
Post-Trial Proceedings

People v. Maynard, 80 Misc. 2d 279 - NY:
Supreme Court, New York 1974

1-25-1973

Application for Bail Pending Appeal

Lewis M. Steel '63

2/7/73 Bail application withdrawn without prejudice.
(It gave me original papers back) which are these).
Had no choice. Murphy would have denied if I did
not. Felt he was bound by 3-2 decision. Said I could renew
at some future date.

-----X
STATE OF NEW YORK)
S I R S: ss.:
COUNTY OF NEW YORK)
PLEASE TAKE NOTICE that the undersigned, upon the affidavit
LEWIS M. STEEL, being duly sworn, deposes and says:
of Lewis M. Steel, sworn to the 25th day of January, 1973 and
1. I am one of the attorneys for the defendant-appellant,
all the proceedings had heretofore will move this Court, before
having been his trial counsel and his attorney on appeal.
the Hon. Francis Murphy, Jr., on the 7th day of February, 1973
2. The defendant has been in custody since November, 1967,
at 10:30 O'clock in the forenoon or as soon thereafter as Counsel
when he was arrested in Germany on a charge of murder in the 1st
may be heard, for an order pursuant to § 460.60 of the CPL set-
1st degree. His first trial in May and June, 1969, ended in a
ting reasonable bail pending appeal.
hung jury. After a mistrial in 1970, he was retried in the fall
Dated: New York, New York Yours, etc.,
of 1970, January 25, 1973 if the lesser included charge of manslaughter
LEWIS M. STEEL,
in the 1st degree under the old penal law DANIEL L. MEYERS
351 Broadway
New York, N.Y. 10013
966-7110
Atty. for Defendant-
Appellant
3. The Appellate Division, First Department affirmed his
To: Frank S. Hogan
District Attorney 9, 1972, Stevens, P.J. and Murphy, J,
New York County
dissenting in a memorandum by Murphy, J. Permission to appeal
to the Court of Appeals was granted by the Hon. Francis T. Murphy,
Jr., on November 17, 1972. Notice of Appeal to the Court of
Appeals was filed on November 22, 1972. On December 28, 1972,

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

WILLIAM A. MAYNARD, JR.,

Defendant-Appellant.

AFFIDAVIT IN SUPPORT
APPLICATION FOR BAIL
PENDING APPEAL.

-----X

STATE OF NEW YORK)

S I R S: ss.:

COUNTY OF NEW YORK)

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LEWIS M. STEEL,

in the 1st degree under the old penal law DANIEL L. MEYER

351 Broadway

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966-7110

Justice Irwin Davidson.

Atty. for Defendant-
Appellant

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the Court of Appeals appointed Lewis M. Steel and Daniel L.
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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4. The defendant is presently incarcerated in Clinton
THE PEOPLE OF THE STATE OF NEW YORK,
Prison, in Dannemora, New York, after having been
Respondent, AFFIDAVIT IN SUPPORT
OF APPLICATION FOR
BAIL PENDING APPEAL.
fined in Ossining Prison, Attica Prison and
- against -

5. Prior to the trial in which he was convicted, and while
WILLIAM A. MAYNARD, JR.,
charged with murder in the first degree, bail was set at \$50,000.
Defendant-Appellant.

The defendant, who is indigent as a result of being incarcerated,
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ss.:
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\$50,000. LEWIS M. STEEL, being duly sworn, deposes and says:
11, 1972, I am one of the attorneys for the defendant-appellant,
having been his trial counsel and his attorney on appeal.
seeking. The defendant has been in custody since November, 1967,
when he was arrested in Germany on a charge of murder in the
1st degree. His first trial in May and June, 1969, ended in a
hung jury. After a mistrial in 1970, he was retried in the fall
of 1970, and convicted of the lesser included charge of manslaughter
in the 1st degree under the old penal law. He was sentenced to a
term of 10-20 years imprisonment on February 4, 1971 by Mr. 78
Justice Irwin Davidson. Sutton in this Court, and obtained a stay of
his release. The Appellate Division, First Department affirmed his
conviction on November 9, 1972, Stevens, P.J. and Murphy, J,
dissenting in a memorandum by Murphy, J. Permission to appeal
to the Court of Appeals was granted by the Hon. Francis T. Murphy,
Jr., on November 17, 1972. Notice of Appeal to the Court of
Appeals was filed on November 22, 1972. On December 28, 1972,

the Court of Appeals appointed Lewis M. Steel and Daniel L. Meyers to represent Maynard on appeal.

4. The defendant is presently incarcerated in Clinton Prison, in Dannemora, New York, after having previously been confined in Ossining Prison, Attica Prison and Greenhaven Prison.

5. Prior to the trial in which he was convicted, and while charged with murder in the first degree, bail was set at \$50,000. The defendant, who is indigent as a result of being incarcerated, was unable to make bail.

6. On June 29, 1972, Mr. Justice Sutton set bail at \$50,000 pending appeal to the Appellate Division. On September 11, 1972, bail was posted for the defendant by Stuyvesant Insurance Co. as surety. On September 14, 1972, after initially seeking to challenge the sufficiency of the bond (but ultimately conceding this fact) before Mr. Justice Burns in Part 30 of the

New York Supreme Court, the District Attorney reargued the bail application before Mr. Justice Sutton. After reargument, Judge

Sutton ordered that Maynard be produced before him on September 19, 1972, so that he could establish travel restrictions. On September 15, 1972, the District Attorney filed an Article 78

against Mr. Justice Sutton in this Court, and obtained a stay of his release. This action, Scotti v. Sutton, was dismissed as moot on November 9, 1972.

7. The bail fund in the amount of cash and securities totalling \$50,000 is still available in the event this Court

fixes bail. The fund has been raised from many persons, including distinguished members of the New York bar.

The defendant is presently incarcerated in Clinton
prison to represent Maynard on appeal.
SABINE COURT OF THE STATE OF NEW YORK
the Court of Appeals appointed Lewis M. Steel and Daniel T.

8. This application is directed to Mr. Justice Murphy under CPL 460.60 as he granted the defendant permission to appeal.

9. With regard to the criteria set forth in CPL 510.30 with regard to bail on appeal, counsel sets forth the following facts:

(i) Mental condition, character and reputation: Counsel has visited the defendant many times since his incarceration, and has always found him to be an exceptional person with great strength of character, insight and integrity. He appears to have deeply suffered from his incarceration, but has maintained his dignity and composure throughout.

On the issue of his character and reputation, I attach hereto 3 letters from persons who have known the defendant over the years.

The first is from the distinguished writer, William Styron: He says:

I am writing you in behalf of William A. Maynard, hoping that you might find it reasonable and appropriate to grant him bail. I appeared as a character witness at his trial, believing him then as now innocent of the crime of which he was accused, and further convinced that his conviction was a miscarriage of justice.

Mr. Liman suggests that his letter be sealed as Maynard may be endangered by other prisoners because he talked to representatives of the Commission. It was common knowledge, however, in the prison that Maynard did this. I got to know Maynard well and came to regard him as a young man of exceptional intelligence, poise and decency. Such was my respect for his gentleness and integrity that I found it (and still find it) inconceivable that he should be accused of committing the ruthless and brutal crime for which he was ultimately sent to prison.

It is my understanding that Maynard has been dreadfully brutalized during his time in prison so far, and has suffered perhaps more than the ordinary anguish that attends incarceration. Knowing the nature of Maynard's sensibility,

under GBT 490*90 as he directed the defendant's permission to
 8. This application is directed to Mr. Justice Wilby

I cannot help but feel that further time behind walls might totally mutilate or even destroy the personality of a man who I know from first-hand evidence has much still to contribute to society. In his struggle toward vindication -- a vindication I somehow am convinced he will eventually win -- the granting of bail would be a crucial first step toward allowing him to regain his equilibrium. Those of us who have a stake in his future have shown our faith in Maynard by unhesitatingly responding to secure his bond. I think I am speaking for all of us when, I say that your favorable decision might be instrumental in saving the very life of a valuable, decent man whose spirit must otherwise be crushed and ruined.

The second letter is from Arthur L. Liman, former General Counsel of the Mc Kay Commission, who describes his contacts with Maynard in the aftermath of the Attica uprising. In his letter, Mr. Liman indicates that Maynard was a reluctant bystander to

the Attica events (the defendant received two gunshot wounds and as one having the ability of selfmastering and self-recapture of the prison and a manuscript he was working on was destroyed by the take-over force). Mr. Liman assesses Maynard as follows:

I found Mr. Maynard to be intelligent, cooperative and candid. He is by nature extremely sensitive and almost obsessed with a concern for privacy. Obviously, the communal aspects of prison life and regimentation had a corrosive effect upon him. When I met him he was in segregation because he preferred solitude, where he could write, to the din of normal cell life.

*Individual, he was associated with no groups in prison. Thus, Mr. Liman suggests that his letter about Maynard may be endangered by other prisoners because he talked to representatives of the Mc Kay Commission. It was common knowledge, however, in the prison that Maynard did this. Nor, from what I've been able to gather from attorneys who have been working in behalf of the Attica prisoners charged with crimes as a result of the uprising, was there any resentment. As Maynard was in segregation when the uprising began and was only released after the take-over was completed, he knew nothing about its origins. Being a solitary

The third letter is from Mrs. Gitta Bauer, the assistant bureau chief of the Springer Foreign News Service of West Germany. Mrs. Bauer won the Theodore Wolff Prize in 1970 (the German equivalent of the Pulitzer Prize) for her reporting from the United States and served as President of the Foreign Press Association in 1971. Mrs. Bauer says:

(ii) The defendant's ability to support himself: Prior to his trial in fall 1970, which I covered as a reporter, I was shocked by the verdict, since the proceedings had raised serious doubts in my mind, the same kind of doubts that are reflected in your and Justice Harold Stevens' dissenting opinion. Since then I have sought the acquaintance of Mr. Maynard and have seen him several times at the Correctional Facility of Green Haven and at the Bronx House of Detention.

Mr. Maynard appeared to me to be a man of great discipline and as one having the ability of selfmastering and self-restraint. I was amazed by his serenity of mind, the sanity of his judgement and the strength with which he is bearing his fate. Putting myself in his shoes I seriously doubt whether I could have maintained his confidence, that justice will ultimately prevail. I am absolutely sure, that Mr. Maynard, if set free on bail, would continue to comport himself in the same manner, and that he would in no way be a threat to society, but rather an example in the

trade newspaper, Variety, and I personally verified this fact directly. I am saying this not lightly, Sir. Being a skeptic by education, profession and the experience of life I am not

(iii) Family ties: The defendant's family ties in New individual, he was associated with no groups in prison. Thus, he talked to the Mc Kay personnel only about prison conditions generally and the brutality of the prison's recapture. By so doing, he did a service to his fellow prisoners and to the public generally. Far from causing him problems with other prisoners, his cooperation placed him in jeopardy from only one segment of the prison population he comes in daily contact with -- the guards. Counsel therefore is content to have the Liman letter appear openly on the record, as the guards already know that Maynard spoke to the McKay investigators.

has lived in New York City most of his adult life. He was raised as a child by his grandmother, D5. Irene Pratt, in Florida, and has visited her on a regular basis all his adult life (Appellant's Brief, p. 22).

Wm. BAKER MOTEL FIRE IN 1910 (THE GER-
MANIA) Mrs. BAKER WON THE THEODORE WOTTE PRIZE IN 1910 (THE GER-
MANIA) chief of the syndicate foreign news service of West Ger-
many. The third letter is from Mrs. Greta Baker, the assistant

easily taken in by pleasant manners or appearances. Rather, I would say that my assignments as a foreign correspondent all over the world - including the Nuremberg trials, the trial of Adolf Eichmann in Jerusalem and lately the Angela Davis trial - and the opportunity to meet people from all walks of life have taught me to see through surface varnish and recognize the working of people's minds. York City,

\$50/10 Please accept my statement as an objective reflection of what I concluded from careful observation.

The defendant testified at trial that this conviction re-

(ii) The defendant's ability to support himself: Prior to his incarceration in this case, Maynard had been a principal in a small personally held business corporation. Through this

b. Section 975 Policy; 7/23/64; New York City; sentence in a small personally held business corporation. Through this corporation, he acted as an agent for well-known jazz musicians 10/21/64; \$100/10 days; Rao and Babock, J. (sentence).

c. Attempted Bail Jumping; 3/21/66; New York City; sentence in Europe, where he made regular trips. Maynard also was in partnership with his brother-in-law in a clothing business in time served.

New York City prior to his arrest. Additionally, the appellant

The sentencing minutes on this matter, Indictment No. 3226, was attempting to develop a career as an actor. Some two months 1964, March 21, 1966 Special and Trial Term, Part 38, Schweitzer, before the homicide for which he now stands convicted, Maynard J., reveal that the appellant voluntarily surrendered after return- was offered a leading role in a motion picture which was to be ing from a trip to Egypt to face another charge.

filmed in New York. This acting assignment was announced in the

d. Possession of a weapon, November 15, 1965; Tangiers, trade newspaper, Variety, and I personally verified this fact di- Morocco; sentence: 1 year suspended.

rectly with the film's producer.

e. Possession of a weapon (misdemeanor); 4/19/66; San

(iii) Family ties: The defendant's family ties in New Diego, California; sentence - 1 year probation.

York City are excellent. His sister, Valerie Maynard, is a well-

After being sentenced in the instant case, the appellant known sculptor in New York City, and works with the Studio Mu- was sentenced on the following two charges:

f. Bail jumping as a misdemeanor, March 1, 1971, Supreme seum in Harlem. Another sister, Barbara Fraser, has lived in Richmond Hills, Queens for many years. Mrs. Fraser's husband is Court, New York County, Birns, J., 1 year concurrent with man- a public employee and works for the City of New York. Maynard slaughter sentence.

has lived in New York City most of his adult life. He was raised

This charge of bail jumping arose when the defendant stayed as a child by his grandmother, Dr. Irene Pratt, in Florida, and in Europe on a business trip, and did not appear on a motor has visited her on a regular basis all his adult life (Appellant's vehicle charge. The record reveals, however, that before going Brief, p. 22).

to Europe, the appellant did attend court when required (Appellant's

(iv) Prior record: Prior to his conviction for manslaughter, the appellant, who is 36 years old, had been convicted of the following:

a. Assault in the 3rd degree; 12/17/63; New York City, \$50/10 days, Malzhin, J.

The defendant testified at trial that this conviction resulted from his participation in a civil rights demonstration involving discrimination in the building trades unions.

b. Section 975 Policy; 7/23/64; New York City; sentence 10/21/64; \$100/10 days; Rao and Babock, J. (sentence).

c. Attempted Bail Jumping; 3/21/66; New York City; sentence time served.

The sentencing minutes on this matter, Indictment No. 3226, 1964, March 21, 1966 Special and Trial Term, Part 38, Schweitzer, J., reveal that the appellant voluntarily surrendered after returning from a trip to Egypt to face another charge.

d. Possession of a weapon, November 15, 1965; Tangiers, Morocco; sentence: 1 year suspended.

e. Possession of a weapon (misdemeanor); 4/19/66; San Diego, California; sentence - 1 year probation.

After being sentenced in the instant case, the appellant was sentenced on the following two charges:

f. Bail jumping as a misdemeanor, March 1, 1971, Supreme Court, New York County, Birns, J., 1 year concurrent with manslaughter sentence.

This charge of bail jumping arose when the defendant stayed in Europe on a business trip, and did not appear on a motor vehicle charge. The record reveals, however, that before going to Europe, the appellant did attend court when required (Appellant's

FOI[REDACTED]:

the appellant's motion for a writ of habeas corpus of the
(TA) BYRON RECORD: BYRON FOR HIS CONVICTION FOR MANSLAUGHTER

Brief, p. 112(4)). The appellant thereafter travelled to Europe on business using a valid passport, which he replaced in Germany because it was dirty. When the appellant sought a new passport, which he did not have to do as the old passport had not yet expired, and was clearly readable, he gave the American Embassy his correct European and American addresses (see, Appellant's Brief, p. 120).

g. Unauthorized use of a motor vehicle as a misdemeanor, March 1, 1971. Supreme Court, New York County, Birns, J., 1 year concurrent with the manslaughter and bail jumping sentence.

(v) As indicated, the appellant does have two convictions relating to missed court appearances. However, in the first case, the appellant voluntarily surrendered himself upon returning from overseas. In the second matter, the appellant was travelling openly in Europe on business, and actually made his whereabouts known to American authorities. This is hardly the conduct of a man who did not intend to return and dispose of outstanding charges. Moreover, the testimony in the record, given by a police officer, was that the appellant's lawyer told the authorities that the appellant had gone to Europe, (Appellant's Brief, p. 11), again indicating the appellant's intent to resolve his problems with the law rather than flee.

In further consideration of this application, counsel calls the Court's attention to the following facts:

Appellant's prior counsel, Gussie Kleinman, Esq., informed me when I undertook Mr. Maynard's defense, that he had been offered time served by the district attorney's office if he would plead guilty to a lesser crime under the indictment. She further

mainly because it was difficult. When the appellant sought a new
on business nature a valid passport, which he refused to cer-
brief' b. JIS(4). The appellant specifically requested to Enlobe

informed me that Mr. Maynard refused to accept the offer on the
basis that he was innocent of the crime, and looked forward to
being vindicated at the conclusion of his trial. only accepted
a plea. Recently another of Maynard's former attorneys, Selig be-
lenefsky, Esq., verified to me that this offer had been made.
The author, James Baldwin, who attended many court sessions in
behalf of the defendant has also verified that he was present when
this offer was made, more than \$50,000, bail.

Additionally, Mr. Maynard has for the entire period of his
incarceration sought a lie detector test and/or a sodium pentothal
test in order to establish his innocence. I personally requested
that the district attorney administer such tests when I became
day of January, 1973.
counsel. The district attorney refused. As with the refusal
to accept time served, these requests of the appellant are con-
sistent with the conduct of a person seeking vindication through
the judicial process.

Lewis M. Steel
LEWIS M. STEEL

Raymond S. Fisher
RAYMOND S. FISHER
Qualified in New York County
Criminal Justice March 20, 1968

10. The Likelihood of Reversal: This Court is aware of
the majority and minority opinions which have been filed in this
case, and which are attached hereto and made a part hereof. I
can only add that I know of few cases which have ever had greater
number of serious issues to be decided by an Appellate Court.

11. The defendant has not previously sought the relief
requested herein from any other court.

12. In conclusion, counsel calls to the attention of this
Court the fact that the defendant has already been incarcerated
since he was arrested in Germany in November, 1967, that he has
been wounded through no fault of his own while in custody, that

being vindicated of the conclusion of his first

phase that he was innocent of the crime, and looked forward to

informed me that Mr. Maynard refused to accept the offer on the

he has served a significant part of his sentence -- years which cannot be given back to him if he is eventually vindicated, that he would have already been free if he would have only accepted a plea bargaining deal, that 2 judges, having all the facts before them, have set bail at \$50,000.00, and that the issues on appeal are substantial.

WHEREFORE, this Court should set reasonable, but in no event in an amount more than \$50,000, bail.

I am writing you in behalf of William A. Maynard, hoping that you will find it reasonable and appropriate to grant him bail. I appeared as a character witness at his trial, believing him then as now innocent of the crime of which he was accused, and further convinced that his conviction was a miscarriage of justice.

Lewis M. Steel
LEWIS M. STEEL

I first became acquainted with Maynard ten years ago when he was introduced to me by another writer and mutual friend, James Baldwin. I got to know Maynard well and came to regard him as a young man of exceptional intelligence, poise and decency. Such was my respect for his gentleness and integrity that I found it (and still find it) inconceivable that he should be accused of committing the ruthless and brutal crime for which he was ultimately sent to prison.

Sworn to before me this 25th day of January, 1973.

Eugene G. Eisner

NOTARY PUBLIC
EUGENE G. EISNER
Notary Public, State of New York
No. 81-6167250
Qualified in New York County
Commission Expires March 30, 1974

It is my understanding that Maynard has been deprived of his sanity during his time in prison so that he has suffered perhaps more than the ordinary man's incarceration. Knowing the nature of Maynard's sensibility, I cannot help but feel that further time behind walls might totally mutilate or even destroy the personality of a man who I know from first-hand evidence has much still to contribute to society. In his struggle toward vindication -- a vindication I somehow am convinced he will eventually win -- the granting of bail would be a crucial first step toward allowing him to regain his equilibrium. Those of us who have a stake in his future have shown our faith in Maynard by unhesitatingly responding to secure his bond. I think I am speaking for all of us when, in respectfully appealing to you to free him on bail, I say that your favorable decision might be instrumental in saving the very life of a valuable, decent man whose spirit must otherwise be crushed and ruined.

Very sincerely yours,
William Styron

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cannot be given back to him if he is eventually acquitted that
he has served a significant part of his sentence -- years which

WILLIAM STYRON
ROXBURY, CONNECTICUT 06783

December 4, 1972

Hon. Francis T. Murphy, Jr.
Justice of the Appellate Division
New York, N.Y.

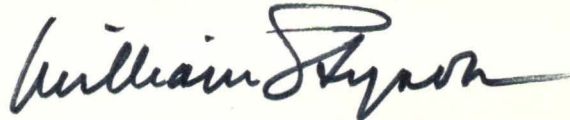
Dear Justice Murphy:

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Very sincerely yours,



Letter of William Styron

ARTHUR L. LIMAN

32nd Floor
345 Park Avenue
New York, N.Y. 10022

November 28, 1972

Lewis M. Steel, Esq.
diSuvero, Meyers, Oberman, Steel
351 Broadway
New York, N.Y. 10013

People v. William A. Maynard, Jr.

Dear Mr. Steel:

You have asked me to describe my contact, as general counsel of the New York State Special Commission on Attica, (the "McKay Commission") with William Maynard.

I and members of my staff met with Mr. Maynard on several occasions in the course of our investigation, and questioned him about conditions at Attica, and the events preceding, during and after the uprising in which Mr. Maynard was a reluctant bystander.

I found Mr. Maynard to be intelligent, cooperative and candid. He is by nature extremely sensitive and almost obsessed with a concern for privacy. Obviously, the communal aspects of prison life and regimentation had had a corrosive effect upon him. When I met him he was in segregation because he preferred solitude, where he could write, to the din of normal cell life.

At all times he was courteous, and I thought insightful. While I am not familiar with the facts relating to his conviction, and it would be inappropriate for me to make recommendations on his bail application, I have no objection to your reporting to the court the fact of his full cooperation with the Commission (including exhibiting a copy of this letter to the court). I suggest that, to avoid the possibility of inmate reprisals for cooperation, the letter and the fact of his cooperation be sealed.

Sincerely yours,


Arthur L. Liman

Letter of Gitta Bauer

AXEL SPRINGER PUBLISHING HOUSE

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NEW YORK OFFICE:

50 ROCKEFELLER PLAZA · ROOM 803 · NEW YORK, N. Y. 10020 · TELEPHONE (212) 582-4170

SPRINGER FOREIGN NEWS SERVICE

Gitta Bauer

November 27, 1972

Justice Francis Murphy
c/o Mr. Lewis Steel
Attorney at Law
351 Broadway
New York, N.Y. 10013

Dear Judge Murphy:

I have known Mr. William A. Maynard, Jr. since his third trial in fall 1970, which I covered as a reporter. I was shocked by the verdict, since the proceedings had raised serious doubts in my mind, the same kind of doubts that are reflected in your and Justice Harold Stevens' dissenting opinion. Since then I have sought the acquaintance of Mr. Maynard and have seen him several times at the Correctional Facility of Green Haven and at the Bronx House of Detention.

Mr. Maynard appeared to me to be a man of great discipline and as one having the ability of selfmastering and self-restraint. I was amazed by his serenity of mind, the sanity of his judgement and the strength with which he is bearing his fate. Putting myself in his shoes I seriously doubt whether I could have maintained his confidence, that justice will ultimately prevail. I am absolutely sure, that Mr. Maynard, if set free on bail, would continue to comport himself in the same manner, and that he would in no way be a threat to society, but rather an example in fortitude.

I am saying this not lightly, Sir. Being a skeptic by education, profession and the experience of life I am not easily taken in by pleasant manners or appearances. Rather I would say that my assignments as a foreign correspondent all over the world - including the Nuremberg trials, the trial of Adolf Eichmann in Jerusalem and lately the Angela-Davis-trial - and the opportunity to meet people from all walks of life have taught me to see through surface varnish and recognize the working of people's minds.

over

Axel Springer, Chairman of the Board · Peter Tamm, President

Letter of Arthur L. Liman discretion.

Stevens, P.J., Kupferman, Murphy, McNally, Tilzer, JJ.

5776

The People of the State of New York,
Respondent,

S.H.Landau

-against-

William A. Maynard, Jr.,
Defendant-Appellant.

G.W.Oberman

277 Bwy NY 13

Judgment of Supreme Court, New York County,

rendered February 4, 1971, convicting defendant, after trial before Davidson, J. and a jury, of manslaughter in the first degree [former Penal Law §1050] and sentencing him to imprisonment of not less than 10 nor more than 20 years, affirmed.

This is the third trial of this case, the first two having ended respectively in a disagreement and a mistrial.

Two eyewitnesses saw the defendant shoot and kill Marine Sergeant Kross and a third eyewitness, who had been watching Maynard during an earlier confrontation, saw Maynard in immediate flight from the scene of the shooting. The record shows that Maynard's guilt was established beyond a reasonable doubt.

It was not error to reject the testimony of one Levy with reference to street lights. The People's witness Weinstein, Deputy Director in charge of the Engineering Division of the New York City Bureau of Gas and Electricity, had been called as a witness by the People to establish the existence of light fixtures. He was not called as an expert to give opinions on lighting effects. The so-called expert testimony that he gave was testimony elicited for the first time during defendant's cross-examination of Weinstein. Counsel by its cross-examination had made Weinstein his own witness on these subjects, and the trial court's ruling that defendant may not call Levy as an expert witness to contradict expert testimony elicited by him was within the bounds of its discretion.

As is said in Bender's New York Evidence,
Vol. 1, § 27.03 :

"Normally, strict order of proof requires that when a party desires to examine an adversary's witness on matters outside the scope of cross-examination, he must call that witness as his own for direct examination. In actual practice, this rule is usually relaxed when a cross-examiner brings up new matter. However, when that occurs, the witness then becomes the witness of the adverse party who is bound by the answers. Such witness, when questioned on new matter, may not be contradicted by other evidence."

We have examined the other assignments of error and found them to be without merit.

All concur except Stevens, P.J., and Murphy, J.,
who dissent in the following memorandum by Murphy, J.:

We cannot vote to affirm this conviction because of the numerous errors committed at the trial; some of which are discussed below.

The defendant was convicted of manslaughter in the first degree and sentenced to imprisonment for an indeterminate term of not less than 10 nor more than 20 years. A sailor, Robert Crist, testified he was accosted by James Barnhardt in Greenwich Village and that he thereafter chased and struck him. A police officer separated these two antagonists and walked the purported homosexual away from the altercation. Defendant Maynard, together with a male companion, then berated Crist for striking the older and smaller man. An argument developed among these three persons which lasted from 2 to 5 minutes and terminated when Sgt. Kroll arrived on the scene; and Maynard and his male companion departed. Kroll and Crist decided to continue the argument and drove, in Kroll's car, after Maynard and his companion, catching up with them on West 4th Street between Sixth Avenue and McDougal Street. Two witnesses, Crist and Dennis Morris, testified they saw defendant shoot the decedent Kroll in the face with a sawed-off shotgun. Michael Febles also identified the defendant as the person he saw arguing with Crist and, although he did not see the actual shooting, he testified that he heard the shotgun blast, saw Maynard and his accomplice run away and observed the accomplice throw an object to the ground. Howard Fox, a cab driver, testified that at 1:10 in the afternoon of the day before the shooting, he drove Maynard and another

person to Greenwich Village and that Maynard's companion had a camera bag over his shoulder.

Defendant Maynard claimed he was not in Greenwich Village, but at his wife's family's home in Queens; and that although he was separated from his wife he was still friendly with her brother, Michael Quinn. At the first trial the Quinn family testified they did not know defendant's whereabouts on April 2-3, 1967, although they had previously executed affidavits averring that he was in the Quinn household during that critical evening. However, at this trial they supported Maynard's alibi and claimed they were coerced into giving false statements at the first trial by Assistant District Attorney Gallina.

The prosecution's case relied principally on the identification testimony of Robert Crist, Dennis Morris and Michael Febles. The street lighting, the opportunity of the witnesses to observe the killer, the police identification procedures, and whether the alibi witnesses were telling the truth at the first trial or at this trial were among the contested issues at the trial.

The prosecution called, as its second witness, Irving Weinstein, an expert in street lighting. His testimony dealt with the lighting conditions on the streets where the crime was committed, as well as the area where the identification witnesses had seen the defendant. Weinstein testified to the kind of lighting as well as its amount. From tests he took in May of 1969, he concluded that the average light in the area was 1.5 foot-candle and that this meant that one with 20-20 vision could read small print of a newspaper, albeit with difficulty. He conceded that the

needle of a light meter barely moved and that his conclusions were arrived at mathematically. He testified that he had a reasonable degree of professional certainty that the mathematical formula he used to calculate the amount of foot-candles was reliable, and that the lighting in this area was twice the standard set as the proper standard for the City of New York. He also gave his opinion that if the windows in the bank on the southeast corner of West Fourth Street and Sixth Avenue were lit, visual observation would be aided because objects would be seen against the illuminated background, and that "silhouette lighting" made it easier to see faces and features. On its case, the defense attempted to call Charles Levy, a lighting consultant, to give expert testimony on the same subject matter as that testified to by Weinstein. The Court sustained the prosecutor's objection to this witness. We believe this was error of such a nature as to deprive defendant of a fair trial and, alone, mandates a reversal. The issue of the lighting is an integral part of the identification evidence on the night of the crime. The People, in an effort to make the identifications more believable to the jury, paint a picture of streets lit twice the standard for New York City. It defies reason to deny the defense the right to meet this issue, especially since the offer of proof makes clear that Levy would have rebutted Weinstein's principal points as well as the lay witnesses who were permitted to give opinions on lighting. (Cf. People v. Dewey, 23 A D 2d 960; People v. Jackson, 10 N Y 2d 510.) The District Attorney's summation refers to Weinstein's testimony to establish that the identifications were made on a "well-lighted street"; and the Court's charge that in determining the accuracy of the identifications the jury

should consider ". . . the lighting conditions", merely magnify the gravity of the preclusion.

It was also error to receive in evidence, as the Court stated, "as an admission by conduct" the testimony of Howard Fox that when he, Fox, came into the room where defendant was being held in police custody, the defendant looked at Fox, Fox looked at the defendant, and the defendant then turned his head to the left. The District Attorney's argument that defendant "in effect recognized him and turned away" is not borne out by the testimony since Fox stated he did not know why defendant turned his head. Nevertheless, the District Attorney in his summation said that this was another piece of evidence tying this defendant to the murder: ". . . not only did Mr. Fox identify the defendant, the defendant identified Mr. Fox, recognized Mr. Fox, that this was the guy in the cab. He turns his head." Both the Court's ruling and the summation were improper and error, prejudicial to defendant. (Cf. People v. Mezzapella, 19 A D 2d 729.)

We further believe that it was error to have admitted into evidence People's Exhibits 21 and 40, a tan plastic bag and its contents. These exhibits were not sufficiently connected to the defendant or the crime. The cab driver, Fox, testified he saw a bag "something like" this bag in possession of the defendant 15 hours before the crime and one of the eyewitnesses, Febles, testified he saw an "object" thrown into the street by the defendant's accomplice; but it "could have been anything". There is no evidence that People's Exhibit 21 was the object thrown down or that this bag, which was found on the steps leading to the basement of a building one block north of where Kroll was killed, was the same

"something like" the object the cab driver saw 15 hours earlier. Without a proper foundation, its receipt into evidence was error. (See; McCormick on Evidence, § 179.)

The identification witnesses, Crist, Morris and Febles, gave descriptions which do not match defendant. Crist had been drinking since 9 P.M. and conceded he was probably intoxicated. He remembers virtually nothing concerning that night, not even the people he spoke to, including the police. After he had seen the defendant on May 17, 1967, at the Sixth Squad, he was shown photographs of the defendant on three or four occasions; and before the Grand Jury in October, 1967, when shown defendant's photo, he said he can't be sure if it's the same man. At the trial he identified the defendant. Dennis Morris picked defendant out of a lineup a few days before the first trial in 1969. On August 2 and 3, 1967, he was not sure defendant was the assailant even though two pictures of defendant were placed with seven other pictures. The suggestive re-showing of the pictures resulted in a positive identification from photographs before the Grand Jury although he did not see defendant in person. Febles' observations (like Morris') were extremely limited. "By chance" he was taken to court by Lt. Stone and was told he was going to see the defendant in the case and then identified the defendant at the courthouse; not in a lineup.

At the Huntley hearing, held prior to the first trial, Lt. Stone and Detectives Hanast and O'Brien testified that on May 17, 1967 the defendant was advised of his "Miranda" rights and waived them, signing a form to that effect. Defendant testified that it was not his signature nor his

handwriting and that he did not sign the form. He produced samples of his handwriting. At a recess the prosecutor, unable to find the original of the form, withdrew the carbon copy that had been received in evidence. The issue not having been litigated, defense counsel at the beginning of this trial, in support of a motion for a new Huntley hearing, offered to prove that Russel Osborne, a handwriting expert, "has preliminarily concluded that the defendant did not sign (the form) but in fact some other person did." The Court denied the application without reference to the forgery issue. During the trial the issue was again raised on cross-examination of Lt. Stone by defense counsel's attempt to question the witness as to the signature on the form. The objection was sustained as academic since the People did "not intend to introduce it in evidence." We believe inquiry should have been permitted of those officers at the pre-trial hearings and at the trial, since their credibility has been seriously challenged. If the defense was able to show that the defendant's signature or any variation of it was not on that form, the integrity and reliability of the entire investigation is undermined. (See, Wigmore on Evidence, 3rd Edition, Vol. II, § 277.) The identification procedures were established by the police by photos, showup and lineups as well as the oral statements of defendant. If, then, defendant could sustain a charge of police fabrication, it would weigh heavily against the prosecution before the jury on those issues and it does not seem reasonable to allow a conviction to stand in light of such a serious allegation. It also seems that with this issue not before the Jury, the prosecutor felt free in summation to discuss, as he did, the integrity, honesty and truthfulness

of the police. He may have been correct in his estimate of the police who testified, but no one will know until it is properly tested. A new hearing and a new trial is mandated on this issue.

Michael Quinn was the first alibi witness called by the defense. His direct testimony materially contradicted the two statements he gave to Assistant District Attorney Gallina and the testimony he gave at the first trial. He testified that the evidence he gave at the first trial was false and that he had been "forced to lie" by Gallina and that his testimony had been rehearsed by Gallina. After completing his testimony, the courtroom was cleared and the Court directed that the proceedings be presented to the Grand Jury and that the District Attorney's office determine whether there had been perjury or a conspiracy to obstruct justice. It is our opinion that the atmosphere created by the Court's action denied defendant an impartial trial in that it affected the remaining alibi witnesses, several of whom were related to this witness. It seems to us that the threat of arrest and indictment could only result in intimidating the other defense witnesses and was calculated to have a chilling effect on their attitudes and testimony. (Cf. People v. Frasco, 187 App. Div. 299; People v. Davison, 3 A D 2d 724.) These investigations could have awaited the end of the trial and been conducted in a calm, non-coercive atmosphere.

Three of the alibi witnesses testified at this trial that they had been coerced into giving false statements and false testimony at the first trial. Before the first

trial Michael Quinn was held as a material witness after having been brought to Assistant District Attorney Gallina's office, where he made the statement he gave at this trial. He was committed to jail on \$100,000 bond. Giselle Quinn, who was not then Michael's wife, testified that, at the same time, she had a conversation with Mr. Gallina and was committed to civil jail on \$75,000 bond. Michael had seven interviews with Mr. Gallina. On May 8th, he testified, he changed his story because Mr. Gallina told him that Giselle (a German national) would be deported and that he would be kept in jail until Christmas. After he changed his statement Mr. Gallina also promised to take care of an auto larceny charge which had been pending for three years. Giselle testified that she was questioned every day by Mr. Gallina during her two weeks' commitment, and also conversed with an immigration officer. When Michael changed his statement, they were both released. Assistant District Attorney Gallina testified that he always expected to call Michael as a rebuttal witness, not as a prosecution witness, and that he only wanted to determine the truth of the alibi. We believe the conduct of Mr. Gallina to be contrary to law and to his authority, and that a court process was used as a tool wrongfully to detain and interrogate defense witnesses. (Cf. People ex rel. Van Der Beek v. McCloskey, 18 A D 2d 205.) Since the witnesses were released as soon as Michael's statement was changed, the motives of Mr. Gallina become suspect. Additionally in this regard, the Court's refusal, upon timely request, to properly instruct the jury on its options, where an assertion is made that a witness' prior statements and testimony were made under duress, was error, as a matter of law.

The scope and content of Assistant District Attorney Gallina's testimony was prejudicial and denied defendant a fair trial. He testified as to his motives for arresting the witnesses, to clearly hearsay material, and to his opinions of the case. He stated that his investigation showed defendant was a violent man, that he had witnesses who identified defendant as the killer, that he believed defendant guilty of the crime, and that the evidence left no doubt defendant was the killer. Mr. Gallina stated his conclusions while allegedly retelling his conversations with Michael Quinn. Further, in summation, the trial assistant, over objection, improperly vouched for Mr. Gallina's testimony and equated him with the tradition and integrity of the office of District Attorney. It is thus apparent that Mr. Gallina was improperly permitted to bolster the People's case and to add the prestige of his office thereto. (Cf. People v. Colascione, 22 N Y 2d 65.)

Finally, we note that it was error to prevent the defense from rehabilitating its witnesses after impeachment and to prohibit impeachment of prosecution witnesses.

(People v. Buchalter, 289 N.Y. 181; Urbina v. McLain, 4 A D 2d 589; Ryan v. Dwyer, 33 A D 2d 878; People v. Sorge, 301 N.Y. 198.)

For the aforementioned reasons, and all of them collectively, we would reverse the judgment of conviction and remand for a new trial.

Stevens, P.J. concurs

Order filed.

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: _____

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: _____

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is _____ the _____, being duly sworn, deposes and says that _____ in the within action; that deponent has read the foregoing _____ and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

_____ of _____, being duly sworn, deposes and says that deponent is the _____ named in the within action; that deponent has _____ read the foregoing _____ and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because _____ is a _____ corporation. Deponent is an officer thereof, to-wit, its _____ The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19 _____ deponent served the within _____ attorney(s) for upon _____ in this action, at _____

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19 _____ at No. _____ deponent served the within

upon _____ the _____ herein, by delivering a true copy thereof to _____ personally. Deponent knew the person so served to be the person mentioned and described in said papers as the _____ therein.

Sworn to before me, this _____ day of _____ 19 _____

NOTICE OF ENTRY

Index No.

Year 19

SUPREME COURT OF THE STATE OF NY
APPELLATE DIVISION: FIRST DEPT

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

THE PEOPLE OF THE STATE OF NEW YORK

Dated,

v

Yours, etc.,

WILLIAM A. MAYNARD, JR.,

~~di SUVERO, MEYERS, OBERMAN, STEEL~~

Defendant

Attorneys for

Office and Post Office Address
351 Broadway
NEW YORK CITY 10013

To

Attorney(s) for

APPLICATION FOR BAIL PENDING
APPEAL AND SUPPORTING PAPERS

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

LEWIS M STEEL
~~di SUVERO, MEYERS, OBERMAN, STEEL~~
Attorneys for William A. Maynard

one of the judges of the within named Court, at

Office and Post Office Address, Telephone
351 Broadway
NEW YORK CITY 10013
Tel. 966-7110

on the day of 19
at M.

Dated,

To Frank S. Hogan

Yours, etc.,

Attorney(s) for

~~di SUVERO, MEYERS, OBERMAN, STEEL~~

Service of a copy of the within

Attorneys for

Office and Post Office Address
351 Broadway
NEW YORK CITY 10013

is hereby admitted.

Dated,

Attorney(s) for

To

Attorney(s) for

RECEIVED

73 JAN 29 AM 11:20

DISTRICT ATTORNEY
NEW YORK COUNTY