* v. *Lane, supra,* 10 NY 2d at 354.

(7)

The prosecution argued that, in considering the appellant's character evidence, the jury should also consider Gallina's testimony because:

> "Under the limitations of time and rules of evidence, you may not have a complete and full picture of the defendant. You heard the testimony of Mr. Gallina, and I think that may have given you a certain inkling, it would be nice if we could somehow make ourselves invisible and follow this defendant around as he was back in the spring of 1967; that would be nice, but it's not possible." (A446)

78. The prosecutor stated: "* * * then I confronted her with a statement she made to * * * Maynard's attorney, on October 6, 1970, some three weeks before she took the stand, where it is indicated at that time that she was not sure. And she said 'Oh, there must be some misunderstanding.' Yet she could take the stand before you and say now she is sure, although she stated a few weeks ago to Mr. Maynard's attorney that she wasn't sure" (A444-45).

79. The substance of her entire statement is set out at p. 145, n. 97.

Gallina's testimony as to the appellant's character was legally improper. *People* v. *Loris, supra,* 131 App. Div. at 129. Moreover, it was improper for the prosecutor to argue to the jury that Gallina's testimony, which was nominally received on the issue of "motivation," could be considered by them on the issue of the appellant's character.

It was also improper for the prosecutor to state that the rules of evidence made it impossible for the jury to have a complete picture of the appellant. In *People* v. *Meyer, supra,* 14 AD 2d 241, 243, the court stated:

> "Such statements [in summation] as 'in a court of law there are many things the law doesn't permit you to tell a jury', are clearly improper."

(8)

The prosecutor argued that other persons were present at the scene besides the three prosecution witnesses and some of them "most certainly saw some or all of the action" (A447). The prosecutor stated that despite the fact that people in this city are reluctant to get involved, "three people did get involved" (A447-48).

Later he stated that:

> "The only people who incriminate or exonerate Mr. Maynard are the eyewitnesses. Russel Jackson and Warner Guy were exonerated by Feebles and Crist at the time of the crime. So it would be grossly unfair and unjust to arrest a man for murder if there were available in the world eyewitnesses to the crime who can, if that be the case, exonerate the defendant." (A 452)

The prosecutor said this knowing that there were other eyewitnesses who came forward whom the police had interviewed; knowing that at least two witnesses came forward

and identified persons other than appellant as the perpetrator; knowing that one witness at the prior trial came forward and did not identify the appellant; and after having prevented defense counsel from asking the police about other eyewitnesses who came forward and gave descriptions of the perpetrator which did not match the appellant (A118-22).[80]

(9)

The prosecutor stated that if the police wanted to frame the appellant, all they had to do was take the stand and swear that the appellant admitted committing the crime (A453), despite the fact that he prevented the defense from proving that the appellant's signature had been forged upon a waiver of rights form produced by the police. (Point I, *supra*).

The prosecutor also vouched for Lieutenant Stone's integrity and honesty (A453-54):

> "[Lieutenant Stone] has now been selected to head a specialized unit * * * in the new police investigation squad * * * investigating corruption within the police department *of all the officers in the police department, the one selected to police their own,* so to say, *the one with sufficient integrity and honesty to assume that position is Lieutenant Stone* * * * I ask you did that man Lieutenant Stone take the stand and willfully commit perjury, did that man engineer Dennis Morris into making an identification and Michael Feebles, because it would have to be him. * * * (emphasis added)

For all that appears Stone might have gotten the job on the ground of seniority or political influence, rather than because of his integrity.

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80. Defense counsel sought to examine Detective Hanast with regard to the statements he took from Dietz and Piazza, not for the truth of their statements, but merely to establish that they had been given. Objection was sustained. See Point XIII(4).

The prosecutor deliberately chose not to litigate whether Stone committed perjury concerning the waiver of rights form, though the defense was ready and able to do so. Given his refusal to litigate this issue, it was the height of impropriety for him to inject Stone's veracity and integrity into issue against the appellant at this trial. *People* v. *Lane, supra,* 10 NY 2d at 354.

(10)

The prosecutor argued (A449):

> "Naturally the police have got to be attacked, you wouldn't have a well rounded trial if the police weren't accused of every form of deceit and debauchery, and what have you, they are attacked in a subtle way, however, in a subtle way Mr. Steel is a very clever attorney—.
>
> Mr. Steel: Your honor, I must object to it.
>
> The Court: I don't object to that—
>
> Mr. Steel: To the personal attacks.
>
> The Court: I don't object to that at all. Overruled."

Personal attacks impugning the motives of defendant's counsel have no place in a prosecutor's summation and the objection should have been sustained. *People* v. *Tassielo,* 300 NY 425 (1950). Instead, the court not only overruled the objection but affirmatively sanctioned the comments, lending the weight of his office to the prosecutor's insinuation.[81]

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81. The imputation to counsel of dishonorable motives in challenging the fairness of the investigation was especially objectionable since, as we have noted above, uncontradicted evidence did exist establishing forgery and perjury on the part of the police *vis-a-vis* the waiver of rights form and therefore counsel had good reason to suspect and to question the fairness of the police investigation.

(11)

The prosecutor argued that Michael Quinn had attempted to elude the police even though he knew they were looking for him (A430-31).

He then stated (A431):

> "And this is extremely interesting in view of something that happened in this case, and I take this opportunity to give it to you."

For the next two pages, over objection, the prosecution testified to his out-of-court efforts to locate Mary Quinn after she testified for the defense and after he had cross examined her (A431-33). He concluded this by stating (A433):

> "* * * and a couple of days later they [defense counsel] advised, 'Mother Quinn does not know where she [Mary] is, and cannot supply you with information as to where she is.'
>
> The same thing all over again as Michael Quinn—
>
> Mr. Steel: I object, your honor.
>
> Mr. Sawyer: Later I am told she will call me, when she returns. But she hasn't to this day. But it doesn't matter; she is not important in this case, *but it illustrates something about the efforts to locate Michael Quinn.*" (emphasis added)

The prosecutor made himself an unsworn witness and stated that Mary Quinn concealed herself so that he could not recall her as a witness. This was improper. *People* v. *Roberts,* 26 AD 2d 655 (2d Dept. 1966) (where the district attorney implied in summation that a witness was not called because of danger to his life); *People* v. *Fielding,* 158 NY 542, 548 (1899). The defense motion for a new trial was also predicated upon this impropriety (Sent. Min. p. 4).

After he gave the unsworn testimony, the prosecutor asked the jury to consider it as illustrating how Michael Quinn had eluded Gallina. This was improper.[82]

The prosecutor's making himself an unsworn witness as to Mary's unavailability is objectionable on other grounds as well.

Mary testified as a defense witness and was cross-examined. For reasons known only to himself, the prosecutor questioned her only about some of the inconsistencies in her testimony. The prosecutor later asked the defense to help in locating her, which was given.[83] The matter was dropped and the prosecutor did not ask for further help in locating Mary. Instead, he lulled defense counsel into believing that he had no further problem in contacting her and had decided not to call her as a witness. When defense counsel argued that Mary Quinn could have been challenged by the prosecutor on cross or called on rebuttal (3403), the prosecutor retorted by testifying as to his off-the-record efforts to locate Mary Quinn. He was thus able to interject an issue into the case by his own testimony which was not subject to cross-examination or rebuttal.

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82. He also told the jury to consider a Gallina hearsay statement, received over objection, as evidence that Michael actually eluded the police that day (A433-34). The prosecutor's use of Gallina's hearsay testimony for the truth of the matter stated was improper. *People* v. *Mleczko, supra,* 298 NY at 16.

83. On November 16, 1970, the prosecutor asked defense counsel to supply him with Mary Quinn's out of town address so he could call her as a witness (2133). The prosecutor had spoken to Mary Quinn and she refused to supply it. Defense counsel stated Mary also told him she would be out of town the entire week and that he did not know where she was (2135). The court asked defense counsel to ascertain her address and supply it, and counsel agreed (2136). On November 18, Mr. Steel stated that he had learned Mary Quinn was a secretary in a film company on location in the Chesapeake area and planned to return in a few days (2432). On November 23, when Mary returned, she called defense counsel and he told her to call the prosecutor. Defense counsel stated she would be available, if required, on that Wednesday (2724-25).

If the prosecutor could not find Mary Quinn because she was hiding out of state, he had full legal recourse under former Code Crim. Proc. §8-3(d) to establish this and introduce her prior trial testimony into evidence. He chose not to establish this "fact" according to law. Instead he took the uniformly condemned course of stating as fact to the jury matters clearly outside the record. Where the prosecutor's conduct is in such flagrant disregard of settled principles of forensic conduct, then the only effective sanction is to reverse the conviction.

(12)

Patrick Quinn testified the appellant was asleep on his mother's couch in Queens at 8:30 a.m. on April 3. Mary testified the appellant met her at 9:15 or 9:30 in Manhattan. The prosecutor stated (A443):

> "Now, clearly, if the defendant was in Manhattan at 8:30 in the morning, he could not possibly have been on the Quinn couch at a quarter to nine, and Patrick Quinn could not possibly have come into this court and testified that he saw the defendant on the couch before he left for work.
>
> So let's look at the testimony on the prior hearing."

The prosecutor then read Mary's prior trial testimony where she said the appellant met her at 8:30 (3539-40) despite the fact that the prosecutor had never impeached her with it. Clearly Mary's prior statement was not properly in the case to impeach her credibility.[84] It certainly could not be used as substantive evidence of the facts contained in

84. Mary's prior testimony was used to refresh Patrick's recollection (2526-27) but it did not do so (2528). It was not admissible to impeach Patrick, as the prior testimony of *another* witness at a previous hearing is not admissible for this purpose. Fisch, *New York Evidence,* 1971 Supp. §474, p. 134; *People* v. *Walls,* 42 AD 2d 575, 576 (2d Dept., 1973).

it, and argued in this fashion. *People* v. *Welch,* 16 AD 2d 554 (4th Dept., 1965).

We have stated above that if Mary were unavailable, then the prosecutor could have established this by following §8-3(d) and could have thus used her prior testimony. He could not ignore the law and use the prior testimony, which was not in evidence, as though it had properly been proved. Because he did so, the conviction should be reversed.

(13)

On the infallibility of his eyewitnesses' identifications, the prosecutor argued that if one has a "focus of attention", then:

> "the human mind is an amazing thing, it records hundreds of images in the course of a day, much as a camera records an image." (A458)

This grandiose statement is completely contrary to all scholarly consideration of human perception and identification.

Wall, in *Eye-Witness Identification in Criminal Cases, supra,* pp. 5-6, quotes numerous authorities who conclude that though the question of personal identity might seem to be the simplest possible:

> "the fact is precisely the reverse. The question whether a * * * man * * * is one individual or another, has proved itself over and over again, by far, instead the most perplexing. Cases of mistaken personal identity have been all but innumerable."

Far from functioning like a camera, "the eyes and ears of justice" are sometimes defective.[85]

85. "A surprisingly large number of people who are not color blind, who do not need an oculist, and who are supposed to have normal vision, in fact do not have it. They cannot recognize likenesses or differences, nor distinguish differences in form, size, and position as can persons who are normal in that respect" (Wall, p. 9).

The fallibility of human perception was acknowledged by the Supreme Court in *United States* v. *Wade, supra,* 388 U.S. at 228 and is the basis for the *Wade, Gilbert* and *Stovall* decisions.

Since the ability of the eye witnesses to make accurate identifications was the primary issue below, it was prejudicial error for the prosecutor to bolster his witnesses in this improper mannr.

(14)

The prosecutor argued (A450-51):

> "* * * fifteen minutes after the murder of Sergeant Kroll a person in a taxicab said something to Steven Berman; Steven Berman had just seen the marine on the ground; it had *so excited his interest in connection with what he had seen* that he ran and told the police, the guy in the cab said something. *Use your common sense as to what was said.*
>
> The police got in that car and went after this vehicle, and that there were 2 men in the car; they were brought back. Their names were Russel Jackson and Warner Guy * * * neither one of these men committed the crime, but their names were noted.
>
> The defendant has admitted on this trial that he knew Russel Jackson and I submit to you *it is not unreasonable to assume that the police in possession of the names of Russel Jackson and Warner Guy made some effort to determine who were the friends and associates* of Russel Jackson and Warner Guy, and *that they came up with William Maynard.*" (emphasis added)

This argument was based upon material which had been excluded from evidence by the court below and hence it was totally improper.

The prosecution established that after the homicide, Berman (who was not present when the crime was com-

mitted) saw one colored boy in a taxi, who said something to him. The trial court specifically ruled that Berman could not relate what was said (1235).[86]

Plansker (also not present when the crime occurred) testified that he followed a taxi cab containing two colored boys and brought them back to the scene. They identified themselves as Warner Guy and Russel Jackson, and were then released. Crist did not identify either of the boys.

The prosecutor called Detective Stone and offered to prove that through a police check of the associates of these two boys, "the name of this [appellant] came to light" (1796). Defense counsel objected on hearsay grounds, and was sustained (1797).[87]

The appellant stated on cross that he knew Russel Jackson (2794-95). There were no follow-up questions.

The fact that Jackson and Guy did not commit the crime proved nothing. The fact that Berman was suspicious of a boy proved nothing. The fact that the police chased two boys because Berman told them one boy said something to him proved nothing. Yet these are the kind of facts about which a jury can speculate endlessly. What was said to Berman that made him so suspicious? Why did the police chase the taxi? Something very important must have been said to Berman to make the police do this. The defendant knew one of them. Did one of the defend-

86. The prosecutor made an offer of proof as to what was said (1228-29) and the court heard extensive argument in support of the offer (1229-32). After a recess so that he could research the law (1232) the trial judge then ruled that Berman could not state what he heard the boy say.

87. The prosecutor again attempted to elicit this testimony from Stone and the court ruled there was no foundation (1798-99). The court recessed and permitted the prosecutor to give an expanded offer of proof (1799). The prosecutor did not make any such further offer.

ant's friends say something suspicious about him to Berman? It is obvious that any slight probative value this testimony had was far outweighed by its potential prejudice.

When the prosecutor summed up, he exploited this non-evidence to derive the maximum prejudice from it.

The court would not permit Berman to testify to the hearsay statement. The prosecutor got around this ruling by telling the jury to speculate on what was said. Undoubtedly they did so.

The court would not permit Stone to testify about what other police officers did because of hearsay statements by Jackson and Guy. The prosecutor ignored the ruling and argued the matter to the jury as though it had been established by the evidence.

In *People* v. *Esposito,* 224 NY 370 (1918), this Court reversed a murder conviction and reprimanded the prosecutor for asking the jury to speculate on matters which had specifically been excluded from evidence. See also *People* v. *Allen,* 26 AD 2d 573 (2nd Dept., 1966), and *People* v. *Birch,* 6 AD 2d 28, 30 (1st Dept., 1958), where the district attorney made improper reference in summation to evidence that had been stricken, and where convictions were reversed.

(15)

We have referred in other points to other improper arguments made by the prosecutor in summation, Points I, IV, V, VIII.

This lengthy series of objectionable arguments constituted prejudicial error. As was stated in *Berger* v. *United States, supra,* 295 US at 89:

> "* * * we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The trial court did not sustain defense objections to the objectionable material or direct the jury to disregard it, but twice told defense counsel not to interrupt the prosecutor and refused to listen to specific defense objections after summation, in order to correct misstatements before the jury retired. In one instance the court affirmatively sanctioned the improper statement. In these circumstances, and because proper objection was made, the conviction must be reversed. *People* v. *Fielding,* 158 NY 542, 548 (1899).

POINT X

Appellant's right to due process was violated by the prosecutor's refusal to make timely disclosure of exculpatory evidence.

Defense counsel moved before trial to compel disclosure of any exculpatory evidence possessed by the prosecutor (43-57); for the appointment of an investigator because the appellant was indigent (65-70), and for one month's adjournment to give counsel, who took the case one week before, adequate time to prepare (114-126).

The exculpatory evidence motion was denied upon "the unequivocal statement of the District Attorney that he has no and knows of no exculpatory evidence which might in any way benefit the defendant which is not already on record." (Mem. Dec. p. 2).

The investigator motion was denied, because such an appointment would be "merely an idle gesture [of] the

court'' since the witnesses sought by the defense were unknown (Mem. Dec. pp. 3-4).

The motion for time to prepare was denied on the ground that ''I have seen nothing * * * which indicates to me that it would be prejudicial to this defendant if he were brought to trial now'' (127).[88]

The motion for the investigator was renewed before trial.[89]

Although the prosecutor made the categoric statement that he had no exculpatory evidence in his possession, he turned over 4 items of exculpatory evidence 3 weeks later (574-5):

> First, an interview with Warner Guy, one of the two boys who spoke to Berman after the shooting, which contradicted Berman's testimony (Ct. Ex. 5 for Identification).
>
> Second, an interview with Donald DiBrienza, who claimed to have information about the Kroll homicide (Ct. Ex. 6 for Identification).
>
> Third, an interview with James Louis Scott, who stated that he saw Jonnie Rose shoot the marine (Ct. Ex. 7 for Identification).
>
> Fourth, a report on confidential information received that the homicide was committed by Andy Bones, together with a white man named Lennie who lived in the Broadway Central Hotel (Ct. Ex. 8 for Identification).

Defense counsel later moved to dismiss the indictment on the ground that the prosecutor's failure to make a timely

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88. The appellant had beeen in custody for 3 years at this point.

89. Counsel stated that the Episcopal minister at the Tombs told him that Warner Guy (who police records showed as present at the scene shortly after the shooting) stated the appellant was not the perpetrator (92-101). He wanted an investigator in order to locate Warner Guy. The motion was denied (100).

disclosure of this material denied due process of law, further stating that the court's refusal to appoint an investigator made it impossible to locate the witnesses whose existence had just then been disclosed (1876).

After the motion was denied (1880), the prosecutor, for the first time, revealed the existence of two additional eye witnesses to the crime, Louis Piazza and Paul Dietz, with the equivocal statement that neither "has made or can make * * * an identification" (1886).[90] Defense counsel again moved to dismiss on the ground that turning over this material "at the eleventh hour" was a fundamental denial of due process (1890).

The only justification given by the prosecutor for failing to make a timely disclosure was that *he* did not feel the evidence was credible or exculpatory.

In *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135 (2d Cir. 1964), the prosecutor only disclosed the two eye witnesses he believed, without revealing two others who did not identify the defendant. Holding that the evidence should have been revealed, the Second Circuit stated (326 F.2d at 138):

> "* * * there are circumstances in which a prosecutor must, or certainly should know, that *even testimony which he honestly disbelieves* is of a type or from a source which in all probability would make it very persuasive to a fair minded jury." (emphasis added)[91]

90. Dietz noticed the argument on West 3rd Street, then heard the shot and saw two men running away from the scene of the crime. Piazza watched the argument between Crist and the two men on West 3rd Street and saw Kroll's car drive up. He gave a detailed description of the person arguing with Crist, which did not fit the appellant.

91. Citing *Application of Kapatos,* 208 F. Supp. 883 (SDNY, 1965), for the holding that a failure to turn over certain evidence which might have raised doubt as to an eye witness identification was not justified because the prosecutor "lacked confidence in [the witness's] credibility" (326 F.2d at 135).

The concurring opinion in *Meers* is also to the point in this case (326 F.2d at 141):

> "The prosecutor must have been aware * * * of the fact that assigned counsel only had a week to prepare his defense. The prosecutor must have known that defense counsel was unaware of the existence of the two eye witnesses. * * * In these circumstances failure to reveal the existence of this evidence can be considered the equivalent of suppression."

In *Williams* v. *Florida,* 399 U.S. 78, 82 (1970), the Supreme Court stated:

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right to conceal their cards until they are played."

The prosecutor had no right to conceal his cards and play them at the eleventh hour, when he knew the defense would have no opportunity to locate and interview the witnesses. He knew funds for an investigator were denied. He knew counsel only had a week to prepare. He had notice of the defense alibi witnesses before trial. His belated disclosure came when the lack of time to prepare and the lack of an investigator made it a foreordained conclusion that the newly revealed evidence could not be utilized. Cf. *Clay* v. *Black,* 479 F.2d 319 (6th Cir. 1973), where belated disclosure of exculpatory evidence which prevented the defense from utilizing it at trial constituted a denial of due process. The prosecutor's conduct was hardly

> "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Williams* v. *Florida, supra,* 399 U.S. at 82.

The judgment appealed from should be reversed because failure to make timely disclosure of exculpatory evidence,

combined with the court's refusal to authorize an investigator for an indigent defendant[92] plus the court's refusal to grant a reasonable adjournment, denied appellant the reasonable possibility of investigating facts crucial to his defense, and hence denied him due process of law.

POINT XI

The trial court denied appellant's right to a fair trial by ordering indictment of a defense witness for perjury before the verdict.

Michael Quinn, the first defense alibi witness, explained his testimony at the first trial and his pretrial statement to Gallina, by stating that Gallina had forced him to lie. During Michael's cross, and during redirect, the trial court took over the questioning on this point at least nine times,[93] stating, in response to defense objection (2146):

> "* * * Oh, the court is going to cross examine all it wishes to, all it wishes to, all it wishes to."

The court's questions were asked with a tone of disbelief and sarcasm. Counsel objected and asked for a mistrial. The court then stated before the jury (2195):

> "You understand I am going to pursue this further."

At the end of Michael's testimony, the judge cleared the court room, except for the appellant, lawyers and public officials, and directed that Michael remain on the witness stand (2316-17). When one spectator refused to leave, the trial court told the court attendant to call the police (2317).

The judge stated that he refused to sit by and have a crime committed in his presence (A135), and that no one

92. The court also denied counsel's motion to be assigned, so that this further economy seems hardly justified.

93. 2146, 2163-64, 2169, 2195, 2208, 2232, 2246-47, 2248, 2295.

was going "to make a mockery out of my court nor a fool out of the judge" (A136). He decided not to order the witness's immediate arrest only because the resulting publicity might hurt the trial. Instead he told the District Attorney "to send a member of the indictment bureau here and he has * * *" (A136). The court then told this assistant (A136):

> "* * * that with respect to the gentleman who will leave the stand in a moment, that I direct you sir, as a justice of the Supreme Court, this direction is given to you as a prosecuting officer in this county in the indictment bureau of the district attorney's office, I direct you, sir, to present these proceedings to the grand jury for immediate indictment. That is my direction to you."

The court also asked this assistant to determine whether there has been "subornation of perjury, outright perjury, or conspiracy to obstruct justice, whether or not anybody acted as an accessory or * * * compounded, a felony" (A137).

This was significant because virtually the first questions which the trial judge had asked Michael were (2146):

> "Now do you know whether or not the other members of your family are going to be called to testify in this case"

and

> "Did your mother and your sister, know that you were testifying in this case this past week" (2147).

When the judge directed the District Attorney to present Michael's testimony to the grand jury, defense counsel objected because there were other defense witnesses whose testimony the court was affecting by this procedure (A138).

Defense counsel later moved for a mistrial on the ground that the proceedings constituted intimidation of defense

witnesses and deprived the appellant of due process of law. The court denied the motion on November 17, 1970.

In *People* v. *Frasco,* 187 AD 299 (2d Dept. 1914), the court reversed where the trial judge, after a defense alibi witness testified, dismissed the jurors and asked the district attorney how to send the matter to the grand jury for a perjury indictment.

The *Frasco* case arose under the Penal Law of 1909, which specifically empowered the trial judge to *immediately* commit a person where it appeared he had committed perjury in a judicial proceeding. (§1628.) This section was not reenacted in the present Penal Law, and hence no statutory authorization existed at the time the incident occurred for the trial court's precipitous and intimidating conduct in this case.

The *Frasco* decision is not an isolated one. *People* v. *Davidson,* 3 AD 2d 724 (2d Dept. 1957) was reversed on the same ground, citing 88 C.J.S., Trial §52, p. 140:

> "It is, however, ordinarily improper for the judge in the midst of the trial to charge a witness with perjury and direct him to await criminal action, or initiate contempt proceedings against a witness for false swearing, since such action may tend to terrorize or overawe the witnesses and deprive the parties of a fair trial."

In *People* v. *Van Arsdale,* 242 App. Div. 545 (1st Dept., 1934), where the judge merely told the witness to stay in the courtroom after he left the stand, did not ask for a perjury indictment, and affirmatively instructed the jury to ignore the incident, the court held:

> "The only inference which the jury could draw from the detention of [the witness] was that the court believed he had committed perjury, with the result that

> the jurors' minds might not only have been poisoned against this particular witness, but also against the defendant who had placed him on the stand."

In accord: *Ex parte Hudgings,* 249 U.S. 378, 384 (1914), condemning the citing of a witness for contempt on the ground of perjury in the middle of a trial as having "a dangerous effect on the liberty of the citizen when called as a witness * * *"; cf. *Webb* v. *Texas,* 409 U.S. 95 (1972); *M'Nutt* v. *United States,* 267 F. 670, 673 (8th Cir., 1920), stating such conduct would "impress on [subsequent witnesses] the imminent danger to them of arrest for perjury if they failed to answer questions as the prosecutor desired * * *"; cf. *Hartenstein* v. *Bindseil,* 164 N.Y.S. 102, 103 (App. Term 1917) reversing where the trial judge, sitting without a jury, indicated his disbelief in the testimony of a witness before the proof was completed:

> "* * * such a statement was calculated to have an effect upon the attitude of witnesses during the remainder of the trial that may well have been extremely prejudicial to the rights of the plaintiff, who was thus to all intents and purposes, prematurely put out of court."

The judge's direction to indict Michael for perjury could only be based upon his total disbelief of Michael's explanation for his prior statements.[94] One who had not prejudged would wait until the close of all the evidence to make a decision whether to call for an indictment against Michael or against the former assistant.[95]

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94. Entrapment is a defense under Penal Law §35.40 and Michael testified that he gave false testimony because induced to do so by a public official.

95. This is not the first time a witness in this State testified he lied at a prior proceeding because of duress. When a prosecution witness stated he lied because the defendants threatened him in *People* v. *Buchalter,* 289 N.Y. 181, 202 (1942), the trial judge did not rush to order his immediate indictment for perjury.

Each of the vices which the courts have held to be inherently prejudicial in this kind of procedure was present in this case.

The trial judge attempted to isolate the jury from the proceedings, yet the proceeding itself was so extraordinary that if none of it "penetrated the intelligence of those jurors, it was * * * little less than miraculous," *People* v. *Frasco, supra,* 187 AD at 304.

The proceeding was "calculated to have an effect on the attitude of the witnesses during the remainder of the trial," *Hartenstein* v. *Bindseil, supra.* The judge below made specific inquiry of Michael as to whether his mother and sister knew he was testifying and whether they would be called as defense witnesses. The judge not only directed the assistant district attorney to present an indictment against Michael Quinn, but directed him to investigate the existence of a conspiracy.

The effect which these actions had upon the testimony of the other alibi witnesses who followed Michael to the stand was apparent. Patrick Quinn refused to state outright that his prior testimony was false, although it was clear from the guarded answers he gave that this was the case (see especially 2531). The impact upon Elizabeth Quinn was equally apparent. The trial judge, himself, asked her whether her prior statements were true and reminded her that her answers were recorded. Elizabeth Quinn refused to state outright that her prior testimony was false (2621), yet this was the clear import of the rest of her testimony. The imminent danger to them of arrest for perjury if they failed to answer the questions "as desired" had been forcefully brought home. *M'Nutt* v. *United States, supra.*

There was no statutory authority for the action taken by the trial court. His unwarranted and precipitous conduct not only constituted an abuse of discretion as a matter of law, it deprived the appellant of his constitutional right to a fair and impartial trial as the dissent below recognized (A8). Accordingly, the judgment of conviction should be reversed.

POINT XII

The trial court erred in precluding the defense from rehabilitating its witnesses after impeachment, and in permitting improper impeachment of one defense witness.

(1)

Mary Quinn was cross examined as to prior inconsistent testimony given at the first trial and admitted making the statements. When asked on redirect to explain the inconsistencies, the court sustained the prosecutor's objection (2070-71).

This ruling was error.

> "While a party may introduce prior inconsistent statements made by witnesses for impeachment purposes as bearing on credibility (CPLR 4514), it is equally well-established that the witness, or the party for whom he was sworn, may produce evidence in denial or explanation of impeaching statements." *Regan* v. *Dwyer*, 33 AD 2d 878, 879 (4th Dept. 1969).[96]

In *People* v. *Buchalter*, 289 N.Y. 181, 202 (1942), where a witness admitted making false statements, then testified on redirect that he had been threatened and was in fear, the Court held:

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96. In accord: *Urbina* v. *McLain*, 4 AD 2d 589, 591 (1st Dept. 1957), cf., *Collins* v. *Kelly*, 226 N.Y. 180, 184 (1919), and *Ferris* v. *Sterling*, 214 N.Y. 249, 254 (1915).

> "It was necessary and proper for the district attorney to elicit the reason in the witness' mind for his conduct. The impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would materially remove it."

It was prejudicial error for the court to exclude the witness's explanation.

(2)

Giselle Quinn was not permitted to testify as to the circumstances under which Gallina obtained the statements from her and Michael Quinn (2349-51).

In *Urbina* v. *McLain*, 4 AD 2d 589, 591 (1st Dept., 1957), where an insurance company investigator had obtained a witness' statement in a questionable manner, the court held:

> "If at trial the statement is used to impeach the testimony of the witness, plaintiff can then introduce evidence to show the circumstances under which the statement was obtained to impair its effectiveness for impeachment purposes."

Giselle was not permitted to show the circumstances under which Michael's statement had been obtained in order to impair its effectiveness. The ruling preventing such proof was error.

(3)

Elizabeth Quinn was asked on cross whether she told one of the defense attorneys before trial that she was not sure the appellant was at her home on April 2 (A141). She did not recall saying this and was forced to admit, when she saw defense counsel's notes, that "the words appear here" (A144).

On redirect, the judge, sustaining the prosecutor's objections, not only refused to permit counsel to question her

about the whole of the statement, but also refused to hear any offer of proof or argument whatsoever (2648), and further refused counsel's request to introduce the whole of the statement into evidence (2647-49).[97]

This was prejudicial error.

In *People* v. *Baker,* 23 N.Y. 2d 307, 324 (1968), this Court held:

> "A party may always read another pertinent part of a statement used for the purpose of impeachment to correct a false impression that reading only a part of the statement may give (See CPLR 347, subd. [b])."

As we argue in Point IX(6), the gravity of this error was magnified because the prosecutor relied heavily in summation upon this "contradiction" which he disingenuously created.

(4)

The treatment accorded every defense witness,[98] both in the above-enumerated respects and as set out in Point

97. The entire interview (Def.'s Ex. DD for identification) which counsel was precluded from presenting shows that Mrs. Quinn told Mr. Steel that when she first reconstructed the weekend, she was convinced Maynard had slept overnight the first weeekend after Easter, April 2-3. She remained convinced until Gallina pounded away at her in the interviews and finally decided Maynard was there either the weekend of the 2nd or the following weekend and she was not sure now. The follow-up interview (on the same sheet of paper) states that Mrs. Quinn was asked whether she remembered a family discussion about the flowers blooming a week after Easter Sunday—"she remembered and stated she was convinced that Michael and Maynard were at her home the Sunday following Easter Sunday. She also recalled that Maynard had slept on her new velvet couch that weekend and Michael had slept in his old bed."

98. Another example of this was the trial court's badgering of Kathleen Quinn when she testified that she never told Gallina in 1969 that she was unsure of the appellant's whereabouts on April 2-3.

Kathleen had testified that when Gallina asked her if it was "possible" that the appellant was at her home a different Sunday, she said it was "possible" but she was "practically positive" it was April 2-3.

(footnote continued on next page)

XI, stands in sharp contrast to the over-solicitude shown by the trial judge in permitting the prosecution full latitude in rehabilitating its witnesses and in preventing the defense from impeaching them in the normal course of cross (see Point XIII).

This contrast in treatment of defense and prosecution witnesses, as we argue below, in itself raises a serious question as to whether justice was dispensed evenhandedly from the bench. Even in isolation, however, the above cited errors cannot be deemed insubstantial. The defense alibi stood or fell upon the jury's appraisal of the defense witnesses' credibility. Each error directly affected the jury's assessment of the witness's credibility. In these circumstances the errors cannot be disregarded under Code Crim. Proc. §542 as merely technical.

POINT XIII

It was error to prohibit defense impeachment of prosecution witnesses in material respects.

(1)

When Morris testified, the defense subpoenaed his yellow sheet for cross-examination purposes and the subpoena was disregarded (1319). The prosecutor disclosed only that in addition to a youthful offender conviction, Morris had a

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She told Gallina that it was now two years later, but when she first recalled the weekend in question, "I was positive of their whereabouts" (2412).

After she made this statement, the court asked her six times whether she ever said she was not sure of their whereabouts and Kathleen repeated her answer (2412-14). When the court asked the question for the seventh time, defense counsel objected that she had been asked the question four or five times already and the court stated (2414), "Would you like to testify for her? Is that what you want to do?"

dismissed marijuana charge (1320). According to the prosecutor, the seized material turned out to be oregano (1320). The court ruled there was no "basis for asking him whether he used drugs" (1320). The court also denied a request for Morris' military record (1321).[99]

It was error for the trial court to refuse to permit Morris to be asked whether he sold or indulged in drugs. Although the marijuana charge had been dismissed upon an analysis of the substance, this was legally irrelevant. *People* v. *Vidal,* 26 NY 2d 249, 253 (1971).

It was also logically irrelevant. If the charge had been for selling, then the fact that Morris meant to dupe his buyers by substituting oregano for marijuana would not detract from the underlying moral turpitude involved in selling drugs. If the charge were for possession, dismissal would be irrelevant if Morris believed he had marijuana in his possession. Although counsel could not ask about the arrest, the fact of the drug arrest gave him a "reasonable basis for believing the truth of the things he [would ask] about." (*People* v. *Alamo,* 23 NY 2d 630, 633 (1969)). Hence, it was error to preclude him from asking the impeaching questions.[100] *People* v. *Donovan,* 35 AD 2d 934 (1st Dept. 1970).

The prosecutor did not disclose Morris' military record. Although counsel could not question about infractions of military rules, he could inquire about in-service acts which were equivalent to civilian crimes. *People* v. *Lee,* 35 AD

99. The court refused to rule whether he would make the same advance determination as to the scope of cross-examination of the appellant when he took the stand (1321) and refused later to do so (Point XIV). The defense excepted to these rulings (1322).

100. The court below committed the same error in curtailing cross-examination of Gallina. Point VIII (C).

2d 542 (2d Dept. 1970). Non-disclosure of the military record was error.

When Feebles took the stand, the defense request for his yellow sheet was also denied (1017). Although counsel asked whether the witness had been arrested, the prosecutor was careful to state that he was disclosing *convictions* (1013-14).

In addition to a larceny conviction, Feebles had two convictions for disorderly conduct (1014). The court ruled that no inquiry could be made as to those convictions (1014). When counsel stated that these could have been compromise convictions, he was told to sit down (1017).

Nothing we can find precluded questioning Feebles about those 'dis.con.' convictions. See Fisch, *New York Evidence,* §458, p. 264. Inquiry can be made about convictions for any matter except vehicle and traffic infractions. It was error to preclude such questioning.

Moreover, as counsel argued, without disclosure of Feebles' yellow sheet it was impossible to tell whether those were compromise convictions. If they were, then counsel, at the least, had a right to question Feebles about the acts underlying the charges. *People* v. *Sorge,* 301 NY 198 (1950). It was error to preclude this line of questioning.

The prosecutor did not disclose Feebles' *arrests* as opposed to convictions, and the trial court refused to direct him to turn over the yellow sheet.[101] If the yellow sheet showed arrests without dispositions, then counsel had a right to ask if any authority indicated to Feebles, or if Feebles believed that his testimony could affect the disposition of any open charges.

101. Through the yellow sheet, counsel would be able to ascertain where to locate the official court records on any arrests.

The California Supreme Court recently held that the prosecutor was under a duty to disclose the yellow sheets on prosecution witnesses even in the absence of a defense request. *In re Fergerson,* 487 P.2d 1234 (1971). Since the prosecutor has full access to this information about defense witnesses, fundamental fairness requires that the defense be put upon an equal footing. This Court should follow *Fergerson.*

(2)

After the prosecution was permitted to introduce various prior statements of defense witnesses into evidence, the defense moved to introduce prior statements of prosecution witnesses. The motion was denied (3325-29). Prior to this, the defense also moved to introduce Feebles' prior trial testimony as a prior inconsistent statement. This was denied on the theory that the witnesses could only be confronted with the statement (1108-9). The rulings not only were arbitrary and capricious since the prosecution was allowed to introduce such statements of defense witnesses (3293), but were error as a matter of law.

The right of the jury "to scrutinize prior inconsistent statements cannot be cut off by the mere admission by a witness that he has been guilty of an inconsistency." *People* v. *Schnainuck,* 286 NY 161, 165 (1941).

The prior inconsistent statements of the prosecution witnesses should have been admitted. The error was prejudicial because the prior statements of defense witnesses were permitted into evidence and one of them, Michael Quinn's statement to Ruskin,[102] went into the jury room.

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102. The judge's refusal to let the defense introduce Feebles' prior trial testimony when Feebles had no recollection of it was directly contradictory to his ruling permitting the prosecutor to introduce Michael Quinn's prior statement to Ruskin, when Michael did not recall it.

(3)

James Barnhart was not permitted to testify that on the night of the homicide, Crist accused him of assaulting him with a knife earlier that night (2008-9).

This evidence was probative in two respects.

First, it directly contradicted Crist's account of the events[103] which he said caused him to assault Barnhart and therefore, if believed, would cast doubt upon Crist's credibility and veracity.

Second, Crist had been drinking heavily that night and his misidentification of Barnhart was evidence from which the jury could have inferred that his drunken state so befuddled his capacity to observe and report that no identification he made could be trusted.

The proffered evidence was relevant and material on the issue of Crist's veracity, credibility and capacity to make a correct identification, and it was error to exclude it from the jury's consideration.

(4)

The defense was precluded from asking Detective Hanast whether other eyewitnesses to the crime whom the prosecution did not call (and the defense could not locate because of untimely disclosure) had given descriptions which did not fit the appellant (A118-22). The answers were not sought for the truth of the matter stated, but merely to show the information was communicated to the police (A120-21). This ruling was error.

> "Testimony as to a conversation offered to prove merely the conversation took place rather than to prove

103. Crist was permitted to testify that Barnhart had made an indecent proposition to him and that this was the reason he chased Barnhart.

the facts contained in the conversation is plainly not hearsay." Wigmore, *On Evidence,* 3rd Ed. §1361, p. 2; Richardson, *Evidence,* 9th Ed. §§209, 210.

In his opening, the prosecutor asserted that out of all the witnesses that April morning, "only two persons were willing to step forward and become involved" (336). He further stated (338):

> "It's a terrible crime but fortunately there were witnesses. Dennis Morris, Robert Crist and *others who to this day have not come forward.*" (emphasis added)

Dietz and Piazza were witnesses who came forward, and their statements to the police proved this. By disallowing this proof the court permitted the prosecution to perpetuate his misstatement of the true facts.

(5)

John Von Means testified below and at the prior trial that the appellant came to his home in the Village around 5 p.m. on April 2, to get the keys to a boutique. Von Means and Maynard had been in partnership until March when they had a falling out and Von Means was denied access to the store.

Michael Quinn was also a partner. When Michael testified, the defense attempted to prove through a locksmith's receipt that the lock to the boutique had been changed on April 1 (2083-96), and hence that the appellant had no reason to go to Von Means' apartment the next day to obtain keys that no longer fit the lock. The court denied the offer of proof because Von Means had not yet testified (2089 and 2095).[104]

104. Defense counsel stated to the court when the offer was made that Von Means had given the testimony about the keys at the prior trial (2093).

The appellant was asked *on cross* whether he went to Von Means' apartment on April 2 (2793). (Von Means still had not testified.) On redirect, the court again refused any proof as to the locksmith's receipt and refused to admit it into evidence (2808-09). In summation, the prosecutor argued that there was no proof, outside the appellant's own testimony, that the lock had been changed (3598).

The court's ruling forbidding proof of the locksmith's receipt prior to Von Means' testimony was arbitrary, capricious and directly contradictory to another ruling it made wherein the prosecutor was permitted to prove, *prior to Von Means' taking the stand,* that Von Means reported a burglary of his apartment on April 1, 1967. This is another example of the disparity in treatment accorded to the defense and prosecution during this trial.

Proof the lock on the store had *already* been changed, would have discredited Von Means' testimony that the appellant came to his apartment on April 2, to obtain the keys in order to deprive Von Means of access to the store. It was competent evidence and there was no reason to exclude it.

In contrast, proof that Von Means reported a burglary on April 1, had no probative force in establishing that the appellant was in Von Means' apartment the next day. It was improper bolstering of a witness by extrinsic evidence on a collateral matter (2866-67).

The irony is that the judge had already recognized this when he refused to permit defense counsel to offer extrinsic evidence to support Michael Quinn's testimony that he remembered being with the appellant on April 3, because he posted a letter registering the trademark to the boutique on that date. The offer was rejected on the ground (2304):

> "This letter has no probative force whatsoever as to whether he [Michael] was with Mr. Maynard that morning and it will not be received."

By the same token, proof through the testimony of a police officer that Von Means had reported a burglary on April 1, did not establish that appellant came to his home on April 2, any more than proof that Michael mailed a letter on April 3, established that the appellant was with him on April 3.

(6)

These errors were material because they went to credibility of prosecution witnesses. The jury's assessment of their credibility was critical, since the defense witnesses put the appellant elsewhere at the times the prosecution witness claimed to have seen him in the Village.

There was a huge disparity in the trial court's rulings as between the defense witnesses and the prosecution's witness upon the credibility issue (Point XII). The prosecution was repeatedly permitted to impeach defense witnesses improperly and the defense was repeatedly denied the right to rehabilitate them in accepted fashion. In contrast, the trial court erroneously safeguarded the credibility of prosecution witnesses by rulings which denied to the defense the right to impeach them. The dissent below held it was error "to prevent the defense from rehabilitating its witnesses after impeachment and to prohibit the impeachment of prosecution witnesses" (A10).

The disparity in treatment between the prosecution and the defense pervaded the trial.

When, for example, Crist testified that he was taller than the black man who killed Kroll and the defense attempted to have the record reflect this fact, the trial court

refused to do so (905-06); yet, when Fox testified that the appellant turned his head (Point V), the trial court permitted the record to reflect the gesture (1636). The prosecutor was also permitted to have the record reflect a gesture Morris made and the court itself described it (1288).

When Crist was confronted with a prior inconsistent statement, the court commented before the jury, "he hasn't changed his testimony one iota" (811). And when defense counsel tried to show that Crist's statements as to the assailant's height were contradictory, the court stated, "you have deliberately read something which is exactly what we were talking about" (896). During Feebles' cross on inconsistencies, the court stated that "it's beginning to look as though these questions and answers that you refer to are a little bit out of context and are only part of the testimony of this man * * *" (1106). However, when defense counsel objected to a statement being read by the prosecutor to impeach a defense witness because it did not contain a contradiction, the court was quick to tell him (2637-38):

> "The Court: Objection overruled, but you have no right to say that this does or does not impeach or have any effect. That is what we have a jury here for."

This disparate treatment cannot be disregarded as insubstantial.

At the outset of the case, defense counsel moved to disqualify the trial judge on the ground that the District Attorney selected the judges who presided at homicide trials, and that appellant was entitled to a selection done by a less arbitrary process (2). The prosecutor stated

that this was the usual practice and there was every reasonable basis for following it here (3-4).

While there are cases sustaining this practice (*Matter of Gleason* v. *Mullen,* 204 Misc. 450 (N.Y. Co. 1953); *Shakur* v. *Murtaugh,* 307 NYS 2d 817 (1st Dept. 1970)), at least one case has rejected it. *McDonald* v. *Goldstein,* 273 AD 649 (2d Dept. 1948), affirming 191 Misc. 863. See also Liebowitz, "A Novel System of Criminal Court Calendar Practice," 35 Cor.L.Q. 349, 351 (1949) ("In sum, the prosecutor under the old system could hand-pick a judge to preside over a trial, a prerogative never vested by law or practice in counsel for the accused"). The Judicial Council long ago recommended its abolition. See *Fourth Annual Report of the New York Judicial Council* (1938), at p. 59.

While we urge this Court to hold that permitting the prosecutor to pick the judge to preside over a trial violates due process of law in any case, we further submit that in the particular facts of this case, given the judge's continual disparity in rulings upon the same subject matter, the practice complained of deprived the appellant of due process of law and a fair trial.

We also submit that each of the above cited errors committed by the trial court in refusing to permit defense impeachment of prosecution witnesses was material, and cannot be disregarded as merely technical under Code Crim. Proc. §542.

POINT XIV

The court below erred in precluding appellant's rehabilitation after impeachment and in permitting his improper impeachment.

(1)

Before the appellant testified, defense counsel asked the court to rule whether and to what extent the appellant could be impeached with prior convictions. The court refused, except to rule that he could be impeached with a Moroccan conviction (2556-61).

Since the trial court had ruled on the extent to which two prosecution witnesses could be impeached *before* cross-examination (Point XIII), it had no legitimate reason for refusing to accord the defense the same treatment and its refusal to do so was arbitrary, capricious and an abuse of discretion.

(2)

Counsel argued in a pre-trial motion, during trial and at sentencing to set aside the verdict, that the Moroccan conviction did not meet with due process standards and it could not be used for impeachment. The Supreme Court has held that a conviction obtained in violation of due process cannot be used to enhance punishment (*Burgett* v. *Texas,* 389 U.S. 109 (1967)), or to impeach. *Loper* v. *Beto,* —— U.S. —— (1973). California also holds that unconstitutionally obtained convictions may not be used for impeachment purposes. *People* v. *Coffey,* 30 Cal. Rptr. 457 (1967).

Since the Moroccan conviction occurred under a legal system which presumes guilt and which accords the accused none of the constitutional safeguards which inure here by right, this Court should hold that it had no value for impeachment purposes and that its use was error.

(3)

The appellant admitted the Moroccan conviction and a California conviction for possession of a gun. The court refused to let him explain the circumstances surrounding these convictions (2680-81). This was error.

In *People* v. *Tait,* 234 AD 433, 439 (1st Dept. 1932), aff'd 259 NY 599 (1933), the court held:

> "So far as the right of the witness to explain the facts and circumstances surrounding his conviction, there can be little question. The right of a witness, or a party, when testifying to thus explain a conviction, has been sustained by the Court of Appeals."

This error was substantial and material.

On cross, the prosecutor was permitted to read portions of the certified copy of the conviction into evidence and to falsely imply to the jury that the defendant served jail time pursuant thereto (2804-05). When defense counsel asked the appellant whether he actually spent time in jail, the prosecutor's objection was sustained, even though it was clear that no jail time had been served (2806). Thus, the prosecutor received an unfair advantage which should have been corrected by permitting the appellant to explain the circumstances, as he had a right to do.

This is not the only unfair advantage the prosecutor reaped from preventing the appellant's explanation of the convictions.

The appellant's explanation would have shown that, in both cases, he was not the actual possessor of the weapon, but was convicted for constructive possession.[105]

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105. At the first trial, the appellant testified that the California conviction resulted because he owned the car in which a gun belonging to his passenger was found (F725-26); and also testified that as to the Moroccan conviction, he was one of five persons living in a house where a weapon was found and they were all charged with its possession (F823).

Despite the fact that the explanations were on record at the prior trial and should have been received below, the prosecutor argued (3558-59):

> "On the question of the defendant's nonviolent * * * character we have some hard facts * * * which suggest someone with a reputation for nonviolence and nonpeaceableness * * * within a three year period was convicted of assault, was convicted of possession of a firearm on November 14, 1965 in Morocco, was convicted of possession of a firearm in California in April of 1966. * * * These are *admitted facts,* these are part of the record. *Peace loving people,* ladies and gentlemen, *do not possess guns. These convictions,* as opposed to opinions of friends, *are hard facts.* * * *"

These were admitted facts, but they were not the whole story and the prosecutor knew it. This is but another instance of the kind of distortion created throughout the trial by the prosecutor's improper objections to material which was properly offered to rehabilitate, then using the half-truths which he elicited on cross as if they were the entire truth.[106]

The defense attempt to obtain an explanation of the conviction was proper. The error in excluding it was material and prejudicial because the prosecutor then used the unexplained convictions to refute the appellant's character evidence and to wrongfully impute to the appellant actual possession of weapons on prior occasions.[107]

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106. See for example, Point XII(3), where he impeached Elizabeth Quinn with part of a prior statement, objected to her rehabilitation with the whole of the statement, and then argued in summation that he had established a material contradiction.

107. The summation contains another impropriety. The appellant explained that his assault conviction arose from a civil rights demonstration (2670). The prosecutor stated (3559): "* * * he wishes to create an impression that he has been involved over a period

(footnote continued on next page)

(4)

On cross, the appellant was asked whether he heard that an auto-larceny charge was adjourned to September 22 when he appeared in court on July 10 (2789). He stated that he had no recollection of having heard the adjourned date (2792).

On rebuttal, over objection, the prosecutor called a stenographer to testify that the adjourned date was part of the proceedings and the appellant was present in court when the matter was adjourned (2965-77). The prosecutor stressed this evidence in summation as proving the appellant a liar (3550-51).

This proof was improper in two respects.

First, it was extrinsic proof upon a collateral matter and a witness cannot be impeached by contradicting his veracity on a collateral matter. *People* v. *Perry,* 277 NY 460 (1938); *People* v. *Sehlinger,* 265 NY 149 (1934); *People* v. *DeGarmo,* 179 NY 130 (1904); *People* v. *McCormick,* 278 AD 410, 412 (1st Dept. 1951), aff'd 303 NY 403 (1951), where it was stated:

> "The reason for the rule is obvious. Since credibility of a witness is a purely collateral issue, the cross-examining counsel is bound by the answers elicited by the questions pertinent to the subject. This rule is rendered necessary to the orderly and expeditious administration of justice. Without it, collateral issues might be multiplied *ad infinitum.*"

Second, proof that the adjourned date appeared on the record of the July 10 proceedings is no proof that the appellant actually heard the date announced. In fact, de-

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of time in striving to protect the rights of his fellow men; he is asked —what is the evidence of civil rights activities that we have before us." The prosecutor made this argument knowing that no extrinsic evidence on a collateral matter such as this could have been introduced at the trial to bolster the appellant's statement.

fense counsel was prevented from asking the question which might have shed light upon whether the date was heard—i.e., whether the courtroom was crowded and noisy (2978).

Since the prosecutor had been improperly permitted at length to establish the collateral fact, it was arbitrary, capricious and an abuse of discretion as a matter of law for the trial judge to prevent defense counsel from asking one pertinent and material question going to the probative force of this evidence.

(5)

The appellant testified that Mary Quinn was not present at the Quinn household on April 2-3 (2769). At the prior trial, he stated she was with him (2769-72). The prosecutor implied on cross (2772-73) and in summation (3542-43) that the appellant fabricated his testimony in order to tie it into Mary's testimony. On redirect, the appellant attempted to explain how he came to the conclusion that his prior testimony was mistaken. He attempted to show that prior to the time he testified at the first trial, he had not claimed that Mary was with him, either to his German attorney (2812-16) or in the alibi bill of particulars furnished before the first trial (2816). He stated that his recollection at the first trial was confused and attempted to show how he came to believe that his present recollection was correct. The trial court refused to permit this (2812-21).

A prior consistent statement is admissible to rehabilitate a witness where the opponent, through cross-examination, has created an inference of, or directly characterized the witness's testimony as a recent contrivance. *People* v. *Baker,* 23 NY 2d 307, 322-3 (1968); Fisch, *New York Evidence, supra,* §§494-5, pp. 289-291.

It was proper to prove that the appellant had not claimed Mary Quinn as an alibi witness prior to the first trial, in order to meet the prosecutor's claim that his testimony below was a recent contrivance to tie in with Mary's testimony. The appellant had the right to show that he never told his German attorney or the attorney who prepared the alibi bill of particulars that Mary was with him, just as the prosecutor in *People* v. *Coffee,* 13 AD 2d 410, 411 (1st Dept. 1961), rev'd on other grounds 11 NY 2d 142, 145 (1962), had a right to prove that his witness selected a police drawing resembling the defendant in order to meet a claim of recent fabrication. In both instances, the proof was through consistent conduct of the witness whose testimony was attacked, and "whether [the actions] in fact corroborated [the witness's] testimony would be for the jury to say." 13 AD 2d at 411-412.

(6)

Each of the above cited errors was material upon the issue of the appellant's credibility and they cannot be disregarded as merely technical under Code Crim. Proc. §542.

POINT XV

The trial court committed a series of reversible errors in charging or refusing to charge the jury and in marshaling the evidence.

(1)

We have previously argued that the trial court erred in charging the jury in a variety of respects.

In Point II, we argued that the trial court erred in refusing to give a requested cautionary instruction on the identification issue.

In Point VII, we argued that it was error for the trial court to refuse a requested instruction that if the jury believed the defense alibi witnesses' explanation that their prior statements were made under duress, etc., then the statements had no value for impeachment.

In Point XIII, we argued it was error for the trial court to refuse a requested instruction that Gallina was an interested witness.

In Point VIII, we argued that the trial court erred in refusing a requested defense instruction that Gallina's testimony could not be considered evidence on any factual matter, but was relevant only upon the credibility of the Quinns' testimony that they were coerced by him into disavowing that the appellant was with them on the night of the crime.

In Point III, we pointed out that in marshaling the evidence on the lighting question, the trial court neglected to state that the opinions of two prosecution witnesses as to the lighting at the scene of the crime was predicated upon their concededly erroneous recollection of the lighting.

In addition to these errors, other substantial errors were committed in the course of the charge.

(2)

As to the defense of alibi, the trial court charged (A479-80):

> "* * * The question for you to determine is whether or not the alibi offered on behalf of the defendant is sufficient to raise a reasonable doubt in your minds as to the defendant's guilt.
>
> The burden of establishing the defendant's guilt is always upon the prosecution from the beginning to the end of the trial. If the testimony relating to the alibi

> when taken into consideration with all the evidence in the case raises a reasonable doubt as to the defendant's guilt, you should give him the benefit of that doubt and acquit him."

The defense had submitted a written request to charge[108] which was refused (A461). This was error.

People v. *Cirprio,* 30 AD 2d 956, 957 (1st Dept. 1968), held:

> "The jury should be instructed that while the People are under the burden of proving their case beyond a reasonable doubt, a defendant does not labor under the same heavy load with respect to a defense."

The appellant had a right to have this requested language included in the charge.

Moreover, the defendant is never called upon to prove the defense of alibi beyond a reasonable doubt. *People* v. *Elmore,* 277 NY 397, 405 (1938); *cf. Cool* v. *U.S.,* 409 U.S.

108. II. With respect to the defendant's alibi:

While the People are under the burden of proving this case beyond a reasonable doubt, the defendant does not labor under the same heavy load with respect to a defense. The defendant in this case has testified, and has presented evidence from Elizabeth, Michael and Patrick Quinn, and Katherine Quinn Moran that he was not at the scene of the crime when Sergeant Kroll was killed, but that he was at another place. If this evidence is believed it is the most cogent proof that the defendant did not commit the crime as charged. In order to find the defendant guilty, you must first find beyond a reasonable doubt that the alibi evidence was false or mistaken. However, even if you disbelieve the testimony that Maynard was at Elizabeth Quinn's home on the night of the murder, this disbelief alone is insufficient ground for a verdict of guilt. In order to prove the defendant guilty, it is up to the prosecution to prove beyond a reasonable doubt that the defendant was present at the scene of the crime and was the man who fired the shotgun. You have already been instructed that it is up to the People to prove the defendant's guilt beyond a reasonable doubt, and this includes proving each element of the crime, including his presence at the stated place and his committing the acts charged at that place at a given time. This burden of proof never shifts.

100 (1972). When the court below charged, he improperly shifted this burden of proof by instructing the jury that they had to decide whether the proof of alibi was "sufficient to raise a reasonable doubt in your minds as to the defendant's guilt." This was clear error under *Elmore.*

Furthermore, in *People* v. *Rabinowitz,* 290 NY 386 (1943), (and *People* v. *Russell,* 266 NY 147 (1934)), this Court held that the jury cannot be instructed that if they disbelieve the alibi, that this corroborated, or caused acceptance of, the prosecution's case.

> "If * * * the jury did choose to accept as true the prosecution's evidence, then rejection of the alibi testimony would necessarily result, *but not vice versa.* Disbelief of the defendant's witnesses could not * * * be corroboration of the People's witnesses. Much less could it be * * * that rejection of the defendant's proof spells acceptance of the People's proof." (emphasis added) (290 NY at 388)

The appellant had a right to have the jury informed, as requested, that disbelief of the alibi evidence can not *ipso facto* result in a verdict of conviction, and that even if the alibi is rejected, the jury must find the prosecution has proved guilt beyond a reasonable doubt to convict.

The court erred in refusing to charge that the appellant did not labor under the same heavy burden with respect to the alibi defense as did the prosecution with respect to its proof; it further erred in shifting the burden of proof as to alibi; and it further erred in failing to inform the jury that rejection of the alibi defense did not justify a guilty verdict unless it found that the prosecution had proved the case beyond a reasonable doubt. These errors were substantial and material and require a reversal of the conviction.

(3)

When the trial court revealed that he only intended to charge the jury on murder I, murder II, and manslaughter I (3671), defense counsel requested that the court also charge on manslaughter, second degree (3672). The court refused, and the defense excepted (3672). This was reversible error. *People* v. *Heineman,* 211 NY 475 (1914); *People* v. *Drislane,* 8 NY 2d 67 (1960); *People* v. *Malave,* 21 NY 2d 26; *People* v. *Asan,* 22 NY 2d 526 (1968).

In *Drislane* and *Heineman,* the trial courts refused second degree manslaughter charges because the proof showed that the crime was committed with a dangerous weapon (a knife or a gun). *Drislane* held:

> "Obviously a revolver is a dangerous weapon; nevertheless it was held that the omnibus clause [Penal Law §1052(3)] should have been submitted to the jury, leaving the latter free to convict of the lesser degree if they were so minded" (8 NY 2d at 70).

In *Heineman,* the defendant shot a man on the street after they had an argument. Before the shot was fired and while the defendant was holding his gun on the victim, the victim was backing away but then rushed towards him (211 NY at 480).

In this case Kroll, with an accomplice, pursued the black man in an automobile to start a fight after the black man walked away from the argument. When Kroll got out of the car, the black man warned Kroll not to come any closer, or he would shoot. Kroll was shot after he disregarded the warning and continued to advance towards the black man.

As in *Heineman* (211 NY 2d at 480):

> "It was not for the judge to weigh the evidence. The jurors certainly could have determined that the de-

> fendant was guilty of manslaughter [second] * * * They might have found that the facts proved * * * did not make out a case of felonious homicide within any of the precise definitions contained in the Penal Law, and therefore that he was guilty under the omnibus clause of Section 1050."

It does not matter, in charging a lesser degree, "that the defendant was guilty of no crime, rather than any lesser crime, if he testified truthfully * * * since a jury may properly find a lesser included offense from any portion of the defense and prosecution evidence, or from any part of the total proof." *People* v. *Asam, supra,* 22 NY 2d at 532.

The trial court's failure to charge manslaughter second degree, upon defense request, was reversible error.

(4)

When charging on credibility, the court gave the following instructions as to prosecution witnesses (A472):

> "Now, the fact that the witness Feebles * * * Berman * * * and Von Means have been previously convicted of a crime is not proof that they lied in this case. The only purpose for which the prior convictions of a witness may be considered is on the question of the degree of credibility. That is to say, the extent or degree to which you will believe the testimony of a witness who has been convicted of a crime.
>
> The matter of credibility of such a witness is for you to determine."

When charging the jury on the appellant's credibility, the court stated (A473-74):

> "Now the defendant admitted that he was previously convicted of several crimes, including possession of firearms, assault in the third degree. Now, these prior convictions do not disqualify him as a witness, in his own behalf. However, you have a right to take

into consideration the fact that this defendant has violated the law and committed crimes for which he was previously convicted in determining how much credence you will attach to his testimony, and to say whether or not he is reliable and worthy of belief, and for that purpose only you can use it."

There is no legal basis for the trial court to make this distinction between the appellant and the prosecution witness. Why when the defendant's turn came, imply that prior convictions may at some point disqualify him as a witness?

The defense had asked for a charge on the effect of prior convictions upon all witnesses, including the appellant,[109] which was denied except as charged (A461).

The requested charge was proper. It would have informed the jury that certain crimes directly reflect on credibility whereas others have but slight bearing. Further, it would have informed them not to draw an inference of guilt from the fact that the appellant had previously been convicted. *People* v. *Goldstein,* 295 NY 61, 64 (1946). Refusal to give the charge was error.

109. X. On the effect of prior convictions:

When the defendant testified, he admitted convictions for various misdemeanors. You can draw no inference of his guilt in this case from the fact that he has been convicted before of other charges, nor may you make the assumption that if he broke the law before, he probably did so this time.

These misdemeanor convictions bear only upon the issue of his credibility as a witness. In this connection, he is no different than any other witness taking the stand and testifying.

Other witnesses also admitted prior convictions. Michael Feebles was convicted of larceny, John Von Means was convicted of receiving stolen property, and Dennis Morris, while not convicted of a crime, admitted to stealing a purse.

In assessing the credibility of these witnesses, I charge you that acts such as deceit, fraud, cheating, or stealing may reflect on credibility, but that acts such as simple assault or possession of a gun have little or no direct bearing on honesty or veracity.

(5)

The prosecutor opened by stating that he would prove that the appellant twice fled the jurisdiction to avoid arrest for the crime in question (340-41).

The evidence offered to establish this claim was given by Lieutenant Stone, who testified that the composite sketches of Kroll's assailant appeared in the daily press on April 27, 1967 (1795). On May 17, 1967 the appellant was arrested on another charge and was questioned about the Kroll homicide (1797). He was released.

On August 7th, Stone wanted to locate the appellant, and the appellant called him (1811-12). Stone asked him to come to his office (1812). The next day appellant's attorney called Stone (1813). In March of 1968, seven months later, the appellant was brought back from Germany in custody (1814).

Stone testified that between May 17 and August 7, he did not assign detectives to follow the appellant or any of his associates (1846), and after August 7th, no new personnel was assigned to the case (1847). Stone stated he learned the appellant was in Europe from his attorney (1847).[110]

In his charge on flight, the court stated that there had been "evidence concerning the claimed flight of the defendant * * * after the police started questioning [him] * * *" (A477). The court then summarized Stone's testimony (A477-78).

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110. On cross, the prosecutor tried to establish that the appellant went to Europe despite the fact that a criminal case was adjourned (2789). Appellant stated he did not know the adjourned date since the arrangements were made between his attorney and the DA (2792).

A few distortions of fact appear in this portion of the charge,[111] but the major misstatements of fact appear when the court summarized the appellant's evidence that his trips out of New York City were motivated by considerations having nothing whatsoever to do with flight to avoid arrest.

The defense proved that the appellant was raised in Florida by his maternal grandmother, Dr. Irene Pratt (2831-32). He ordinarily visited her 3 or 4 times a year (2672), and did so in early May, 1967 (2996-97) before he was ever questioned by the police. Michael Quinn's daughter lived in Orlando, and they also visited her (2696). While they were in Miami, they went sightseeing, went to church, and visited with various friends and relatives of Dr. Pratt (2838).

The appellant proved that he had a valid passport which was issued to him in 1963 (Def. Ex. K), showing he traveled in Europe in 1964, 1965, and 1966.

On August 26, 1967, 3 weeks after Stone called him, he went to Brussels on business. Michael dropped him at the airport (2800). Giselle Quinn testified that when the appellant left, she saw him off at the airport, where they sat two to three hours in the public lounge (2341-42).

The appellant introduced a passport application (Def. Ex. EE) which he submitted in person to the American Consul in Hamburg, Germany on October 23, 1967, because he felt his passport was watermarked and ill-kept (2713).

111. For instance, the court spoke about the publishing of a composite sketch of Kroll's assailant and the appellant's trip to Florida as if a causal connection had, in fact, been established between the two events (A478) which occurred weeks apart. The appellant had testified that he had not learned of Kroll's murder until after he returned from Florida (2692). It was, of course, for the jury to decide whether the publication of the sketch in fact motivated the trip to Florida or whether the trip to Florida was motivated, as the defense contended, by the appellant's desire to see his grandmother.

It was made in his own name, and gave both his address in Germany[112] and his address in the United States.

In summation, defense counsel argued that all this evidence showed there was no flight (3390-92).

The trial court was under a duty not only to present the prosecutor's facts, but also to present the defense facts. However, after detailing Stone's testimony, the court gave only this statement to cover the defense facts (A478):

> "On the contrary, the defendant contends that nothing he did can be interpreted as a consciousness of guilt or an effort on his part to elude apprehension or arrest on the instant charge.
>
> It is contended that he drove to Florida with Michael Quinn and that the defendant visited his maternal grandmother while in Florida.
>
> That he then drove to Canada and subsequently returned to New York City. That when he went to Germany in August of 1967, he went there for business reasons.
>
> * * * and that his acts of going and coming to Florida, to Canada and to other places were all done in the normal course of his usual activities."

The defense had submitted a request to charge (Request V).[113]

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112. He was, in fact, arrested at this same address a short time later.

113. "In this case the prosecution showed that the defendant went to Florida in early May of 1967, returned to New York and traveled to Europe in late August of the same year. The defendant explained the purpose of those trips by testifying that he regularly visited his grandmother in Florida, and that he traveled to Europe in the regular course of his business and without any attempt to conceal his whereabouts. He called Dr. Pratt, his grandmother, who testified that Maynard was in the habit of visiting her two or three times a year and did not depart from his usual routine in Florida on the May 1967 visit. He introduced his passport into evidence to show a regular course of travel and also introduced his passport application as evidence that he made his whereabouts known to the proper United States authorities."

The court failed to state that there was evidence the appellant did not conceal himself on either trip and in fact, on the European trip, had made his address known to the authorities. The court failed to state that there was evidence he frequently traveled both to Europe and to Florida; and the court failed to state that there was evidence that while in Florida the appellant did not depart from his usual routine.[114]

All of this evidence, which the court refused to bring out though a specific request was made, was material as to whether the trips were made with a guilty motive or whether they were made for reasons having nothing to do with flight to avoid prosecution.

More than the mere fact of a trip out of the country after a crime was committed must be shown to establish consciousness of guilt. In *People* v. *Stillwell,* 244 NY 196, 199 (1926), where the defendant was apprehended in England eighteen months after the crime, and extradited, this Court held:

> "Guilty motive for the departure must be present before the departure can become a relevant factor in the determination of guilt."

In *People* v. *Fiorentino,* 97 NY 560, 567 (1910), this Court held that evidence of flight is of no value whatsoever:

> "* * * unless there are facts pointing to the motive which prompted it and hence *any explanation of the accused should always be considered in connection therewith.*" (emphasis added)

In this case the court refused to put before the jury those facts upon which the explanation of the accused was

114. Compare, *People* v. *Reade,* 13 NY 2d 42 (1963) where immediately after the crime the defendant not only failed to appear in any of his usual haunts, but did not return to his job though he had wages owing to him, and had dyed his hair and eyebrows a different color from their normal color.

based. By omitting these facts, the court stripped the appellant's explanation of its persuasive force.

People v. *Baker,* 26 NY 2d 169 (1970) held:

> "This court has always recognized the ambiguity of evidence of flight and recognized that the jury *must be closely instructed* as to its weakness as an indication of guilt of the crime charged." (emphasis added)

Although the court below correctly instructed on the legal theory, it did not closely instruct as to the facts. By failing to instruct upon the facts favorable to the defense, the court materially distorted the total evidence on this issue to the prejudice of the appellant.

(6)

The trial court (and the prosecutor) improperly treated the prior inconsistent statements of the defense witnesses as substantive evidence.

When the prior statements of Elizabeth, Patrick and Michael Quinn were offered into evidence, defense counsel asked the court to instruct that they came in not as proof of what was said in the statement, but as a method of impeaching credibility (3293). The court merely stated that their purpose was to attack the credibility (3293). Counsel again asked the court to state that the statements "are not proof of the truth of the statement" (3294). The following then ensued (3294):

> "Mr. Sawyer: Well, it has been conceded that the statements as transcribed have been accurately transcribed. * * * *Whether or not they contain—whether or not that statement, or a subsequent statement is true is entirely a matter for the jury.* * * *"
>
> Mr. Steel: It is a misleading statement by Mr. Sawyer. He is misstating the law—

> The Court: *The jury is going to have to determine where the truth lies in this case,* in any event. That is what they are here for and that is the reason why the District Attorney offers these, to attack the credibility of those witnesses who appeared for this defendant, and that is the purpose for which they are received, *and they are to aid you in your determination of where the truth lies in the case.* But *they are offered exactly as the District Attorney has offered them*: to attack the credibility of those witnesses who have testified for the defense." (emphasis added)

The court earlier made this same type of statement when Michael Quinn was cross-examined.[115]

In so instructing the jury, the trial court fell into the error which caused reversal of the conviction in *People* v. *Carroll,* 37 AD 2d 1015 (3rd Dept. 1971), where the court held (at 1016):

> "In its charge on the subject, the trial court stated: '* * * it is for you to determine what credence you will give the statement and to the testimony of the witness here in court.' While the instruction is couched in terms of credibility, the jury's understanding of it could have only been that they could consider the statements as direct evidence of the appellant's guilt."

The error below was even more serious. While the instruction was "couched in terms of credibility," the court refused to correct the prosecutor's misstatement of the law and to instruct the jury, as defense counsel re-

115. When asked about a November 28, 1967 interview with Assistant District Attorney Ruskin, Michael stated, as he had at the prior trial (F920) that he had no recollection of the questioning, though he recalled speaking to Ruskin (2190-91). The prosecutor was permitted to read the entire interview into the record, over defense objection (2179-90). Although defense counsel stated that the interview was not evidence but was read for the purpose of refreshing recollection, the trial court commented that this evidence was for the jury to evaluate "just as they see fit" (2188).

quested, that the statements could not be considered for the truth of the matter contained. Instead the court told the jury that they had to determine "where the truth lies in this case" and that the statements "are to aid you in your determination of where the truth lies."

The prejudicial effect of the error was compounded by the prosecutor's summation. He argued that the November 28 statement of Michael to Ruskin proved that Michael did not know where the appellant was on April 2-3. He told the jury (3533):

> "Read this statement which has been admitted into evidence, was made to Mr. Ruskin, please read it. Please study it. *If he knew at that time that he was with his family and the defendant was,* and if he was afraid as Mr. Steel says, *then all right, give the alibi*— I was at home, then he's safe, then he's covered. *But no, read this statement* * * *" (emphasis added)

The prosecutor later used the May 17 statement of Michael to Lieutenant Stone as if it were substantive evidence corroborating Von Means' testimony (3599):

> "Funny enough, the meeting between Mr. Maynard and Mr. Quinn on April second *is corroborated* in an unexpected way, *by Michael Quinn, when he is being interviewed by Lieutenant Stone* on May 17, 1967, states in response to questions by Lieutenant Stone about the meeting: Gee, I recall there was one incident, when I was downstairs and when Maynard was upstairs, it is in Lieutenant Stone's testimony * * *" (emphasis added)

Both statements were admissible only on Michael's credibility. The Ruskin statement could not be used to prove that Michael did not know Maynard's whereabouts on April 2-3, or the Stone statement to prove that Michael

was with Maynard at Von Means' apartment at some time, much less on April 1.

While the court below did perfunctorily state in its charge that the prior statements were not admitted for their truth (A481), this warning came too late. *People* v. *Welch,* 16 AD 2d 554, 558 (4th Dept. 1962):

> "* * * the cautionary words of the trial court were made long after the contents of the statements had been presented to the jury in the form of exhaustive questions quoting verbatim the contents of the affidavits. When the instructions were forthcoming, they were equated to the receipt in evidence of the affidavits. Not once during the lengthy questioning * * * was the jury told, as they should have been, that the quotations * * * *had no independent testimonial value* but were received only for the purpose of impeaching the witness." (emphasis added)

In accord: *People* v. *Ferraro,* 293 NY 51, 56 (1944), where a faulty instruction on the use of prior inconsistent statements was held not to be cured by later, correct instructions by the trial court.

Moreover, the proof that the inaccurate characterizations of the statements and the prosecutor's improper argument had a prejudicial effect upon the jury, is that during deliberation, they asked for the November 28 statement of Michael to Ruskin (3839). In *People* v. *Price,* 35 AD 2d 1015, 1016 (2d Dept. 1970), the court held:

> "Despite the court's charge that the statement was to be considered only on the issue of [the witness's] truthfulness, its act of sending the statement to the jury, upon their request * * * effectively destroyed the prior warning. The jury had no right to see the statement and its request clearly indicates that it improperly considered the statement on the issue of the defendant's guilt."

(7)

In marshaling the evidence, the court continually impugned the truthfulness of defense witnesses and continually omitted any damaging admissions made by prosecution witnesses.

One such instance was the testimony of Michael Quinn as to the statements which Michael gave to Gallina prior to the first trial (A544-45):

> "* * * *even though* the statement which he gave to Gallina contained language that it was truthful and * * * freely made without duress, and without Gallina promising him anything for making the statement, *he now says* that the statement * * * was untrue, he said Gallina promised that if he made the statement his fiancee Giselle Nicole would not be deported and he would be released from civil jail. * * * He *claims* that he made the statement * * * as part of a deal with Gallina that * * * he would be released * * * and Gallina would wipe out a [pending auto] charge * * * and that his fiancee Giselle Nicole would not be deported. * * *" (emphasis supplied)

When the trial court summarized Gallina's testimony (A574-79) he utterly failed to mention that Gallina admitted promising to do all the things that Michael had "claimed".

Throughout the marshaling of the evidence, the trial court would state that a defense witness "claims" doing something or saying something (A543, A544, A546, A552, A555, A556, A560, A562, A567). When the court marshaled the evidence as to the prosecution witnesses, their testimony was summarized in narrative form, as if it were fact. Specific objection was made to the marshaling on this ground (A616).

Thus Crist "noticed an older colored man," James Barnhart, and Barnhart "put his arm around his waist and suggested that Crist accompany him to his home for the night" (A490), whereas Barnhart "*claims* he had no words with [Crist] at that time" (A536) and "*claims* he did nothing to the sailor before he heard the stamping of feet" (A537).

Thus Von Means saw the appellant come to his apartment on April 2 and heard him ask for the keys to the boutique (A569), whereas the appellant "admits that he knew Von Means" and "claims he did not visit Von Means that day at the Hotel Albert" (A567).

The court also referred (A581) to evidence which he had previously excluded (A102-03) and refused to correct the error when it was specifically called to his attention (A614-15).

In charging the jury on the definitions of homicide and the degrees, the court, as defense counsel pointed out (A618), assumed in all examples that the appellant was the person who killed Kroll. For example, "Just ask yourselves, did the defendant Maynard deliberately and with premeditation intend to kill * * * Kroll?" (A590).

(8)

The magnitude of the errors in the charge cannot be deemed insubstantial. On virtually every question of law, the trial court erred in refusing proper defense requests to charge and further erred in the content of the charges actually given. The marshaling of the evidence was no better. The court listened to a few defense requests then refused to hear any others, ruling that counsel's general exception to the marshaling was sufficient (A615-16). The judgment of conviction must be reversed because of the errors in the charge.

Conclusion

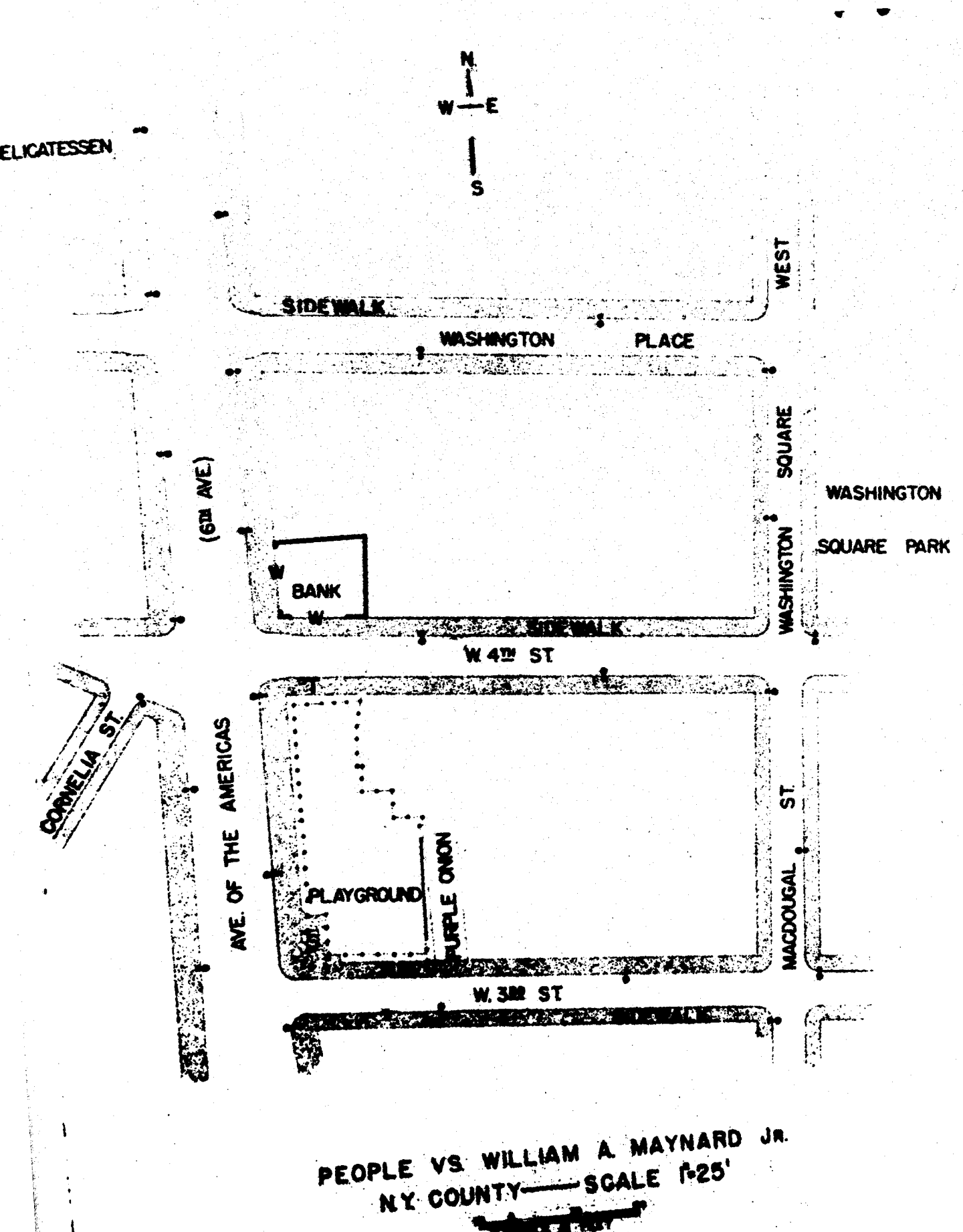
We have submitted fifteen different categories of error, each of which, we believe, requires reversal of the conviction. Certainly the extent of the error, in cumulation, cannot be disregarded as merely technical or insubstantial. Moreover, the fact that the jury, in the first trial, was unable to agree on a verdict, and that the jury below initially reported itself deadlocked and only came to a verdict after three days of deliberation, are "circumstances not to be overlooked in deciding whether an undoubted error in the conduct of the trial is of sufficient importance to require a new trial." *People* v. *Sing*, 242 NY 419, 421 (1926).

We have argued that the evidence was insufficient as a matter of law to prove guilt beyond a reasonable doubt, and accordingly ask that the judgment be reversed and the indictment be dismissed. Alternatively, the judgment should be reversed and a new trial ordered, with appropriate pre-trial hearings.

Respectfully submitted,

GRETCHEN WHITE OBERMAN
Attorney for Defendant-Appellant

Of Counsel:
DANIEL L. MEYERS
LEWIS M. STEEL



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