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Motions

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

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3-1974

## Motion for a New Trial: Miscellaneous Files

Lewis Steel '63

March 12, 1974

Hon. Irving Lang  
Supreme Court  
100 Centre Street  
New York, N. Y. 10013

Re: People v. Maynard  
Ind. No. 3937/67

Dear Judge Lang:

At oral argument I was unaware of the recent United States Supreme Court decision in Davis v. Alaska, \_\_\_ U.S. \_\_\_, 42 LW4295 (decided 2/27/74).

I suggest that the logic of Davis should be controlling on the Court in this case. Davis involved a direct appeal through the state court, and a review by the Supreme Court on certiorari, rather than a review by way of a writ or motion for new trial. As the case is one of constitutional dimensions, however, the procedural distinctions would not seem to alter the force of the opinion.

In Davis, the defense was refused the right to cross-examine an eyewitness with regard to a youthful offender conviction due to a state law rule protecting the privacy of the youth. Counsel, as a result, was prohibited from proving to the jury that this witness may have had a motive for lying. Just like this case, counsel was forced to rely on his ability to attack identification procedures, rather than linking these procedures into a framework which would have showed that the witness was open to suggestion.

The Davis case and the Maynard case turn on the same operative facts. In both cases, it was crucial to the defense to

March 12, 1974

Hon. Irving Lang

be able to argue to the jury that the witness in question could be controlled by the police, or led by them to identify whom they want identified. The Supreme Court's stress on the constitutional right of confrontation in Davis applies with equal weight to Maynard.

Needless to say, Davis also is instructive on the privilege point before Your Honor. The youthful offender provisions mandating secrecy of convictions is analogous in purpose to the doctor-patient privilege. Neither can be invoked by the state to destroy a defendant's right of confrontation.

Respectfully,

Lewis M. Steel  
Attorney for the Defendant

LMS/cpm

cc: Hon. Richard Kuh  
District Attorney  
Att: Juris Cedarbaums  
John Keenan  
Assistant District Attorneys  
155 Leonard Street  
New York, N. Y. 10013



March 15, 1974

Hon. Irving Lang  
Supreme Court  
100 Centre Street  
New York, N. Y. 10013

Re: People v. Maynard  
Ind. No. 3937/67

Dear Judge Lang:

This is being written to complete the record insofar as possible with regard to Michael Febles. As the information contained in this letter is part of the files of the Supreme Court of the State of New York, New York County, I would assume that Your Honor should judicially take notice of these facts:

Febles was indicted in New York County in March, 1974, Indictment No. 1458/74, for five counts of possession of weapons as felonies, two counts of reckless endangerment in the first degree, and one count of disposing of dangerous weapons and appliances. The indictment alleges that all of the crimes occurred on January 8, 1974.

The indictment is under the name Miguel Febles. On March 14, 1974, Febles pled not guilty in Part 30.

Very truly yours,

Lewis M. Steel

LMS/cpm

cc: John Keenan, Esq.  
Assistant District Attorney  
155 Leonard Street  
New York, N.Y. 10013





FRANK S. HOGAN  
DISTRICT ATTORNEY

DISTRICT ATTORNEY  
OF THE  
COUNTY OF NEW YORK  
155 LEONARD STREET  
NEW YORK, N. Y. 10013  
RECTOR 2-7300

RECEIVED FEB 11 1974

ADDRESS ANSWER TO THE DISTRICT ATTORNEY,  
ATTENTION OF THE SIGNER OF THIS LETTER AND  
REFER TO NUMBER \_\_\_\_\_

February 8, 1974

Lewis Steel, Esq.  
351 Broadway  
New York, New York

Dear Mr. Steel:

I am again formally requesting you to produce in court the piece of paper Mr. Sawyer handed you in court which contained the information on Michael Febles' yellow sheet. The reference to the record is on page 1034.

Sincerely,

Juris G. Cederbaums  
Assistant District Attorney

JGC:jm

cc: Honorable Irving Lang  
Justice of the Supreme Court  
100 Centre Street  
New York County, New York 10013

Answered on the record  
in CT 2/21 + 22/74

February 22, 1974

Ms. Judith Benjamin  
Court Reporter  
Supreme Court, Rm. 1000  
100 Centre Street  
New York, N. Y. 10013

Re: People v. Maynard

Dear Ms. Benjamin:

This is to follow up my letter to you of January 4, 1974 wherein I requested the minutes in the above case. The hearings were held in Part 46 before Judge Lang; the dates are as follows:

November 12, 1973  
November 19, 1973  
December 11, 1973  
December 20, 1973

Your prompt cooperation is appreciated. If there is any trouble around provision of the minutes, please contact my office.

Thank you.

Very truly yours,

Lewis M. Steel

LMS/cpm



700038  
January 4, 1974

Ms. Judith Benjamin  
Court Reporter  
Supreme Court, Room 1000  
100 Centre Street  
New York, New York 10013

Re: People v. Maynard

Dear Ms. Benjamin:

I would like to order the minutes in the above case for the hearings held in Part 46 before Judge Lang for the following dates:

November 12, 1973  
November 19, 1973  
December 11, 1973  
December 20, 1973

Thank you.

Very truly yours,

Lewis M. Steel

LMS/cpm

700038  
February 7, 1974

Mr. David Seidman  
3219 Park Avenue  
Oceanside, N. Y. 11572

Re: People v. Febles

Dear Mr. Seidman:

Enclosed is our check in the amount of \$40.00 in final payment for the minutes in the above. Thank you again for your prompt attention in this matter.

Sincerely,

EISNER, LEVY & STEEL

Carolyn P. Manning  
Assistant

Enc. 1



February 6, 1974

7000-38

Mr. David Seidman  
3219 Park Avenue  
Oceanside, New York 11572

- 516, 536-0273

Re: People v. Febles

Dear Mr. Seidman:

As per our conversation today, enclosed please find our firm check in the amount of \$40.00 in part payment for the minutes in the above.

Thank you so much for your kind cooperation.

Sincerely,

EISNER, LEVY & STEEL

Carolyn P. Manning  
Assistant

Enc. 1

P. S. Please call me at once as soon as you know anything, pro or con.

CPM

Memo . . . . . from the desk of

Gene Eisner

To:

Maynard

Date:

Oceanside

Mr Seidman -

576 - 536 -

0273

LS-20-3146

Tables Minutes in Brooklyn

Cont Reporters

M. S. Rosella

L211 - Said would

get min on 2/4  
or 2/5 & call us.

e.

cc: [unclear]  
[unclear]  
95 T 129



200038  
January 31, 1974

Mr. David Seidman, Court Reporter  
Queens County Criminal Court  
125-01 Queens Boulevard  
Kew Gardens, New York 11415

Re: People v. Michael Febles  
Ind. No. B-16935, June 17/70  
B-16855, June 16/70  
Kings Criminal Court, Part 1B

Dear Mr. Seidman:

We are writing to you to request the minutes in the above proceedings. Miss Rosella's office informs us that you are out ill today, and also advised that we write you to formally order transcripts in the above. We are particularly interested in the 17th, and need the minutes as soon as possible. Because of an existing emergency situation, and because we are asking for a priority, we would willing to pay any amount you request, and would also provide messenger service to expedite delivery.

Please call my office at the above telephone number, and speak to my assistant, Carolyn Manning, so that we will know when to expect the transcript and what fee you will require.

Thank you very much.

Sincerely yours,

Lewis M. Steel

LMS/cpm

January 15, 1974

700038

Ms. Rose Dunn  
Court Reporter  
Criminal Court  
100 Centre Street, Rm. 320  
New York, N. Y. 10013

Re: People v. Maynard

Dear Ms. Dunn:

As per your telephone call of the above date, enclosed is our check in the amount of \$50 to pay for the minutes of the hearing held on August 30, 1973, Part 46, before Judge Lang in the above captioned case.

Very truly yours,

Lewis M. Steel

LMS/cpm  
Enc. 1



January 15, 1974

Mr. Jack L. Berman  
Court Reporter  
Bronx Criminal Court  
Room 400  
161st Street and Third Avenue  
Bronx, New York

Re: People v. Michael Febles

Dear Mr. Berman:

Enclosed is our check in the amount of \$15.00  
for the minutes in the above case. Once again, thank you  
for your cooperation.

Sincerely,

Carolyn P. Manning  
Legal Assistant

Enc. 1

January 11, 1974

209038

Dear Gretchen,

The Brady case which I said would be helpful to you in Maynard is People v. Bottom, New York Law Journal, January 8, 1974, pg. 18, columns, 1, 2, 3, decided by Judge Burton Roberts. It was too hard to xerox.

/cpm

January 11, 1974

300038

Mrs. Sylvia Fromar  
100 Centre Street  
Room 320  
New York, N. Y. 10013

Re: People v. Febles

Dear Mrs. Fromar:

This letter authorizes my legal assistant, Carolyn P. Manning, to obtain from you the minutes for January 21, 1966 in the above captioned case. Ms. Manning will deliver the minutes to Mr. Jack Berman, Court Reporter, in the Bronx Criminal Night Court on Saturday, January 12th, to be transcribed.

Thank you for your cooperation in rushing this through for us.

Sincerely,

Lewis M. Steel

LMS/cpm

Handwritten initials and scribbles, including a large 'M' and the number '17'.



AM

for:

Steel

\_\_\_\_\_

of

Court Reporter

Please return the call    Will call again    Came in    See me

needs the check for \$50 before  
spig the wayward minutes

Phone: 347-6247   Date: 1/15   Time: 1015   By: [Signature]

1778-5969

January 10, 1974

Ms. Carol Wright  
554 Montgomery Street  
Brooklyn, New York

Re: People v. Febles

Dear Ms. Wright:

I can't tell you how much we appreciate your kind cooperation in providing us with such quick service in the above, and for your keeping in touch with us to let us know how the transfer of the minutes from the archives was progressing.

I enclose our check in the amount of \$40.00 as requested by you.

Once, again, thank you.

Sincerely,

Carolyn P. Manning  
Legal Assistant

Enc. 1

January 4, 1974

Mr. J. Edwin LaVallee  
Superintendent  
Clinton Prison  
Dannemora, New York

Re: William A. Maynard, Jr.  
Former Clinton Inmate

Dear Sir:

I am the attorney for William Maynard, a former inmate at Clinton, now imprisoned at the Men's House of Detention in Manhattan, 125 White Street, New York, N. Y. 10013.

Prior to Mr. Maynard's being transferred to New York in February, 1973, he was fitted by your dental department for a replacement of his upper left front tooth. To date the dental replacement has not been received by my client. Mr. Vincent Conti of the Medical Unit Administrator's office at 125 White Street sent a letter to your facility on December 1, 1973 requesting the appliance for Mr. Maynard. To date he has received no answer.

Today, my assistant Mrs. Manning spoke to an Officer Briquer of your facility, who stated that he would inform the proper authority of Mr. Maynard's whereabouts and have the replacement sent to him.

Your cooperation in expediting this matter is appreciated.

Yours very truly,

Lewis M. Steel

*SE 9000*  
LMS/cpm



January 4, 1974

Mr. Jack Berman  
Court Reporter  
Bronx, Criminal Court  
Room 400  
161st Street and Third Avenue  
Bronx, New York

Re: People v. Michael Febles  
No. C322

Dear Mr. Berman:

This is to conform our conversation of today in reference to the above case. We would like the minutes taken on January 21, 1966 in Part 1E of the Criminal Court at 100 Centre Street, New York, N. Y. Once again I must impress upon you that Mr. Steel needs the minutes before January 16th. Thank you for all your help, and please let me know when the minutes are ready.

Sincerely,

Carolyn P. Manning  
Legal Assistant

Febles  
January 4, 1974

Ms. Carol Wright  
Court Reporter  
Brooklyn, Criminal Court  
120 Schermerhorn Street, Rm. 513E  
Brooklyn, N. Y. 11201

Re: People v. Michael Febles  
No. C322

Dear Ms. Wright:

This is to confirm our conversation of today in reference to the above case. We would like the minutes taken on January 17, 1966 in Part 1E of the Criminal Court at 100 Centre Street, New York, N. Y. Once again I must impress upon you the fact that Mr. Steel needs the minutes before January 16th. Thank you for all your help, and please let me know when the minutes are ready.

Sincerely,

Carolyn P. Manning  
Legal Assistant

Fables

① Minutes  
re  
Commitment  
for Psychiatric  
Exam

Part I E Crim Court NYC

100 Centre St  
11201  
New York

1/17/1966

Information  
# C322

before Judge Frank Cacciatore  
643-8118 - Bulletin  
Carol Wright - Court Reporter.

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Part I E <sup>set</sup> <sup>in 400</sup> ② Sentencing  
1/21/66 Jack 161 5 minutes  
Court Reporter Berman 14x into 500  
before Judge LARRY Vetrano 7500



January 4, 1974

Ms. Rose Dunn  
Court Reporter  
100 Centre Street  
Room 320  
New York, N. Y. 10013

Re: People v. Maynard

Dear Ms. Dunn:

I would like to order the minutes in the above case  
for the hearing held on August 30, 1973 in Part 46 before  
Judge Lang.

Thank you.

Very truly yours,

Lewis M. Steel

LMS/cpm

October 19, 1973

Ms. Rose Dunn  
Court Reporter  
Supreme Court, Rm. 1000  
100 Centre Street  
New York, N. Y. 10013

Re: People v. Maynard

Dear Ms. Dunn:

This letter is to follow up our former correspondence of 10/3/73 requesting a copy of the hearing minutes in the above case. The hearing was held on 8/30/73 in Part 46, before Judge Lange.

Your cooperation is appreciated.

Very truly yours,

Lewis M. Steel

LMS/cpm

*Handwritten notes:*  
Circuit  
Rose Dunn  
10/20/73  
11/12/73  
11-19-73  
11/11/73  
12/20/73  
Part 46  
Judge Lange  
People v. Maynard  
1000  
100  
100

October 3, 1973

Ms. Rose Dunn  
Court Reporter  
Supreme Court, Rm. 1000  
100 Centre Street  
New York, N. Y. 10013

Re: People v. Maynard

#3937/67

Dear Ms. Dunn:

I would like to order the minutes in the above case for the hearing held on August 30, 1973 in Part 46 before Judge Lang. My secretary has been calling you at the courthouse and leaving messages, but you have been missing each other. We need the minutes as soon as possible, so if you call and don't reach anybody, just leave a message with the answering service as to the amount of money you will charge for the minutes. We will send a check for that amount right away.

Your cooperation is appreciated.

Very truly yours,

Lewis M. Steel

LMS/cpm



Memo . . . . . from the desk of

Gene Eisner

To:

Date:

Order wire!! today.

David Seidman, C.R.

Queens Lower Crm

520-3594

520-3146

Re: Pro. v. Michael

Fibers <sup>with</sup> ~~with~~ <sup>with</sup> ~~with~~

no. B316935-677-70

no. B316855-6-16-70

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C.R.

Memo

Queen 29618 sup 520-3505  
lower 520-3594  
Warrant 520-3146  
643-2040  
from the desk of  
Gene Eisner

To:

~~Court Reporter~~  
Seidman

Date:

~~David Segal~~

no. 16935-6-17-70

# 13 168 ST - Warrant  
issued 7/2/70  
6-16-70 - David Seidman

Queens

for Pounelley

King - 643-8118

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART

-----X

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

WILLIAM MAYNARD, :

Defendant. :

Indictment No.  
3937/67

-----X

Appearances:

Frank S. Hogan, Esq.  
District Attorney of New York County  
155 Leonard Street  
New York, N. Y. 10013

By: Juris Cederbaums, Esq.  
Assistant District Attorney  
of Counsel  
For the People

Lewis Steel, Esq.  
351 Broadway  
New York, N. Y. 10013  
For the Defendant

Lang, J.:

During the early morning of April 3, 1968, Marine Sergeant Michael Kroll was shot and killed on West 4th Street in the Greenwich Village area of New York City. Some six months later, the defendant, William Maynard, was indicted for that homicide.

The first trial in this case was held in 1969 and resulted in a hung jury. The second trial resulted in a mistrial. The third trial resulted in defendant's conviction of Manslaughter in the First Degree. On February 4, 1971, the defendant was sentenced to a prison term of not less than 10 nor more than 20



years. The conviction was subsequently affirmed in the Appellate Division by a divided court 3-2 (People v. Maynard, 40 A D 2d 779).

At the trial, the People produced four witnesses placing the defendant at the scene. Robert Crist, who was with Kroll at the time of the shooting, Dennis Morris, and Melvin Febles; each of whom identified the defendant as the person who shot Kroll. All testified that after the shooting they saw Maynard and his companion run west on West 4th Street to 6th Avenue and then north on 6th Avenue. A cab driver, Howard Fox, testified that earlier that evening, he drove Maynard and a companion to the Greenwich Village area. The defendant testified in his own behalf that he was not in the area but was with his family in Queens. Members of his family corroborated his alibi.

In the present motions, defendant seeks the following relief:

(1) to set aside the conviction, pursuant to CPL § 440.10, on the grounds of newly-discovered evidence based on affidavits by Paul Dietz, Edward Murphy and William Purcell;

(2) to set aside the conviction and/or sentence, pursuant to CPL §§ 440.10 and 440.20, on the grounds of improper conduct by the District Attorney and the trial court;

(3) an order permitting the defendant to be given a lie detector test; and

(4) an order permitting broad discovery of various police department and prosecutor's reports concerning investigations in this case.

These motions were originally returnable before another judge of this court who set the matter down for a hearing before



another judge, not the trial judge. The Administrative Judge of this court referred these motions to me. At the onset, it is my opinion that the better practice with respect to motions to set aside a judgment of conviction based on newly-discovered evidence is that they be made before the judge who conducted the trial. This is apparent because the judge who has heard the case is in the best position to determine whether in fact the new evidence may have affected the jury's verdict.

The power to grant an order for a new trial on the grounds of newly-discovered evidence is purely statutory and such power may only be exercised when the requirements of the statute have been satisfied, the determination of which rests in the sound discretion of the court (People v. Salemi, 309 N.Y. 208, 215).

CPL § 440.10(g) provides that a judgment of conviction may be set aside on grounds that new evidence has been discovered which could not be produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

Prior to the enactment of CPL § 440.10, CCP § 465(7) provided for a new trial based on newly-discovered evidence if such evidence was not cumulative and would probably have changed the verdict.

I find there is no distinction between these two statutes and the criteria for determining the sufficiency of the new evidence remains the same.



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The case law interpreting these statutes makes it clear that not every type of new evidence will be grounds for setting aside the conviction. Besides meeting the requirements of the statute, the new evidence must also be material to the issues at trial, it must be more than merely cumulative and it must not be merely of an impeaching or contradictory nature (People v. Salemi, supra; People v. Priori, 164 N.Y. 459).

For purposes of these motions, it is deemed that the evidence was not discoverable at the time of the trial and that the motions are timely made.

(1) The Dietz Motion

In respect to the Dietz affidavit, having examined it and the memoranda provided by the prosecution and the defense, I find no need for a testimonial hearing. Basically, the affidavit states that Dietz heard the shooting and saw two men run toward 6th Avenue. He was also present when Robert Crist was interviewed by the police officer and described Crist as being "drunk." At the trial the testimony indicated Crist was "intoxicated." The gist of the motion is that there is a difference between being "drunk" and being "intoxicated" and this difference requires a new trial.

I disagree. The fact that Crist was in an intoxicated state was not disputed at the trial. His condition was fully explored, subjected to a vigorous cross-examination, adverted to by counsel in summation, and alluded to by the dissenters in the Appellate Division. The weight and credibility to be given his testimony was determined by the jury. Thus the most that can be said of this 'new evidence' is that it is cumulative and designed



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merely to impeach the credibility of Crist as a witness. It throws no new light on the issues and the motion must be denied (People v. Salemi, supra; People v. Patrick, 182 N.Y. 131; People v. Williams, 35 A D 2d 1023).

(2) The Murphy Motion\*

As to the Murphy affidavit, a testimonial hearing was ordered, but Mr. Murphy never appeared. While defense counsel intimates possible intimidation of Murphy by the Police Department, there is no evidence of this. It should also be noted that defendant's counsel never asked the court for a subpoena or body attachment to produce his witness.

Assuming Murphy would have testified to the contents of his affidavit, that although he did not see the person who shot Kroll, he did see a man, who was not Maynard, run east on West 4th Street after the shooting. Even if such testimony were true, the overwhelming evidence, including statements in the Dietz affidavit, is that the killer ran west on West 4th Street. Since Murphy makes no claim that the person he saw was the killer, his testimony cannot be said to be such 'new evidence' that would require a new trial.

In People v. Priori (164 N.Y. 459), a case not dissimilar to the present one (the area of the homicides are even the same), the newly-discovered evidence was contained in an affidavit by a witness who stated he heard a shot and saw a man run from the scene. He also said he saw the defendant, known to him, at the scene but defendant did not do the shooting.

The court held that assuming the evidence was recently discovered, material to the issue, not cumulative or of an impeaching nature, it was not such as required the court to hold it



would probably have changed the result if a new trial was granted. I reach the same conclusion in regard to the purported Murphy affidavit.

(3) The Purcell Motion

While I am not either condemning or sanctioning any conduct of the Police Department or the prosecution relating to Purcell, in light of the other evidence examined, including affidavits by the District Attorney, defendant and Purcell's own letters, I find that the Purcell affidavit is presumptively and demonstratively perjurious and unworthy of any credence whatever.

Defendant argues that in order to create evidence in the case, the police officers attempted to create in Purcell a witness who would testify that Maynard confessed the murder to Purcell. That this being so, the entire prosecution case is so tainted that a new trial must be ordered.

Purcell, in his affidavit, states that sometime in June of 1970, he was removed from his jail cell, where he was awaiting trial on an unrelated homicide charge, and placed in Civil Jail, force fed heavy doses of tranquilizing and narcotic drugs and intimidated and rehearsed into being a witness against defendant. But the overwhelming evidence shows that some five months prior to this alleged plot, Purcell wrote a letter, dated 2/2/70, to the District Attorney, stating Maynard confessed the crime to him while they were in the Tombs together and that he wanted to prove his rehabilitation by offering to testify against him. Purcell, also known as James Sullivan, was at the time awaiting trial on a felony murder charge upon which he was found incompetent to stand trial and had spent more than 10 years at Matteawan State Hospital.



This letter was unsolicited. In a series of following letters Purcell told of his befriending Maynard, gaining his confidence and gave details about Maynard and the killing as allegedly related to him by defendant. Following up on this, the District Attorney, at Purcell's insistence that his life was in danger in prison, had him committed to civil jail, where he was prescribed certain drug therapy by the prison doctor, now deceased. Purcell, after recantations and re-recantations, was never called to testify.

It is upon the affidavit of such a man that defendant bases his motion. While defense counsel, just as the District Attorney, had a duty to investigate any of Purcell's claims, it taxes this court's senses why defendant suddenly puts him forth as a person deserved to be believed. Defense counsel attacks Purcell's letters as "worthless", "containing obvious misstatements", "sounds completely made up" and yet asks us to review the affidavit as a statement of an honorable and truthful man. The court agrees that the Purcell letters must be considered products of a practiced prevaricator. And we look upon the affidavit with the same eyes.

Defense counsel, an able and exceptionally committed attorney, would have this court believe that this case has a spiritual similarity to the Dreyfus affair. Yet I cannot view Henry Purcell as a present day M. Picquart. Purcell's chameleon like character is evidenced by his claim that after he was given a suspended sentence and released in his own case, he attempted, on numerous occasions, to notify law enforcement officials of the fabrication plot but that he was constantly thwarted and as a



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result was rearrested on trumped up charges and returned to prison. But the only documentary evidence of Purcell's activity when he was free (and presumably not under the influence of any drugs) is a letter he wrote to the District Attorney indicating how he was "sick to [his] stomach" that the press, especially James Wechsler of the New York Post, has been deceived by Maynard and that he would let Mr. Wechsler know the truth about the confession.

The fact of the matter still remains that Purcell was never called as a witness, the jury was never aware of his existence, and defendant was convicted on the evidence at the trial.

In light of these facts, I find the affidavit of Henry Purcell, to be unworthy of belief and that it does not require a hearing. The motion is denied.

(4) Lie Detector Test

While I would have signed an order permitting defendant to take such test during the pendency of the trial, for the reason that if he were at liberty he could take such test by choice regardless of its admissibility and an incarcerated person should not be deprived of such right merely because of his incarceration, the present law in this state is that evidence of the results of a lie detector test is inadmissible at trial (People v. Leone, 25 N Y 2d 511).

Since the results of such test would not be relevant upon any of the present motions, the motion is denied. But, in the interests of justice if the results of all appellate review is adverse to the defendant, I will sign an order allowing him to take such test for purposes of a petition for Executive clemency,



if defendant proceeds to do so, since the Executive is not bound by the rules of evidence.

(5) The "ex parte" Disclosure Motions

Although not used as a witness, Henry Purcell was allowed to plead guilty to a lesser charge of manslaughter in his own case. At the time of sentencing, before the same judge who presided over the Maynard case, the District Attorney pointed out that Purcell had cooperated with the District Attorney although Maynard was not specifically mentioned. The record indicates the judge was aware the reference was to the Maynard case. Purcell subsequently received a suspended sentence.

Defendant argues that such ex parte communication by the District Attorney and to the Maynard trial judge, while that judge was considering pending pretrial motions and sentence, and without Maynard's presence, violated defendant's rights to due process of law.

I disagree. I know of no case that requires a defendant to be present at any sentencing but his own.

Townsend v. Burke, 334 U.S. 736, cited by the defendant, is not in point. In Townsend, the court held that before a defendant is sentenced he is entitled to the presence of counsel to ensure that the conviction and sentence are not based on misinformation or misreading of the court records (See Mempa v. Rhay, 389 U.S. 128). Defendant's absence at the sentence of Purcell did not violate his rights even if that proceeding were related to his case.

Defendant's other contention and the basis of his motion is that Purcell's sentencing should not have been referred to the



Maynard trial judge and by doing so, Maynard's rights were violated.

Specifically defendant claims that during Purcell's sentence proceeding, certain disclosures were made which portrayed Maynard in a most violent light and which necessarily prejudiced the trial judge in determining the Maynard motions and sentence which were then being considered.

While the better practice might have been to have the District Attorney place Purcell's sentencing before another judge, it would be highly speculative for this court to determine whether or not any statements relating to Purcell and Maynard had any influence on the trial judge. This is especially so considering the violent nature of the crime defendant was convicted of by the jury. The motion to set aside the conviction and/or sentence is thus denied without prejudice to renew same before the trial judge.

(6) The Discovery Motion

Defendant seeks broad discovery and inspection of police investigative reports called DD5's in this case. I recognize that such reports may contain all sorts of raw material, hearsay, investigative leads, false confessions and irrelevant matters which are generally exempt property, and the District Attorney vigorously opposes their inspection. However, because of the various allegations and circumstances of this case, to assure that there was no deliberate concealment of evidence and in view of the sharp dissent in the Appellate Division, the motion is granted. The District Attorney is directed to turn over copies of such reports within 7 days.

This decision constitutes the order of the court.

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\* Subsequent to the present motions, with respect to the Murphy affidavit, defense counsel submitted an affidavit from one Nicholas De Martino which was in some respects corroborative of the Murphy affidavit and in some respects contradictory to it.



In any event, this new affidavit would not change the decision upon the motion.

Counsel also submitted an anonymous letter written to Mr. James Wechsler of the New York Post relating to this case. While this letter is clearly hearsay upon hearsay and cannot be considered evidence, the District Attorney was instructed to check his files in regard to the letter and make any appropriate investigation.

Dated: June           , 1973.

J.

11/19/73

IN PART 47 - off the record Conference at the Bench  
Judge Long, LMS, Robert Lehner

Ordered: 1) D.A. or agents not to interfere  
with investigation

2) D.A. to report to Ct on 11/28  
re facts as to Lt calling Mrs Nash

3) reserved on issue of  
a) subpoenas to hospitals, schools, etc  
b) my request that D.A. turn  
✓ over Tebbles' yellow sheet

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11/28/73 - ordered minutes P47

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12/11/73 P47. adj to 12/20

Judge to decide

- 1) question of privilege
- 2) Brady hearing
- 3) medical hearing

I must supply judge  
with lists of names  
on Brady question.

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12/20/73 P47 - granted motion for Brady hearing.  
reserved decision on the privilege question and on the  
medical hearing. Set Jan 16, 1974

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Cof A brief of 148  
+ 1013-17

— Reynolds —  
Reynolds — Michael Feibles  
File 1973 —