9-1973

Respondent's Memorandum

District Attorney County of New York

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY : PART XLVI

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM A. MAYNARD,

Defendant-Appellant.

RESPONDENT'S MEMORANDUM

INTRODUCTION

This memorandum is submitted in opposition to William A. Maynard's current motion tovacate judgment (CPL § 440.10), predicated upon his inspection of various detective division reports (hereinafter "DD-5's") recently made available to him under an order of the Supreme Court, New York County (LANG, J.), dated June, 1973.

POINT I

THERE WAS NO "DISCOVERY ORDER"

Petitioner's initial contention is that the trial court (DAVIDSON, J.) had ordered disclosure of all DD-5's, regardless of content, prepared by any police officer who testified, whether for the defense or for the People. He contends that any failure, apparently whether intentional or not, is per se ground to vacate the conviction. Notwithstanding petitioner's "detailed analysis" of the record (Steel affidavit at 4), there was, in fact, no such "discovery order" (id. at 3).

Petitioner's first attempt to discover the evidence against him occurred in August, 1970, prior to his third trial, when his then counsel, Gussie Kleinman, filed two omnibus motions for "discovery and inspection," requesting, inter alia, all exculpatory evidence, the fruits of any search, any physical evidence, any admissions and any warrants. The Kleinman motions referred also to a prior motion for a "bill of particulars" which was denied on September 3, 1970 (SANDIFER, J.), (see, Steel affidavit of October 2 at 5). The two motions are dated within two weeks of each other and are virtually identical to one another. Apparently both were denied in a single order dated September 9, 1970 (SANDIFER, J.). (See, tr. at 43-44, 47-48).*

At the commencement of this trial, October 5, 1970, petitioner's current counsel, Lewis Steel, announced that "I've got a whole series of motions * * *" (tr. at 8). One was entitled "motion to divulge exculpatory evidence and to make available for inspection and copying." Assistant District Attorney Sawyer was given until 2:30 p.m. (tr. at 11) to answer all seven motions (tr. at 14).

In responding to what the court termed "the motion to divulge any exculpatory evidence that you may possess" (tr. at 43), Sawyer noted that Miss Kleinman's motion to divulge excul-

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* The transcript alone consumes some 4,000 pages. Since all references in this memorandum are to matters of record, with which this Court is already familiar as a result of prior motions, respondent will, if requested, make the record available to the Court at its convenience.

patory evidence had been denied the previous month (tr. at 43-44). Sawyer, however, represented that

> "when, as and if any evidence during the course comes to my attention which is exculpatory, I will certainly make that available to the Court, as is my responsibility and obligation under the law" (tr. at 44-45).

Sawyer assured the court that he had, at that time, "no exculpatory information or evidence of any kind whatsoever" and knew of none (tr. at 45-46).

Mr. Steel told the court that what he desired, beyond what was disclosed at the first trial, was "all the memoranda that were taken at that time, of whatever witnesses, who described the witness [sic; killer?] as being [between the ages of?] 18 and 20. Those are exculpatory. I want those" (tr. at 50).

Without agreeing with this evaluation, Sawyer stated he could recall only Crist having so described the killer (tr. at 51), but agreed to review his records and disclose any other such an identification (tr. at 52, 55). This was subsequently done, and petitioner does not allege the contrary (see, Steel affidavit at 9 and DD-5's cited thereat).

At trial Mr. Steel argued that that was not sufficient, however, because there were "all sorts of DD-5's in this case which no one has ever examined. I'm sure there are all sorts of police memorandum that probably have never been examined" (tr. at 56). It was in response to this accusation that Justice DAVIDSON stated:

> "Nobody is going to stop you from examining all the DD's.
>
> "MR. STEEL: Where am I going to get them from, Your Honor?
>
> "THE COURT: I'll get you anything you want. The subpoena power of this Court will get you anything you want" (tr. at 56).

Petitioner, taking this quote out of context, attempts to buttress his argument that wide-spread discovery was being contemplated. But at the time counsel was clearly concerned only with "exculpatory" information (tr. at 53, 54, 57), and Justice DAVIDSON, at p. 2 of his written opinion denying the motion, again referred to it as one to divulge "exculpatory" evidence. In light of this context, it is misleading to contend that Justice DAVIDSON contemplated any discovery nearly as novel as that to which petitioner asserts he was entitled. In fact, the court concluded "I am not going to make any new law" (tr. at 57).

During subsequent colloquy, the court also addressed itself to Rosario material in the possession of the District Attorney. On October 13, Mr. Steel requested that the court sign eight subpoenas duces tecum (tr. at 174) directed at the police department and seven officers individually. The subpoenas were directed at all written reports and all documents, photographs, drawings, and criminal records of potential witnesses in the Maynard case.

Sawyer was directed to look at the subpoenas and determine which material he would consent to furnish (tr. at

175-76). Sawyer stated he would turn over whatever material he believed he was obligated to disclose and would explain his position as to any matters to which he believed Maynard was not entitled (tr. at 184).

After he examined the subpoenas, Sawyer responded that the material called for was, in essence, the same material requested in the bill of particulars and material which the defendant would subsequently receive under the Rosario rule. He reiterated that he knew of "no material that I regard as exculpatory," but noted that there

> "may be material which counsel may regard as material to its defense, and I think it is fair and proper that I should make available some of this material so counsel can make his own judgment * * *" (tr. at 220).

Sawyer maintained that, apart from turning over exculpatory evidence, his legal obligation was only to supply criminal records and prior statements for use in impeaching prosecution witnesses when they testified (tr. at 221-22). The court agreed:

> "They will get all of the notes, all of the memorandums, all of the writings, all of the statements, all of the Q and A's of every witness in this case who appears for the prosecution as soon as the man takes the stand and as soon as he is ready for cross examination under People v. Rosario. Not before.
>
> "Every policeman who takes the stand is going to have to come up with any DD-5's, UF forms or any memorandum book or anything else that he has in

> aid of cross examination of that policeman, and that has got to be supplied to these defendants immediately such witness takes the stand" (tr. at 222-23).

Sawyer then told the court that he would voluntarily turn over "some police reports which do not constitute prior statements of any witness but which relate to the activities of that witness in the course of the investigation." Sawyer offered to disclose them, and certain photographs and composite drawings, and to turn them over when the appropriate witness testified. The court acknowledged the propriety of this procedure (tr. at 223-24), and refused to sign the subpoenas (tr. at 225).

The court directed Sawyer to examine the police department records for any information of which he was unaware (tr. at 225). He did so (see, tr. at 304-305), and again confirmed that he would turn over any notes required under People v. Rosario (tr. at 306). Mr. Steel was not satisfied, but noted:

> "As I understand Rosario, [if] one of the prosecution witnesses took the stand and testified, Mr. Sawyer quite reigtly would turn over whatever he said" (306).
>
> * * *
>
> "THE COURT: That's all you can expect. * * * Every witness who gets up, who has ever written anything anywhere, after he testifies on direct, you are going to get before you examine him on cross examination; and in addition to that, if there be in existence

> any writing of any kind which has been taken by any police officer or district attorney or anybody else from a person, even though he be not called as a witness. See, you will receive, provided that this is of some help to the defense, and if there is any question about that, I will look at it. But an open, complete disclosure does not exist under the law and you can't have the District Attorney's file (emphasis added).
>
> "[The District Attorney is] under a moral and legal obligation to turn over anything that might be helpful to the defense of an exculpatory nature, but he doesn't have to give you his whole file in the absence of anything like that.
>
> * * *
>
> "And your statement to the effect that you want to see his whole file and determine for yourself whether it's exculpatory or not is a privilege that thus far does not exist under the law.
>
> "MR. STELL: Let me -- I understand what Your Honor is saying and appreciate the distinction" (306-308).

At a later point, when Police Lieutenant Walter Stone testified for the People, the court gave a concrete example of the scope of its ruling. Sawyer told the court he was not turning over all the DD-5's signed by Stone.

> "Some of them relate to his testimony, most of them do not. To the extent that any of the DD-5's relate to his testimony; to the extent any of the DD-5's contain notes or memorandum made by Lieutenant Stone with respect to other witnesses that have testified in this matter; to that extent and to that extent only, I am obliged under the law as I understand it to make these DD-5's available. To the extent they have nothing to do with the testimony of Lieutenant Stone and to the

> extent they do not contain statements made to Lieutenant Stone by witnesses who have testified, then these materials need not be turned over. And I see no reason to do so" (tr. at 1801-2).

The court sustained Sawyer, noting that while all exculpatory matters were to be turned over (tr. at 1804-5) as well as writings made by the witness, "for the purposes of cross-examination" (tr. at 1806) under "the rule in People v. Rosario" (tr. at 1805), "I am not going to give you his work products and he is not turning over the file for a full discovery. There is no provision for that in law (tr. at 1805).

In sum, then, the broad "discovery" of all DD-5's which respondent contends was authorized was not so ordered. All that was required by Justice DAVIDSON, and all that was understood to have been required, was compliance with People v. Rosario, 9 N.Y.2d 286 (1961) cert. denied, 368 U.S. 866 (1961), and with Brady v. Maryland, 373 U.S. 83 (1963). Any doubt in Sawyer's mind as to whether something was potentially exculpatory under Brady was resolved in favor of the defendant. In addition, he also consented to turn over some investigative reports, as requested by the defense, which involved mistaken judgments as to the killer's age and height so that the officers who recorded them could so testify (see, testimony of Hanast [tr. at 1932-80] and O'Brien [tr. at 2024-51]). Photographs and drawings were similarly disclosed. Sawyer's compliance in all these respects was full and honest.

But even were we to assume that Justice DAVIDSON'S order so exceeded the requirements of Rosario and Brady as to encompass the material which petitioner now says he should have had, Sawyer's technical breach would not warrant vacation of judgment. Absent any showing of prejudice, Sawyer's conduct manifestly could not have "procured" the judgment, nor have affected either the verdict or the affirmance. CPL § 440.10 (b)(f)(g). Therefore, Sawyer's failure to disclose the DD-5's now in issue -- even if wrong -- can not warrant undoing a valid conviction unaffected by the conduct complained of. "The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." People v. Fein, 18 N.Y.2d 162, 173 (1966) cert. denied, 385 U.S. 649 (1967). The record here clearly establishes (see Points II and III, infra) that the DD-5's now in issue could have been of no use whatever at trial.

POINT II

THE ROSARIO RULE WAS COMPLIED WITH

It is clearly shown that -- apart from exculpatory matters -- Sawyer's duty to disclose witnesses' prior statements was governed solely by the Rosario Rule. The court expressly so confirmed: "I am going to handle this trial in accordance with he established order of the State, as pronounced in People v. Rosario. I'm not going to make any new law" (tr. at 56-57; see also, 220-3, 1805, 1968). This was manifestly the understanding of Sawyer (tr. at 46, 220, 223) and, so far

as it appeared at trial, of Mr. Steel as well (tr. at 54, 57, 306). Rosario was fully complied with; the material revealed subsequent to trial was not encompassed within the spirit nor the letter of that case.

Police Sergeant Robert Plansker testified, for the People, that he had responded to the scene of the Kroll homicide at about 4:35 or 4:40 on the morning of the killing and saw the marine's body (tr. at 1686-8). Overhearing a conversation between a civilian and another officer, Plansker and his partner pursued a taxicab and stopped it at West Broadway (tr. at 1688-9). The two occupants, Warner Guy and Russell Jackson, were brought back to the scene and questioned; after they were viewed by two witnesses, Guy and Jackson were allowed to leave (tr. at 1689-91).

At the conclusion of the direct testimony, the officer's memo book and "a DD-5 report in connection with this officer's testimony" were shown to defense counsel (tr. at 1692). In cross-examination, Plansker was asked to describe Jackson and Guy, which he did to the best of his ability (tr. at 1693-4).

Petitioner contends that Sawyer was required to turn over DD-5 nos. 4, 7, and 161. He is in error. Each of these documents was totally unrelated to Plansker's direct testimony: The first recounts interviews with Terry Morgan, Louis Piazza, Robert Delaney, George Burke and Thomas Eldred. Morgan and Piazza claimed to have seen the argument which proceeded the

killing; the others merely heard what sounded like backfire (DD-5 no. 4). DD-5 no. 7 merely indicated that no physical evidence was found at the scene by Plansker. No. 161, dated a week later, shows that Plansker canvassed 15 taxi companies and left a circular at those which were open; no affirmative responses were noted.

Under Rosario, the prior statement of a witness was available only for the purposes "to conduct an effective cross-examination [People v. Ballott, 20 N.Y.2d 600, 604 (1967)] i.e., "to impeach and discredit that witness." 9 N.Y.2d at 289. Accordingly, it tis available "[s]o long as the statement relates to the subject matter of the witnesses' testimony." 9 N.Y.2d at 289.

> "It does not mean that the defense will be able to go on a tour of investigation seeking generally useful information. Our decision presupposes that the statement relates to the subject matter of the witnesses' testimony [and] that it is to be used for impeachment purposes only after direct examination * * *
> a N.Y. at 290.

Thus, in People v. Ruppert, 26 N.Y.2d 437 (1970), fn. 3, cert. denied, 404 U.S. 939 (1971) it was held that where an admission was suppressed, it need not have been disclosed under Rosario, because it could not have been used to cross-examine the officer. Similarly, in People v. Fiore, 12 N.Y.2d 188 (1962) the lack of opportunity to cross-examine a witness deprived the defense of "the condition precedent to obtain the pretrial testimony" under Rosario. 12 N.Y.2d at 201. Again, in People v. Butler and Conroy, 33 A.D.2d 675 (1st Dept.

1969) aff'd, 28 N.Y.2d 499 (1971), tapes which did not relate to the subject of the witnesses' testimony but whose only possible use was to cumulatively indicate bias, were expressly held not to be Rosario material.

Plansker's testimony was in no way impeachable by these DD-5's. In fact, like the witness in People v. Pollack, 21 N.Y.2d 206 (1967), he "testified to nothing of consequence" and cross-examination of necessity was so perfunctory that Rosario was inapplicable. 21 N.Y.2d at 215. The defense had no right to use these DD-5's for general discovery. [People v. Rosario, 9 N.Y.2d at 290; People v. Schifter, 34 A.D.2d 561 (2nd Dept. 1970)] and Sawyer was under no obligation to disclose them.

Moreover, because Plansker's testimony was so inconsequential, and because the DD-5's could never have been used to effectively cross-examine him, Maynard could not have been prejudiced even if he had been improperly denied the right to inspect them. Accordingly, if it was error to withhold them, the error was harmless and a new trial unwarranted. People v. Rosario, 9 N.Y.2d at 290-291; People v. Hernandez, 10 N.Y.2d 774 (1961), cert. denied, 369 U.S. 831 (1962); People v. Turner, 10 N.Y.2d 839 (1961) cert. denied, 369 U.S. 807 (1962); People v. Hurst, 10 N.Y.2d 939 (1961); People v. Fein, supra.

If Rosario is inapplicable to Plansker's testimony because his DD-5's were useless for cross-examination, then the rule is certainly inapplicable to the testimony of Hanast and O'Brien, who were defense witnesses and, as a matter of law,

not subject to cross-examination. Both Hanast and O'Brien were found not to be hostile (tr. at 1926-941) and accordingly could not have been impeached with any prior statement. Becker v. Koch, 104 N.Y. 394, 401 (1887). The Rosario rule is, as the Court of Appeals has held, inapplicable to one's own witnesses. People v. Regina, 19 N.Y.2d 65, 76 (1966).

Moreover, Hanast and O'Brien were admittedly called for a very "limited purpose" (tr. at 1926). Hanast was asked about statements by Michael Febles (tr. at 1940-50), Dennis Morris (tr. at 1950-6), Howard Fox (tr. at 1958-61) and Seaman Crist (tr. at 1969). He was also asked to describe Crist's appearance (tr. at 1970-2) and whether he had ever visited Mrs. Elizabeth Quinn (tr. at 1974-5). O'Brien, in turn, testified that Crist appeared excited and smelled of alcohol on the morning of the shooting (tr. at 2032-3) and that Febles was interviewed and reported seeing the marine fall (tr. at 2035-9). O'Brien also recalled interviewing Howard Fox, a cab driver who had driven two men to the village on the morning of the shooting (tr. at 2039-44). O'Brien also stated he had later learned of Maynard's relationship with Gisselle Nikol (tr. at 2044). Thus, even if petitioner had the right to cross-examine these witnesses, their DD-5's, like Plansker's, could not have facilitated it. These DD-5's were totally unrelated to anything in their testimony. As will be seen, infra, they neither exculpated Maynard nor impeached the witnesses. Accordingly, disclosure was not required by Rosario, and again, even assuming it was mandated,

the failure could not, and did not, prejudice Maynard so as to entitle him to a new trial.

POINT III

THE RECENTLY DISCLOSED DD-5's NEITHER EXCULPATE MAYNARD NOR COULD THEY HAVE AIDED HIS DEFENSE.

Assistant District Attorney Sawyer repeatedly assured the court that he was aware of "no exculpatory evidence whatsoever" (tr. at 45-46; also, 55, 220 308). Mr. Steel, however, contended that "all the memoranda that were taken at that time, of whatever witnesses, who described the witness [sic] as being 18 and 20" were "exculpatory, I want those" (tr. at 50). Without conceding that such memoranda were exculpatory, Sawyer nevertheless agreed to turn over any such matter (tr. at 51-52). Accordingly, Sawyer showed the defense, among other things, DD-5's nos. 2, 66, 68, 70, 100, 119, 122, 155, 160, 189, 191, 201 and 207 (Steel affidavit at 9) --in sum, any DD-5's which recounted any identification of the killer, no matter how vague.

Petitioner, however, now contends that dozens of the remaining DD-5's are new, exculpatory evidence. This contention is squarely rebutted by the trial record.

Petitioner's first claim is that DD-5's nos 84, 85, 86, 92, 103, 128, 133, 144, 153, 168, 171, 172, 173, 184 and 195 are of "tremendous" evidentiary value. These documents simply reflect that various witnesses to the shooting were shown suspects -- not Maynard -- and in fact identified none as the killer (cf. DD-5 no. 207, which was turned over, indicating that Dennis Morris, upon seeing Maynard's

photograph, stated, "This looks like the guy" but "it's a little too light" and he wished to view the man in person). On their fact then, these documents, if they had been admitted at trial, would have only strengthened the case against Maynard.

Petitioner, however, puts forward an imaginative theory. These reports are evidence of a thorough, well-documented investigation and it is peculiar, he argues, that while such careful records were kept of negative responses, none were kept of the positive identifications made by Fox, the cab driver, on the evening of May 17, 1969.* The absence of records of positive responses, which petitioner assumes would be unexplainable, would, according to his theory, have convinced the jury that the police were not keeping a record because the identifications were tainted.

This theory is not new, and the absence of a DD-5 reflecting the positive identification -- assuming such absence to be "evidence" -- was known and amply explored at trial. After Fox identified Maynard at trial, and was cross-examined, Sawyer offered to show a prior consistent identification at the police station (tr. at 1586-9). The defense requested, and was accorded, a voir dire to determine the propriety of that identification (tr. at 1589-91). The defense, already having seen and knowing of many DD-5's and other reports (e.g., tr. at 536, 571, 574-5, 731-2, 1010, 1248, 1551), then made precisely

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* Petitioner claims that Crist also testified to such a recollection (Steel affidavit at 11); there is no such testimony. Gelfand's testimony at the first trial is irrelevant to this motion. However, for purposes of this response it can be assumed that several witnesses identified Maynard as the killer.

the argument it now makes:

> "I have received neither a DD-5 form concerning this so-called show-up on 5-17-67 nor a police memorandum book" tr. at 1600.
>
> "If [a contemporaneous police report] is not in existence, I would say that that is per se evidence that this is an illegal show-up" (tr. at 1602.

Sawyer then showed the court that there was a record kept: "No less, a report to the police commissioner" (tr. at 1603). Thus, it became obvious why there was no DD-5: the identification waa far too much of a breakthrough to have been simply filed along with several hundred dead leads.

The trial court, faced with the same lack of a DD-5 now called "tremendous" new evidence, expressly found that the absence of such a report did not evince a tainted procedure (tr. at 1604). The jury, presented with the same argument (tr. at 3471-2) agreed. This Court has no power under CPL § 440.10(2) to second-guess those findings.

Petitioner's contentions regarding "Louis Piazza" and "The Warner Guy - Russell Jackson - Frederick Jackson materials were not only raised at trial, but were the subject of extended treatment on appeal in appellant's brief, point X. On appeal, Maynard contended that the records of an inquiry concerning Guy and Russell Jackson (Ct. Exh. 5 for ident.) and of an interview with Louis Piazza (People's Exh. 74 for ident.) were exculpatory and should have been turned over prior to trial. The Appellate Division rejected that argument as without merit

[People v. Maynard, 40 A.D.2d 779 (1st Dept. 1972)] and nothing in the current batch of DD-5's could possibly have altered that holding.

As to Piazza, DD-5 no. 66 (Peo's. Exh. 74) related to Piazza's description of the killer, but it did not appear that he had ever had the chance to identify Maynard. So Sawyer understood (tr. at 1886). The current Batch of DD-5's simply confirms this; the fact that other witnesses did look at Maynard or his photograph does not demonstrate that Piazza could be located or was willing to do so. They certainly do not demonstrate, as appellant says, that Piazza was deliberately abandoned as a witness because he would have exculpated Maynard. The only mention of Piazza in the new DD-5's is the simple notation that he saw the argument and heard the black man say "I'll be back." This obviously adds nothing to the detailed information reflected in Peo's. Exh. 74 (DD-5 no. 66) previously part of the record.

Russell Jackson and Warner Guy were -- briefly -- potential suspects: the two were in a cab when the shooting occurred and passed in view of Kroll's body. Driving on, they were apprehended by the police, and brought back to the scene; a follow-up was to be conducted. All this was known at trial (tr. at 1689-91; Peo's. Exh. 46 for ident. [DD-5 no. 122]; Ct. Exh. 5) and the DD-5's simply show what procedures were used in eliminating Russell Jackson as a suspect: the police tried to locate Russell, and eventually did so and brought him to the station house but Crist did not positively identify him (DD-5 nos. 114, ———

124). Interviews of Jackson's friends produced nothing (DD-5 nos. 120, 121) and the residents of Jackson's building did not recognize the composite drawing of the killer (DD-5 no. 166). Thus, the investigation gave no reason to suspect Russell further and the inquiry then terminated.* Nothing in the investigation was in the remotest way exculpatory to Maynard, nor did it show any "interest" in Frederick Jackson, other than as one who would know where his brother Russell could be found (see, DD-5 nos. 121, 176). Petitioner's theory that there was "no reason to disqualify" Frederick as a "prime suspect" and that had he called Frederick, the latter might have confessed, is a scenario more in accord with Perry Mason than real-life probabilities. Cf. CPL § 440.10(g); People v. Salemi, 309 N.Y. 208 (1955); People v. Priori, 164 N.Y. 459 (1900).

Petitioner also contends that two other DD-5's, nos. 185 and 193, should have been turned over to the defense because they "shatter" part of the People's theory and turn part of the prosecution attack "into a sham." There is no merit in this argument, for neither does anything of the sort.

Petitioner notes that DD-5 no. 185 reveals that Maynard was seen in Greenwich Village on May 17, a time, according to Mr. Steel, which the prosecution alleged Maynard was in hiding. Counsel's assertion is unsupported by the record: there was never an allegation that Maynard was in flight or hiding on May 17. Quite the contrary: Police Lieutenant

* DD-5 no. 176, dated the next day, stated a prior address for Jackson. Obviously this information was requested previously.

Walter Stone, a People's witness, testified that Maynard was present at 10th Street in the Village on that very evening (tr. at 1797, 1835-9), and that the police were waiting for him there because "it was believed that he was to appear there at the boutique" (tr. at 1838). DD-5 no. 185 simply confirms the fact that Maynard was in the Village that day, and Sawyer could have hardly contended, in the face of Stone's testimony, that Maynard was deliberately "out of the scene" (Steel affidavit at 18).

In fact the People's theory of flight was quite different. Maynard's decision to go to Florida on about April 29 (tr. at 2114, 2696-7) coincided, remarkably, with the appearance, on April 27, of a composite drawing of the killer in the New York newspapers (tr. at 1795), a point made in Sawyer's summation (tr. at 3548).

But obviously such a drawing would not appear indefinately and Maynard would eventually return when he could safely be seen on the streets of New York. This he did some weeks later (tr. at 2697). It is undisputed that he was in the city, and in Greenwich Village on May 17, for he had no way of knowing he was a suspect in the Kroll homicide until August 2, when Lieutenant Stone asked him to come in for questioning on the matter (tr. at 1812). Maynard then hung up (tr. at 1813) and soon thereafter left for Europe (tr. at 2710) thereby jumping bail in another case (tr. at 2933, 2967-76). There were, then, two distinct flights -- one to Florida and one to Europe.

Sawyer argued correctly, referring not to one flight, but to "a pattern" (tr. at 3548-9). Maynard's undisputed presence in New York on May 17 in no way rebutted this pattern and DD-5 no. 185 was in no way exculpatory. Moreover, even if Maynard's presence in the Village that afternoon was probative, it is certainly not a newly discovered fact: Maynard obviously knew where he was and could have said so in his testimony.

Similarly, DD-5 no. 193 was consistent with the prosecution. This document, dated May 23, 1967, merely recounts that Elizabeth Quinn failed to "produce any information of value" when interviewed on May 19. Petitioner contends that this evaluation is inconsistent with the People's theory that the alibi in which she participated was fabricated subsequently by Michael and suggested to her (see, tr. at 3101-3). Petitioner argues that if Mrs. Quinn did not give Maynard an alibi on May 19, this would have been, indeed, "information of value" because "it would have destroyed the alibi before it got off the ground" (Steel affidavit at 20).

Petitioner overlooks one obvious point in his own chronology. At the time the DD-5 was written, the police had no idea Michael would be the architect of this alibi. Petitioner concedes that this interrogation of Mrs. Quinn occurred when Michael was still in custody and before he could arrange an alibi with his family (Steel affidavit at 19). In fact, as late as November 28, Michael was telling Assistant District Attorney Melvin Ruskin that he could not be sure where he or

Maynard were when the marine was killed (Peo's. Exh. 80). Maynard, at the time, was writing to the District Attorney that he was out of New York City when the shooting occurred (tr. at 2739-40). Thus, Hanast could have hardly known in May that Mrs. Quinn's failure to place Maynard in her Queens' home would destroy an alibi which had not yet been invented. For Hanast to have written, then, that Mrs. Quinn's negative responses were "of value" because of what was not yet to occur for at least a half-a-year, he would have had to have been quite a detective indeed!

Appellant's final argument concerns DD-5 no. 205* which relates that a witness to the killing, Dennis Morris, gave an address on Hart Street, Brooklyn, when inducted into the army on May 22, 1967. At trial he was asked where he lived on April 3, and he gave his mother's address on Central Avenue (tr. at 1323). Totally ignoring any possibility that Morris might have moved in those seven weeks, petitioner brands the variance a heinous lie. After the weeks of trial, the hundreds of DD-5's, and the thousands of pages of prior testimony, petitioner apparently would have this Court assume that this change of address was of such great evidentiary value as "could not have escaped the prosecutor's attention." United States v. Kahn, 472 F.2d 272, 287 (2nd Cir. 1973).

He further contends that this so-called impeachment evidence -- not grounds for a new trial in the best of circum-

* Petitioner contends that DD-5 no. 206 relates to an interview with Morris's mother. It does not, nor does it reflect the statements petitioner ascribes to her.

stances [People v. Eng Hing and Lee Dock, 212 N.Y. 373 (1914)] -- was so devastating as to probably have affected the verdict. CPL § 440.10(g). This is an argument truly born of desperation. The jury heard dozens of witnesses and thousands of pages of testimony, including that of two other witnesses -- Febles and Crist -- who identified Maynard as Sergeant Kroll's assailant. They had also heard Morris's character attacked by Mr. Steel at trial and heard Morris admit he was once a thief (tr. at 1325). To assume that the verdict would have been different had they suspected Morris of not living with his mother prior to his army induction requires the most vivid imagination. The fact is so trivial that it barely rates the label "insignificant." Moore v. Illinois, 408 U.S. 786, 798 (1973).

In sum, petitioner's nebulous and frivolous contentions as to the relevancy of the DD-5's which were not disclosed at trial are, to adopt the language of the Court of Appeals,

> "perfect examples of why the public prosecutor--an experienced trial lawyer--must have some area in which he is permitted to judge, in the context of the entire case, the value of evidence to the defense in terms of its potential impact on the jury; he must have some discretion in determining which evidence must be turned over to the defense. These claims are examples of why no court has ruled that every statement obtained by the District Attorney or the results of every avenue of investigation pursued by him must be disclosed to the defense regardless of its materiality, credibility or potential impact on the trier of fact." People v. Fein, 18 N.Y.2d at 171-72.

CONCLUSION

THE MOTION TO VACATE JUDGMENT SHOULD BE DENIED.

Respectfully submitted,

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