1973

Transcript - Appearance Before Hon. Irving Lang, Judge, re: Resentencing and Motion for New Trial

Lewis M. Steel '63

Ind. #3937-67

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 47

- x

THE PEOPLE OF THE STATE OF NEW YORK

against MOTION

WILLIAM A. MAYNARD,

Defendant.

- x

100 Centre Street,
New York, New York,
April 30th, 1973.

Before:

HON. IRVING LANG, Judge.

Appearances:

FOR THE PEOPLE: JURIS CEDERBAUMS, ESQ.,
Assistant District
Attorney

FOR DEFENDANT: EISNER, LEVY & STEEL, ESQS.,

By: LEWIS STEEL, ESQ.,
of counsel.

- - -

Rachel E. Birchman, C.S.R.
Court Reporter

Colloquy

THE CLERK: William A. Maynard, from the pen, Indictment No. 3937-67.

(The defendant is present).

THE COURT: The defendant, through his counsel, Lewis Steel, has made a multi-faceted motion in basically two parts. First he moves for a new trial on the basis of newly discovered evidence, and I will go into the various aspects of that, and secondly, he moves for a re-sentence on the grounds that the trial Judge had before him certain ex-parte matters which might have prejudiced (a) his ruling on the motion to set aside the verdict and (b) the actual sentence itself.

With respect to the motion for a new trial onnewly discovered evidence the first aspect of the motion relates to a man named Purcell, also known as Sullivan. According to the affidavit submitted by Mr. Steel a person by the name of Purcell, also known as Sullivan, claims in his affidavit that while in the Tombs, in City prison, at the same time as Mr. Maynard, Mr. Purcell having been returned for trial on a homicide charge after

ten years in Mattawan State Prison for the Criminally Insane, that during that period the prosecution, the District Attorney and certain law enforcement officers through the use of drugs induced Mr. Purcell to claim that Mr. Maynard had made a confession to him while they were in the same prison.

That although the District Attorney did not ultimately use Mr. Purcell as a witness in the case and he therefore never testified, it is the claim of the defense that the alleged tactics used on Purcell, that is, the drugging, the feeding him of information, was so indicative of the caliber and quality of the investigative techniques used here by the prosecution, that even though he was not used as a witenss, the evidence of these type of tactics should justify a new trial on the grounds that presenting these matters to the jury would have a materially effective verdict.

The second aspect of the testimony for a new trial is that there is a witness named Dietz, who was not called by the prosecution

and unknown to the defense until very, very late, who would testify that a key prosecution witness, that is, the sailor in the case, was drunk at the time that an identification was allegedly made of the defendant Maynard, and thirdly, with respect to the motion for a new trial it is claimed that a new witness by the name of Murphy would testify that he observed a man walking in a direction opposite from the scene, not the defendant Maynard, whom he knew from the area, putting something under his coat.

Further that he observed an argument with respect to a black man and a white man, and that the black man was not the defendant Maynard. That constitutes the basic motions for a new trial.

There is also a motion for resentence on the grounds that the trial Judge, while Mr. Purcell was awaiting trial and disposition of a case, was informed of Mr. Purcell's cooperation with respect to the defendant Maynard by the District Attorney.

That the case of Mr.Purcell was put on

before the trial Judge, who at the recommendation of the District Attorney and because of his cooperation in the Maynard case, gave him a suspended sentence. That was done ex-parte, and in view of the fact that the trial Judge had motions before him addressed to the sufficiency of the verdict, that was in some manner improper, and that further the fact that the alleged statement of confession by Maynard to this man Purcell was before the trial Judge and somehow may have bolstered his feelings as to the guilt of the defendant, and thereby resulted in a sentence perhaps greater than might have been given to the defendant if this information was not before the trial Judge, who then, if I may interpolate what Mr. Steel said, had some lingering doubts as to the defendant's guilt and reflected that in the sentence.

MR. STEEL: Your Honor, it goes further than that. The prosecution's position is that Purcell, a/k/a Sullivan was threatened by my client, and of course that threat in a situation like this would be an independent

crime and also would be further evidence of violent protensity on the part of my client, and if that is brought to the attention of the trial Judge he may well have considered those things as well as the confession.

THE COURT: But, in any event, I think I fairly stated your position, is that correct?

MR. STEEL: Yes.

THE COURT: First of all, this motion was made originally returnable before another Judge in this Court, who then set it down for a hearing before another Judge of this Court, not the trial Judge, and finally the Administrative Judge of the Court directed me to hear the case.

At the outset let me say that in my view the better practice and the best practice with respect to motions for a new trial based upon newley discovered evidence should be made before the trial Judge. This is apparent because it is very difficult for a Judge who has not heard the case, to determine whether

in fact new evidence may have effected the jury's verdict or would have effected the jury's verdict, since he does not know anything about the case basically, therefore, for example, with respect to the hearing I will have to hold or I feel that I should hold, I will undoubtedly have to read the entire trial transcript to determine in my own mind whether or not the testimony would have effected the verdict.

However, that is by the boards, and since the case is now assigned to me I will undertake the assignment. In my view, having looked over very carefully the affidavits and memorandum supplied by both the prosecution and the defense, that with respect to a testimonial hearing I see no necessity for a testimonial hearing with respect to the allegations regarding Purcell, also known as Sullivan, or Dietz at this time.

However, I feel that a testimonial hearing is necessary with respect to the alleged witness Murphy. Accordingly while reserving decision with respect to the allegations and

legal arguments, and if you want to submit briefs with respect to that, you may do so, Mr. Steel, I will set this down for a hearing, testimonial hearing with respect to the witness Murphy.

With respect to the witness Dietz, the basic contention is whether or not the difference between drunk and intoxication is such as to warrant a new trial. The witness in his affidavit and statement made to Mr. Steel in Arizona states that the sailor witness was drunk.

It is conceded that the witness was intoxicated. Indeed, Justice Stevens, in his dissent in the Appellate Division pointed out that the witness was intoxicated. Now, as to whether or not the difference between drunk and intoxicated requires a new trial I will rule on at the appropriate time, but I certainly don't think I need a hearing on that.

With respect to the alleged witness Purcell, also known as Sullivan, having examined the affidavit and the supporting documents and the rebuttal by theDistrict Attorney,

apart from whether or not the District Attorney by use of drugs induced Purcell to say that the defendant Maynard had confessed, there is of course the threshold question since the witness was not even called by the prosecution, as to whether that would warrant a new trial, but furthermore I have examined very carefully the affidavit on both sides, and in my view the affidavit submitted by the witness Purcell to Mr. Steel and his co-counsel is presumptively and demonstratively perjurious.

For example, he states that he was induced after being put in the civil jail through the use of heavy doses of tranquilizing drugs to give a statement implicating the defendant Maynard to the effect that the defendant Maynard had confessed to him.

In point of fact, as shown by the documents, whereas the witness Purcell was committed to the civil jail sometime in June of 1970, in February of 1970 the witness Sullivan, also known as Purcell, had written a letter to the District Attorney saying that

Maynard had confessed to him and was seeking leniency in his own case.

There are additional letters from Purcell to the District Attorney before he was a material witness, committed as a material witness, and presumably before the witness Purcell was given drugs, which all indicated that Maynard had made a confession to Purcell.

Now, the District Attorney, rather, the defense counsel claims that during this period the detective in the case had been feeding the witness Purcell certain information. Whether or not that is true it is perfectly clear from reading Mr. Purcell's affidavit and his own letters that no one could give credence to any testimony of Mr. Purcell.

Indeed, counsel's initial motion is that the District Attorney, Mr. Sawyer, should in no way have ever believed Purcell as to anything. I agree with him, but in like fashion I don't believe Mr. Steel should have ever adopted anything that Mr. Sullivan says.

Further, there is a claim that after Mr.

Sullivan was given a suspended sentence and was out on the street, Mr. Sullivan claims that he on a number of occasions attempted to notify law enforcement officials of plots by the prosecution but that was constantly thwarted, and as a result of his efforts he was rearrested on stumped up charges and resentenced to State prison.

The only documentary evidence in this regard is while Mr. Purcell is on the street presumably not under the influence of any drugs, while living alone, writing a letter to Mr. Sawyer, indicating to him that the people in the press and the public, particularly Mr. Wechsler of the Post, have been deceived by Mr. Maynard, and that he would communicate in some way with Mr. Wechsler and tell him indeed Mr. Maynard was indeed guilty and had confessed to him.

In light of all these factors it is abundantly clear that Mr. Purcell, who has a history of being a homocidal maniac and a perjurious and chameleon like individual can not be believed under any circumstances.

Accordingly I see no purpose in holding a hearing as to his allegations.

Therefore there is one further aspect to your motion, and that is with respect to a lie detector test. In the absense of a consent by the District Attorney results of lie detector tests are inadmissible in court proceedings in my view, and that is the consistent state law on this subject.

Accordingly, whether or not Mr. Maynard passed or failed a lie detector test would not be admissible on a motion of this kind in the absence of a consent by the District Attorney. The District Attorney has not consented. Accordingly, the motion to authorize a lie detector test is denied.

However, as I have told Mr. Steel in conference in chambers where we had all parties, in the event, and I am not pre-judging the case, but in the event the Court's decisions and the Appellate Court's decisions are adverse to him I will sign such an order, for him to make whatever use of it he feels in petition of executive clemency of

some kind or other, since the executive is not bound by the rules of evidence as the Court is in viewing these matters.

With respect to the motion to resentence I think it is fairly clear that the trial Judge was made aware in an ex-parte proceeding of the cooperation of the witness Purcell or alleged witness Purcell or potential witness Purcell.

Whether or not this would mandate a resentence I will research, of course, but I see no purpose in having any additional hearing, because I don't think there is basically any factual dispute as to that.

Therefore at this point I will follow my oral statements with a written order, written opinion, but with respect to the witness Murphy may we agree upon a hearing date.

MR. CEDERBAUMS: People request a date as soon as possible.

MR. STEEL: I tried to ascertain in chambers Your Honor's calendar. If you would let me know - -

THE COURT: I expect to go into a trial

part right next door next week. How about Monday or Tuesday morning? Would that be reasonable, gentlemen? Do you expect the testimony to last more than an hour or so?

MR. STEEL: I would assume it would be very brief. Your Honor read the affidavit. He is going to testify as to what is in the affidavit.

MR. CEDERBAUMS: Could we set a date for next Monday at 9:30? I have other business to take care of later in the day.

MR. STEEL: My only problem is I think Mr. Murphy works nights.

THE COURT: Would you like an afternoon session?

MR. STEEL: Yes, I would.

THE COURT: Monday 2:00 o'clock, gentlemen. It would seem to me if there is any factual dispute with respect to the statements of Murphy, that I would assume you supplied statements allegedly made by Murphy to the detectives at the time of the arrest, that you might have those detectives available at that time, if you intend to call them.

Does that seem reasonable?

MR. STEEL: Yes, Your Honor. I have some other remarks I would like to make with regard to where I think we are at now.

THE COURT: Go ahead.

MR. STEEL: First of all I would like to point out that with regard to the application for the polygraph, Judge Riccobono apparently taking a view contrary to yours, and I refer you to Pages 11 and 12 of the minutes - -

THE COURT: Judge Riccobono could have ordered the polygraph if he wanted to.

MR. STEEL: He could have done a lot of things, that's true, but apparently you are sitting in the case.

THE COURT: You want me to refer that aspect of the motion back to Judge Riccobono, I will be happy to do it.

MR. STEEL: He is then going to take the position he took, while he thought the motion should be granted, it should be before the Judge that is hearing the motion.

THE COURT: I have read Justice Riccobono's minutes. I have read the entire record

very carefully.

MR. STEEL: Yes, Your Honor, you seem to have read the entire record. I would point out if the defendant hadn't have been incarcerated prior to trial for the entire period that he was incarcerated, there would have been no difficulty having a lie detector test conducted on the defendant.

As a matter of fact, the offer was made, as pointed out, from '67 through the second trial, to have the District Attorney's lie detector experts conduct the test that the union formally turned down. The defense was unable to perform its own lie detector test primarily because of the fact that the defendant was unable to raise bail.

THE COURT: If there had been a pre-trial motion, even though the defendant was incarcerated I would have granted it and other motions of that kind, because then it becomes not only a question of admissibility but the ability to have the defense go to the prosecution with that and see if it would effect them, but this is a post-trial motion.

MR. STEEL: Secondly I would like to address myself for a moment to your remarks concerning the Purcell - Sullivan material, which I regard to perhaps relate to the problem that any defense counsel has in presenting material of this type to the Court.

As Your Honor is well aware from reading the record I presented the Purcell affidavit to the Court after being informed of what Mr. Purcell had to do through a letter.

THE COURT: By Mrs. Halbert.

MR. STEEL: Yes. I went up and spoke to him at Clinton Prison with my partner and spent an eight hour day with him and gathered what I could gather in the course of that interview.

I must say that there was no way for me to test the accuracy or the reliability of Mr. Purcell and I was aware of his mental history, other than by filing an affidavit and bringing proceedings of this nature.

THE COURT: It is perfectly apparent from reading the rebuttal material that you were in no way aware of these letters that Mr. Pur-

sell had sent to the District Attorney and all the others.

MR. STEEL: Precisely, Your Honor. As a matter of fact, the letters came out in dribs and drabs.

THE COURT: I hope I did not convey the impression by filing the affidavit there was an attempt on your part to deceive the Court.

MR. STEEL: I frankly am not addressing myself to my own particular personal problems. I have a more serious intent in mind by raising this material. The Court's opinion of me is for the Court to reach.

What the letters show, and I attempted to make this clear in the second affidavit which I filed in this case was somewhat different than the thrust of my original moving papers.

Your Honor has addressed himself in his oral opinion purely to the thrust of what was in my original moving papers and has as if by magic apparently ignored the thrust of the reply affidavit which attempted to co-relate

all of the material which is before the Court, and I'd like to speak about that for a moment.

As Your Honor did point out, Mr. Purcell did mention Mr. Maynard in a February letter after his first two letters, in which he wanted to rat on the entire mental population at Mattawanand did not gain an appropriate response from the District Attorney.

In effect, in one of those first two letters he said "I will also testify against all the robbers and murderers of my type." I wouldn't confabulate was the word in the letter.

Those two letters drew no response, but the third letter involving Mr. Maynard did set the wheels of justice into motion.

After the wheels of justice were set spinning Mr. Sawyer called Mr. Purcell in and took a "Q" and "A" from him, which I have also attached. Interestingly enough the District Attorney in its responses has not been totally candid with the Court, because it hasn't indicated what if any contacts any of

the investigating police had with Mr. Purcell, aka Sullivan, prior to the "Q" and "A" of April 14, 1970.

The detective or should I say patrolman, and I recognize his present status, interviewed Purcell in the interim period. What were their conversations, what notes were taken, what did Hanis tell Sawyer, if anything, and by the way, Mr. Terrence O'Reilly, who was also in the case, and is in it now with regard to those initial conversations.

Nothing was turned over prior to the April 14, 1970, "Q" and "A". As Your Honor I am sure is aware that April 14th "Q" and "A" contains nothing but pure conclusory statements as to Maynard. He confessed to me, he told me he did it, and then there is also the mention on Page 5 of Exhibit J, there is mention of a Mickey Hurley, an Alex the second name is Andrea, and a Jimmy Jordan.

Apparently according to the testimony statements were made in front of these three people. We have no knowledge as to whether this was ever checked out. Mr. Maynard

doesn't know the existence of these three persons, but in any event those three names are mentioned in the April 14th statement.

THE COURT: I am aware of that. We discussed that in chambers.

MR. STEEL: I am putting it on the record, Your Honor, because that is why we have a record. Then Your Honor is aware on April 17th, three days after that April 14th statement, all of a sudden Sullivan - - Purcell now has specific information about Maynard, his vehicle identification number, all of the things which were taken from Maynard when he was arrested back in 1967, and he was in the precinct in May of 1967, all of a sudden now appear in a letter addressed to the District Attorney's office, and thereafter we have a series of letters in which Purcell talks about how he wants to be put in civil jail.

Originally if you remember he was being threatened by friends of Mr. Cody, but now he was worried about being threatened by friends of Mr. Maynard.

Apparently the District Attorney's office

didn't move quickly enough for Mr. Purcell and he started sending a series of letters which I am sure Your Honor is aware of, in which he said "Maynard didn't confess to me. Those were alleged statements and I took law courses, Mr. Sawyer, and in my law courses I have forgotten, alleged something without any meaning. He didn't say anything to me, never confessed to me", and one of the letters finally gets to the point "If you don't do something with me the deal is off." It is a P. S. which says frankly, and I shall be direct. I am sure Your Honor is very much aware of that letter.

It is at this point that the District Attorney's office decides that their honest witness, who already renounced his role in this situation, it is at this point that he is put in civil jail, and I quoted interestingly enough in my affidavit one of the letters which talks about how he is having difficulty remembering and perhaps sodium pentothal would be helpful to him.

Your Honor, I regard that as a veiled

reference to part of the deal while being in civil jail, that he be rewarded with drugs while he is in custody. I am sure Your Honor is aware of that reference in my affidavit.

Lo and behold this gem, who is now taken out of the normal custody and given civil jail treatment, now starts being given doriden for a week and then his dosage is increased four times to the level in which a psychiatrist, and I am sure Your Honor is familiar with him, because he was head of the entire prison hospital unit, Dr. Kaufman, states it is totally outrageous and is in effect quasi-criminal to give persons dosages of that level. That is a mind altering drug.

We might have a nice threshold question as to whether or not this drug was given to Mr. Purcell - Sullivan so that he could resell them in civil jail, being what was going on with the near fatal dose of drugs being given to a witness in civil jail.

You also have the question as to whether

or not the detectives who kept shuttling Purcell, aka Sullivan, over to Sawyer's office, were aware that he was under this drug dosage.

Interestingly enough the District Attorney has not supplied any information as to how many times Mr. Sullivan, aka Purcell, or vice versa, was brought over to Mr. Sawyer's office, what dates he was brought over on, what notes were taken, who was present.

We don't have the civil jail sign out book to find out how many times Detective Hanis went over there. We don't have the District Attorney's books, visitors' books, as to who was brought into the District Attorney's office. We have no memoranda of the discussions which took place, other than the original "Q" and "A", and, Your Honor, I would call for production of those records at this time.

It would seem to me that Your Honor may well wish to fully evaluate the evidence in this case, and I of course am in a position only to ask Your Honor to have these records

produced. They are public agencies and Your Honor would have to sign the requisite subpoena duces tecum to require their production. I ask Your Honor to sign such a subpoena.

THE COURT: For what purpose, Mr. Steel? Assuming that he went over to the District Attorney's office every single day from the civil jail to the time he pleaded guilty and was released, how would that add anything to the case?

MR. STEEL: Your Honor, it seems to me a sophisticated analysis of this record has to be made.

THE COURT: Let me say this, as far as I am concerned I don't see where it would have any effect. However, I will direct the District Attorney to supply you, if he has it, with a list of the times that Mr. Purcell or the material witness was brought over to the District Attorney's office.

MR. STEEL: As well as abstracts of the civil jail book which Purcell would have had to sign out on.

THE COURT: I don't know. Is there such procedure?

MR. STEEL: Yes, there is. I asked for it when I was over in the civil jail and they said without an order from the Judge I would not be able to get it.

THE COURT: I will sign such an order. You will supply that to Mr. Steel?

MR. CEDERBAUMS: Yes.

MR. STEEL: And any notes, memoranda, etcetera?

MR. CEDERBAUMS: To my knowledge there are no notes.

MR. STEEL: Strange how there are never any notes of a man who keeps coming over to one's office.

THE COURT: Do you know offhand how many times Mr. Purcell was brought over?

MR. CEDERBAUMS: I have to check it.

MR. STEEL: I think you will find in terms of accuracy in Mr. Purcell's affidavit he does seem to have a pretty good understanding of the pictures on the wall in Mr. Sawyer's office, the names of the secretaries, some

conversations.

Perhaps he has a fine imagination, but it seems to me if Your Honor reads that aspect of the affidavit fairly closely, even discounting for Mr. Purcell's mental status, there might be a hint of truthfulness which comes out.

THE COURT: Apparently both you and Mr. Sawyer find a hint of truthfulness in Mr. Sullivan. I find none whatever. This is not to say that every single word he says is a lie.

It is obvious the man as I have indicated is a demonstrably perjurious individual, with a history of homocidal mania.

MR. STEEL: Yet he's kept in civil jail at a cost of seventeen hundred dollars of the taxpayers' money. Mr. Purcell writes letters to the New York School of Journalism to get in that school.

Interestingly enough Purcell states in his affidavit that the purpose of that was to make him look good as a witness. Somewhat believable statement given, the fact that

Purcell was kept for seven months on ice as a prospective material witness.

THE COURT: Mr. Steel, I am sure you are aware of the fact, it should come as no surprise, often the prosecution is required to utilize witnesses who are not all as the expression goes clergymen.

They often have to rely on stoolpidgeons, murderers, rapists, robbers, and on occasions liars, and on occasions the fact that a District Attorney who utilizes a witness may achieve some sort of rapport where he feels he can rehabilitate him and try and help him, that's happened before. I am not talking about this particular individual.

MR. STEEL: This particular case is what I would like to discuss, Your Honor. A murderer can tell the truth, so can a rapist, but a liar is a liar.

THE COURT: Mr. Steel - -

MR. STEEL: Let me finish - -

THE COURT: Please finish this aspect of it.

MR. STEEL: When I say sophisticated I

mean to say one can't look at the Sullivan - - Purcell incident as an abstraction in this case. One has to remember there is a long dissent here, which was quite noticably upset of the issue of forgery by my client, namely, while in the prison.

The same Judge found the officers had engaged in suggestive practices with the three eye witnesses. The alibi witness in this case was put in civil jail, according to the dissent, contrary to law, fully negated his entire alibi testimony.

This isn't just one separate incident in this case which you can lean on. Perhaps you look at murderers and rapists and whoever else Your Honor had in mind in the case, but at a certain point you start to construct a pyramid of malfeasance in a particular case, and this case I suggest to Your Honor has reached that level, and that is why it seems to me the Sullivan - - Purcell matter is precisely relevant at this time, and I agree with Your Honor there is no question when you look at these letters he wasn't

given the drugs first, he was given the drugs later, but when he was given the drugs he had already written letters saying Maynard didn't confess to me. I have nothing to do with it.

That is the point, when he started to get his feelings, when he was given drugs, when he was put in civil jail, when the letters started going out to N. Y. U. School of Journalism, that is precisely the point, the District Attorney starts going through his little trip in this particular case, and it is precisely the reason why it seems to me Your Honor should focus in on it.

I agree with Your Honor the original thrust of my moving papers, because I was in the dark, worked on a theory which now proves to be incorrect. The theory, however, that comes out of the total harass of papers is just as venal, just as horrible and just as destructive to the system of justice in this country as the original thrust of the moving papers was, and I would like Your Honor to focus on that, because that is the issue which is now before this Court on the Sullivan - -

Purcell matter.

Now, I have some other matters which I would like to take up with you and that relates to the Murphy situation.

THE COURT: I am going to have a hearing on that.

MR. STEEL: It is preliminary matters. I am not going to argue the matters in advance of the evidence. I wouldn't think of doing that.

With regard to Murphy I note, as I am sure Your Honor did, in the police memorandum book attachment to the District Attorney's answering papers, a statement "I saw sailor jump in the car and drive very quickly up the street."

Now, I bring that to Your Honor's attention because I am sure, as Your Honor is aware, there is a question as to how much light existed on the street at night, and, in any event, it was relatively dark. We are talking about darkness and what the degrees of darkness were, and this is the first thing that Mr. Murphy said to the police on the

scene, according to the submission of the District Attorney's office.

Now, the District Attorney's office takes the position that that is neutral and that is the reason why it was never turned over to counsel, it is '73, in six years, because that statement is neutral on its face, and as I understand from that particular posture of the District Attorney's office defense counsel shouldn't be given the opportunity to interview at least prior to trial witnesses who told the police at the beginning "I was close enough to see one of the men drive off from where the shooting occurred", so that the District Attorney's office has a perfect right to interview that witness and draw its conclusions that he is not helpful to the prosecution and not helpful to the defense and not turn that matter over to defense counsel to allow him to make the same evaluation that the District Attorney made.

Now, Your Honor well knows that in many civilized states in the United States,

and I could name offhand New Jersey, Michigan and California, I am sure there are many others, as a matter of course prior to trial all such material is turned over to defense counsel, so that civilized trials could be had and mistaken witness cases like this aren't dragged through the Courts for years and years.

However, the District Attorney's office in this particular case, as I understand it, takes the position neither Brady vs. Maryland nor Rosario nor any other case requires that type of material to be turned over. I assume that is their position, because if it weren't their position Your Honor could rule as a matter of law that there should be a new trial in this particular case, and I ask you to rule as a matter of law that there should be a new trial in this case, based on undisputed disclosures in the District Attorney's files.

With regard to Mr. Murphy as a minimum prior to trial and not at this stage I should have the right to interview anyone who says

he saw what happened, and it is an outrage for me to be here six years later with a man who has been in jail since 1967, being shown a statement for the first time of a man who was at the scene of the crime and saw at least some of what occurred, maybe not all, but as Your Honor knows trials are pieces of a puzzle, and he might have had a little piece that would have been helpful to me from the very beginning, certainly helpful to the original trial counsel back in 1967.

I am claiming from the face of the officer's book, the so-called neutral information, it didn't say "I didn't see Maynard flee." It couldn't have said that, because Maynard wasn't arrested for six weeks and then he was released.

That is all it said. It said more, but among other things it said "I saw sailor jump in the car and drive very quickly up the street." Now, that car was exactly at the point where the marine was shot and it was dark at night, and anyone who said he could see the sailor jump in the car was obviously

in somewhat close proximity to what occurred, and yet Mr. Sawyer had the nerve to go to the jury and say only three people came forward. This is a terrible city. There are crimes committed. In Queens remember the murder of the woman in the street and the people in the apartment building. That is what Mr. Sawyer went to the jury in this case. All three who came forward picked out that man.

THE COURT: Wasn't the request for this material made?

MR. STEEL: And it was denied.

THE COURT: Isn't that the ruling in this case?

MR. STEEL: Your Honor can hide behind legalisms if you wish.

THE COURT: I resent that. While you have a function I have a function as well. If I felt that a statute was unconstitutional and a Court of Appeals case held it constitutional I would be bound by it. You could argue with me about hiding behind legalisms.

MR. STEEL: I apologize to Your Honor.

Let me suggest to Your Honor that the ruling in this case was made in the abstract, that the ruling in this case was made because I said to the Court turn over, because I want to see what's in there, because there may be something like that, and over here Mr. Sawyer says "Your Honor, I have reviewed it."

MR. CEDERBAUMS: Not Mr. Sawyer.

MR. STEEL: The seat is the same and the seat is the same in this case, and Mr. Sawyer says I get the subpoena duces tecum by motion and orally asking for it, and Mr. Sawyer says "Your Honor, I have reviewed the file. I know my obligations. There is nothing in here that could help him."

That is the abstraction, Your Honor, that was ruled on by Mr. Justice Davidson, and the Appellate Division didn't review that aspect of the decision, so you have a trial Court ruling and no ruling from the Appellate Division on that particular issue.

THE COURT: Was it raised by you in the Appellate Court?

MR. STEEL: Yes and not ruled on. No

reasoning is given.

THE COURT: Not reversed on either.

MR. STEEL: What I am suggesting to Your Honor is that now we know what was in that little packet over there of material which Mr. Sawyer had scrupulously read to determine that it was of no value whatsoever to the defense, and then made his statement to the Court, so it seems to me that issue is not foreclosed.

THE COURT: Are you making another motion in front of me?

MR. STEEL: I think that is before you if you read the motion papers. I don't think Your Honor dealt with it. Yes, Your Honor, the end of the original moving papers raise that issue of the failure to turn over. If you read pages 23 and 24 of my original moving affidavit - -

(Court reads pages 23 and 24).

THE COURT: You say the files remain secret. What you are really saying is that this constitutes error. There is no application here. Mr Steel, I am not trying to be

picky with you.

MR. STEEL: I now so make that application, just so it is clear you will have that issue before you.

MR. CEDERBAUMS: We are talking now about a witness in regard to which Your Honor ordered a hearing. If at the time of the hearing Your Honor considers that a witness who originally told the People, as is shown by our papers, he heard a noise and he saw a sailor driving away, if this in some way was in violation of Brady, after the hearing you can rule on it.

This witness will be before the Court and there will be a hearing before you. I suggest we hold it until then.

MR. STEEL: I haven't made this application before, so I would make the application now, that whatever other material the District Attorney's office has in its possession, and, Your Honor, I can tell you I have walked into Mr. Cederbaums' office, I have seen a stack of D.D.5s on his desk, some of the D.D.5s I have observed having No. 248, for example. I re-

ceived about twenty D.D.5s.

The rest for some reason are kept in the safe keeping of the District Attorney's office until I happen to lock out with a private detective and find a man at the scene and then the D.D.5 is presented to the Court.

It seems to me, and I am making this application for the first time, in light of the disclosure "I saw a sailor jump in the car and drive very quickly up the street" there is no more credibility left to the District Attorney's office claims that their method of observing neutrality is fair to both the People of the State of New York and the defendant, and that the only way that type of search of the record can be made is if counsel himself makes an independent search of all the D.D.5s.

In chambers I pointed out I will go through those D.D.5s and I will check on any people who were at the scene. Mr. Cederbaums was aghast that defense counsel would take those D.D.5s and look for new material which might

help the defense, but I promise you, Your Honor, I will check, if those D.D.5s are turned over to me, and I ask that the entire file be turned over to me at this time, six years later, so that defense counsel can check and see what else is in that hidden record that for some reason I can't have access to, and it seems to me that the motion is clear.

I apologize to the Court for not having formally made it on papers prior to that, but I do make it now and it seems to me that is fairly clear.

Now, one other matter which I would like to put on the record, because I believe it to be important, and frankly as an attorney I have had some difficulty in figuring out exactly what the significance of it is, but I don't want to not put it on the record and then at some future date be faulted for that.

In February of this year I received a telephone call from a man who purported to be Adrienne Connor.

THE COURT: Are you going to go into something not before me now?

MR. CEDERBAUMS: For the record, this matter dealing with Adrienne Connor has been raised in the form of a motion to set aside the judgment similar to this one. That has already been litigated and decided by the Court.

MR. STEEL: I would like to put the material on the record so at least it is preserved.

THE COURT: Mr. Cederbaums says there's been a motion on this.

MR. CEDERBAUMS: I will bring up the Court papers, if Your Honor wishes to see them.

MR. STEEL: There's been a ruling in the Appellate Division against the relief requested, which was a new trial. The Appellate Division didn't rule sufficiently on the original Adrienne Connor material, but it was brought to the Court's attention.

I am talking about evidence after the Appellate Division ruling, which couldn't

have been brought to the attention of the Appellate Division. I am suggesting to Your Honor what I'd like to do is put on the record the fact that in February Adrienne Connor confessed to this crime, called me up, a man who purported to be Adrienne Connor in February, indicated, asked me repeatedly was I Maynard's attorney.

I answered him yes. I kept saying "What do you want? Do you want to see me? Do you want to meet with me?" He refused to answer any of those questions. The only information he gave me he was in New York City and had gotten out of State prison and at the end I asked him to meet with me or what did he want. His response was in what seemed to me to be threatening tones "You will be hearing from me again", and then the phone clicked off.

I notified Mr. Cederbaums of this particular fact and told him I regarded the call to be threatening and asked him if he could use his good offices to at least check on the location of Mr. Connor, because Mr. Connor

had been in jail for a shotgun robbery, and I felt that I was entitled to that as a minimum.

I reported the matter to the police. I also asked Mr. Cederbaums if he could inform me what his investigation or the investigation of his office had revealed as to the whereabouts of Mr. Connor on the night of the killing, in that it seemed to me the purport of the call from Connor to me somewhat revived in my mind the issue of Adrienne Connor, and I asked as a matter of good faith and cooperation, public spiritedness, that the District Attorney's office reveal to me where Adrienne Connor was on the morning that Sargeant Kroll was killed.

They had means to investigate, and the conference before the Appellate Division did specify facts consistent with the crime itself, and Connor did fit the description at least somewhat better than Mr. Maynard, who has no connection in terms of the physical description with the eye witness testimony.

I have asked Mr. Cederbaums in the halls

of this gracious building many times for what follow up he made on the Adrienne Connor matter. Some weeks after the initial interview he told me Connor maxed out in State prison and therefore we can't find him, and they have no way of tracking him down. He said "Would you file a criminal complaint against him?", and I said I am a lawyer and merely because a man says in threatening tones "I am going to get back to you", and the whole conversation seems threatening, I didn't think this was enough to take that particular action, but it seemed to me the District Attorney's office could at least do some checking and could turn over whatever material it had on Mr. Connor to me at this point, both in the interests of justice in the Maynard case and in the interests that I have a wife and three little children, who are of some concern to me.

I have had no response from the District Attorney's office with regard to the Connor incident, and perhaps merely by the fact that we have a Judge and a stenographer and people

in the courtroom I am just seeing it, perhaps your good offices could bring about some light into that additional tunnel of darkness, to use a rather horrible cliche.

That is what I have in mind, Your Honor. As I say, I would ask for a ruling on turn over of quite a bit of information, all the D.D.5s and other memorandum which the District Attorney's office has so scrupulously guarded in this particular case.

I would like all the material with regard to Purcell - - Sullivan, as to how many times he graced the office.

THE COURT: I have already granted that.

MR. STEEL: I was just summarizing.

THE COURT: Do you wish to say anything, Mr. Cederbaums? You don't have to.

MR. CEDERBAUMS: I really don't feel compelled to make a rebuttal.

MR. STEEL: What about a ruling on the D.D.5s, will you take that under advisement?

THE COURT: Yes. This is adjourned until Monday, May 7th, 1973, at 2:00 P. M.

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