[markings from inside of folder; upside down]

~~Malcolm X~~ - Extra copies +

~~Correspondence~~

+

~~Miss C. Roberts~~

ALPERT

M. MARTIN
U.F.52
POLICE DEPARTMENT
CITY OF NEW YORK
COMMAND/ADDRESS
325 HUDSON ST
N.Y. N.Y. 10013

NEW YORK NY 10001 PM 28 DEC 1977

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Allen Alpert Esq.
Asst. District Attorney
155 Leonard St.
New York N.Y.
10013

Room 804

FOR POLICE EMERGENCY ONLY
DIAL 911

William M. Kunstler
ATTORNEY AT LAW
853 BROADWAY
NEW YORK, NEW YORK 10003

212-674-3304

DOROTHY THORNE-BUTLER
LEGAL ASSISTANT

December 22, 1977

Detective Gene Roberts,
3983 Barnes Place,
Bronx, N.Y.

Dear Detective Roberts:

I am the attorney for Norman 3X Butler and Thomas 15X Johnson whose motion to set aside their judgments of conviction is presently scheduled to be heard in Part 30, Criminal Courts Building, 100 Centre Street, New York, N.Y. 10013 at the call of the calendar on January 19, 1978.

Since one of the grounds for this motion is the failure of the District Attorney and/or the Police Department to make your identity known to the defense at the 1966 trial of movants and Thomas Hagan, it is hoped that you will consent to an interview by me as soon as possible.

If you are agreeable, please contact Joan Washington, my legal assistant, so that a mutually satisfactory date, time and place can be arranged.

I would appreciate your prompt attention to this letter.

Very truly yours,

William M. Kunstler

wmk/jw

U.F. 52

William M. Kunstler
ATTORNEY AT LAW
853 BROADWAY
NEW YORK, NEW YORK 10003

Detective Gene Roberts
3983 Barnes Place
Bronx, N.Y.

one time. Never told Dermody he was U/C, + from tenor of Dermody's qs, doesn't think Dermody knew. Doesn't know if any other cop told anyone in DA's office he was U/C. → Dermody seemed angry at Roberts' statements re. whether he had a gun or wallet in his pocket after shooting – re. whether anyone gave him gun. [At present, Roberts remembers someone tapping him on shoulder. Thought it was to see how he was after being shot at. Was no rec. of anyone offering him a gun or him telling or indicating to anyone that to draw a gun.]

1/10/78
by phone

Det. Gene Roberts #2940 50 PIV:

Positive that:

1) had no knowledge M would be shot or anything would happen to M

2) as far as he knows, P.O. not involved in M's death in any way — only saw two people shooting M

3) only one can ID as shooter was H

4) H had an automatic pistol - don't know calibre

5) saw one other person shooting at M w. handgun - don't know calibre - thinks automatic

6) this person & H were together

7) can't ID this other person - didn't get good look - light skinned black man

8) did not hear shotgun - surprised when he reached stage & saw pellet wounds in M's body

2/8/78
by phone

Read Roberts name & address from list of persons interviewed (trans. p. 4269). Roberts said, "That's me". Asked him who Jean Roberts is: "That's my wife". Jean had asked him that day if she could come to hear M speak. Roberts said OKay.

Roberts never told DA he was U/C. Remembers speaking only to Dermody →

motion we could respond to, +
let it. Thanks.

Agent
1/30/78

34-200M-701488(77) 346

District Attorney's Office
COUNTY OF NEW YORK

1/30/78

Called by
Lt. Jonathan Rains
Legal Div., NYPD
374-5400

Rains got letter from K asking to speak to Roberts + to examine NYPD files on Malcolm X.
Rains said PD didn't want to comply w. K's request + asked for our position.
Told him that K's motion did not even to have merit, + all he'd try to do would be to conjure up things that weren't really there.
Said that if it were up to me, I would require K to make

Legal Division

Lt. 374-5400

Jonathan Lava

Letter from K
requesting to interview Roberts
& to review police files

Questions that Bruce Levy interviewed Roberts.

005's

#	
4/14/65	Death of Leon Ameer in Boston on 3/13/65 of natural causes.
2/22/65	Interview of Leon Ameer Lives in Boston + Conn. Cassius Clay's bodyguard In N.Y. 3/22/65 Was Black Muslim until beat up by Muslims in Boston Says he knows who committed the crime, but did not tell police.
3/1/65	Looking for Leon Ameer - was at X's funeral
4/4/65	Warrant for " " on 1/27/65 for embezzling from New Haven Mosque.
2/24/65	Spoke to Leon Ameer re his knowledge of ID of perps. Said he'd be in N.Y. for funeral on 2/27 + would speak to police.
3/15/65	Re autopsy on Leon Ameer.
2/21/65	Interview of William Harris of 614 Oak Tree Place, Bronx, who was shot in right side. 61 yrs old.
2/23/65	Investigation of William Harris.
2/23/65	" " " " - affiliated w. OAAU
2/24/65	
3/5/65, 3/5/65	
2/21/65	Interview of William Parker of 2305 30th Ave, Astoria, who was shot in foot. Was at meeting w. 6 yr. old son.
2/23/65	Investigation of William Parker.
2/23/65	" " " "
2/24/65	
2/21/65	Interview of William Fogel - manager of Audubon Ballroom

2/22/65 Trying to locate Benjamin 2X at 605 W. 156 St.
2/22/65 " " " " " " " "
[Presumably Benjamin Goodman]
2/27/65 Interview of Benjamin Goodman by Ptl. Cusmano (Xerox)
3/26/65 Re- " " by Det. Twomey (Xerox)

~~2/22/65 Interview of~~

2/22/65 Statement of Ronald Timberlake

2/25/65 Request for photos of , B, J, + William Gaines of 159 North Elliot Walk, Bklyn, N.Y.

2/24/65 Attempt to interview Benjamin Price + his wife at home at 131-33 W. 143 St. Not at home.
2/24/65 - Interviewed Benjamin Price - witness to murder
3/23/65 Interview of Alpheus Benjamin Price (Yellow paper; in folder)

#71-1
3/8/65 Re- Interview of Earl Grant who said guard Charles Blackwell said he saw "Linwood" from Plainfield N.J. enter ballroom w. 2 other men.
" Linwood sat on right side front row. 2 other men on left side front row. All 3 wore trench coats. All 3 stared at Blackwell. Heard commotion in back of ballroom.
~~3/8/65~~ 3/8/65 Grant says Blackwell (?) saw in the audience a "person who he knows as Benjamin from Paterson or Newark seated about the third row on the left side"
But, it was the 2 (subjects) people in front row who fired their guns in order to escape. SAW J flee to ladies room.
Det. Cilento trying to interview Blackwell.

3/4/65 } Interview of Gene Roberts & wife Joan Roberts, & given
3/10/65 } subpoenas to D.A's office on 3/12/65.

3/5/65 Interview of witness William Bailey 225 W. 137 St.

3/5/65 Interview of witness Leonard Sneed 225 W. 137 St

3/6/65 Interview of George Phifer who says man named "Willie" operated a tape recorder in Booth 1 or 3.

3/5/65 Interview of John A. X. Davis re Rostrum Guards - e.g. Charles & Robert 35 X.

4/21/65 Interview of Benjamin 8 X Brown, 635 Castle Hill Ave, Bx, N.Y. Correction Officer & Muslim till May 1964. Gave no helpful info.

3/11/65 Interview of possible witness Willie Barnes

3/13/65 Looking to interview William George of 115 W. 118 St.

*3/15/65 Interview of William 6 X Henry George - was shown list of OAAU members given NYPD by FBI.

3/15/65 Interview of Willie 18 X Williams - no info. useful.

3/19/65 Attempt to locate Langston 2X Savage.

3/22/65 Interview of Langston Savage

3/26/65 Interview of Leonard G. Bentley of 215 W. 148 St, witness

3/31/65 Interview of William Jones, witness, of 77 Lefferts Pl., Bklyn

4/5/65 Interview of Wilbert X Moore, guard-witness, of 1095 Univ. Ave, Bx.

2/26/65 Interview of Edward Lloyd

2/27/65 Interview of Earl Grant
*

3/25/65 Interview of Agurs Linwood X Cathcart.
*(see Earl Grant)
Sitting in front row. Knows J + B well but did not see them there that day. But was shown photos of B+J + did not ID them.
Linwood was wearing a NOI pin at the meeting. - He will be a Muslim till the day he dies. Compared X to Benedict Arnold.

3/19/65 Interview of Charles Blackwell - gave info of value + will be reinterviewed.
*

3/29/65 Interview of witness Leonard Larsen of 577 W. 148 St.

Charles Blackwell - G.J. testimony - 3/9/65

205 Security guard in front of stage to left of audience

207 As X started to speak, scuffle a few rows back.
207-8 Two men in scuffle; one stood up halfway

208 Something went "pop" from back of auditorium.
208 Then volley of shots + pandemonium.

208 Did not see anyone firing guns.

209 Two men ran up aisle, toward exit
209 These 2 men had been sitting in first 2 seats in front row.
210 As they ran, they shot over people's heads.

209, 211 Another man ran toward ladies bathroom.
211-2 This man is J - G.J. #1

210-11 IO's G.J. photos #2 & 3 as men sitting in first 2 seats in front row,
210 who were running back firing
#11-12 #1 - J
#2 - H
#3 - B

211 From the three photos, does not recognize man who stood + hollered, "Get your hand out of my pocket."

212 During incident, Blackwell rushed toward audience.

212 ∴ doesn't know if anyone rushed to the stage shooting

213 But positive he saw B, J, + H

Charles Blackwell - Trial Testimony

1611 Guard on floor F/o stage

1614-5 As X began to speak, heard scuffle from audience. Can't tell exactly where in audience it was.

1615 2 men - one said, "Get your hand out of my pocket."

1616 He ran to aisle where he heard the scuffling.

1616-7 Heard blast from in back of him.

1617 Turned toward stage
Saw X fall.

Heard more shots.
Turned around

1617-8, 1620 Saw 2 men come down aisle toward stage shooting at X.

1617-8 Same 2 men who were in scuffle [?]

1618 One had Luger.
One had .45 auto.

1618, 1621 Saw their faces

1620, 1623-4 One pointed gun at him, & he went down. - B

1622-3 IDs H & B as these 2 men. who ran to stage shooting.

1623 B had Luger

1624 After going toward rostrum,
H & B turned around,
& ran back up the aisle away from the stage,

1624-5 shooting over people's heads.

1625 He chased H + G,

1626 - 7 ran into J

1626 who was standing, facing Blackwell.

1627 J turned around + ran ~~toward~~ into ladies' lounge.

END OF DIRECT

1635 Blackwell's G.J testimony

1636, 1651-2 + one sheet of handwritten notes re Blackwell, written by Det. Cavallero.

1652 Blackwell's G.J. testimony rec'd in Ev. as D's Ex Q w/t Obj.

1700 - 17 Blackwell's G.J. testimony is read into the record.

1719 The G.J. photos marked as trial exhibits 31-8 + received as D's exhibits R-Y.

1695 - Explained that he had previously said the ~~[illegible]~~ men firing the gun

1665-6 Admitted he had previously lied when he said he had not seen the men who fired the guns.

1668 Mentions a "Brother" Earl" - is not asked for Earl's last name.

1671 - 2, 1697-9 Earl said Blackwell could give info to police.

1691 ~~Did see people~~

1691 Did see people firing guns.

1691 Had told people he had not seen people firing guns.

1691 Never saw anyone w. sawed-off shotgun

1692-3 His testimony in G.J. re men who were sitting in front row, first 2 seats firing guns as they went toward exit was not true.

Re Direct

1732-3 G.J. #1 + 4 (D's R + V) are of J.

1733 G.J. # 3 (D's T) is of B.

1734-5 At p. 208 of G.J. testimony, the shot or pop he heard from in back of him came when he stepped from stage toward audience.

1738 At p. 209 of G.J., the two men he saw running up the aisle shooting were not the 2 men sitting in the first row.
He lied in G.J. about this.

1739 They were not sitting in front row. - he was mistaken. -

1739-40 He was ashamed to admit he had left his post, & dropped to the floor when B pointed the gun at him.

1740 He never saw H + B sitting in front row.

1742 Can't say which of Both said, "Get your hand out of my pocket"

1744-5 His G.J. testimony that he did not know if anyone rushed the stage shooting, was not truthful. A lie.

1746-7 because he wasn't supposed to leave his post. Felt ashamed.

Interview of Charles Blackwell

Notes. Ex. 30 at trial. IOs B, J + H

Saw Robert 16X + Linwood 15X at ballroom.
(No mention of "Ben").

Interview of Blackwell - 3/9/65
IOs B, J, + H.

Note: dated 3/22 Says Clifton Stansbury says Blackwell said that * Brother Benjamin 2X a/k/a Robert 16X from Plainfield or Newark was seated behind B + H,
& that Linwood Cathcart was seated in another place - this strange because the 2 were from same Mosque in N.J.

Interview of Blackwell - 3/8/65
IOs H + B w. handguns running toward stage firing
IOs J running into ladies lounge.

Saw Linwood X + Benj. 3X in ballroom - knows them from Jersey Mosque

Interview of Earl Grant 3/15/65

Says nothing re Brother Benjamin or of Blackwell telling him of Benjamin.

Interview of Clifton Stansbury - 3/22/65

Blackwell told Stansbury that Robert 16X a/k/a Benjamin 3X ~~was~~ seated behind B + H, + that Benj. 3X had entered ballroom w. Leinwood Cathcart.

Un-Redacted Pages Supplied by FBI

by K's numbers 11-24, 34, 35, 40, 43-48, 50, 51; K's 42 9/78 aff. - 2 unnumbered pgs)

1) 8/25/65 Reuben M. Francis in Mexico (K's aff 4/29/78; unnumbered page)

2) 6/24/65 ✓ James W. Cook, Jr. (K✓51)

3) 4/13/65 ✓ Letter from Leon Lionel Phillips, Jr. (now dead) alleging that shotgun grabber was Lt. in Newark Temple of Islam (K✓49)

*

4) 4/21/65 ✓ Re Letter from Leon Lionel Phillips (↑).

Only 2 Lts in Newark Mosque were

Richard 15X &

Edward 15X (K✓50)

*

5) 4/9/65 ✓ Edward Oliver + Norman Howard Mortimer

CII has only IO'd photos of O, J + H. (K✓47)

6) 4/2/65 ✓ Edward Oliver (2½ page "Note" not provided) (K✓43)

Note probably added later by someone in D.C., probably as result of phone communication.

7) 3/30/65 ✓ Robert 35X Smith - failed to appear in ct. on gvs poss charge.

X's bodyguard on 2/21/65.

Seen w. large amount of $ day after X killed

Lawston Savage (K✓40)

Difference is due to "Mag" card sending out the info. N.Y. card is their file card & in D.C. machine picks up transmission from "Mag" card.

8) 2/23/65 Jasper Davis - witness (K✓35)

Same w. "Mag" card.

9) 2/27/65 Ronald Timberlake IO'd O & H
Timberlake recovered .45 and gave it to FBI. (KH-12)
"Mag" card.

10) 2/28/65 Witness George Mitchell - recognized H from NOI meetings (K13)
Mag card.

11) 2/23/65 Re uncooperative Timberlake (K34) Mag. card.

12) 2/24/65 ✓ Reuben X, H
Willie Harris } onlookers hurt during shooting
Willie Parker }
Ronald Timberlake - .45 cal. gun
Lloyd Wright (K14-24) Mag. card

13) 4/1/65 ✓ Norman Howard Mortimer
O, J, H
Edward Oliver - strong arm man from Newark (K44-46)

14) 10/21/65 ✓ "Suspect" James Willie Cook, Jr. - anonymous tip
Willie Futch, Jr. - c/I re. his arrest w. Cook on
drug charges in Miami 10/12/65 (K's 429-78 aff.;
unnumbered page).

(FBI papers correct;
K's papers apparently mixed up.

Redacted pages not supplied by FBI

K's #s	Apparent Info
1	Membership of MMI as of 8/64
	Undated Memo (2-7)
2	c/I eyewitness - Id's H, + 2 onlookers who were shot, + that police found shotgun
2	c/I Ronald Timberlake - re he has pistol used to kill X.
3	Timberlake giving FBI the gun, +
3	FBI giving gun to N.Y.P.D. officers
4	c/I says H charged w. homicide, + Reuben Francis ?? charged w. assault + poss of weapon.
4	c/I re X's autopsy, + recovery of ballistics ev. in ballroom
5	c/I's summary of incident
5	c/I ID'd photo of H.
5	c/I says H's prints on clip of gun retrieved by Timberlake?
6	c/I Id's B
6	c/I can't ID ? + ? from photos as being in ballroom.
6	c/I IDs B, J. + H
6	c/I Charles Blackwell ?? picked up shotgun + German Luger, + gave Luger a person.
7	NYPD's witnesses saying they fell to floor + didn't see assassins.
7	c/I says NYPD? shifting investigation to MMI officials
7	* Robert 35X Smith ??, a bodyguard w. much $ right after X's death.

2/24/65 FBI memo (27-30)

27-28 c/I gives his eyewitness account of shooting } can't ID shooters
29-30 " " " " " " "

FBI memo dated 2/22/65 (31-33)

31 c/I told FBI of the shooting, & gave eyewitness account, & saw Francis?? shoot M

32 Timberlake?? called FBI & gave them the .45. FBI gave it to NYPD.

32 Blackwell?? recovered shotgun

32 ?? - shot in foot & is in hospital

32 ???? - presently being q'd by police

32-3 NYO not to give NYPD any info w/t prior FBI clearance.

33 NYPD problem; FBI should not become involved.

FBI memo dated 2/22/65 (35)

36 c/I gave ?? eyewitness account of murder

36 c/I re retaliation by MMI vs NOI

Undated (37)

37 MMI - OAAU meeting re burning of X's home - no retaliation vs NOI

* Memo dated 3/3/65 (8-9)

8 NYPD ?? has "two suspects at large" whom they refused to IO to FBI

But, NYPD ?? asked FBI for info re ?? & ??, & FBI gave NYPD photos & descriptions of these 2 people.

One of these people was eliminated by NYPD ?? as a suspect.

8 The other is under investigation & is on the "Security Index."

9 NYPD ?? in Paterson, N.J., ping re associates of H.

9 cI ?? was shown photos of ?? & ??

Teletype - 2/26/65

10 cI said B arrested for X's murder

10 Timberlake ?? IOd B

10 c/I said member of Socialist Workers Party was being interviewed.

UPI bulletin (25)

25 Re. threats vs X in Chicago & LA & police protection there.

Memo dated 2/22/65 (26)

26 c/I told FBI that someone saw Timberlake ?? in poss. of 45 shortly after murder

26 FBI says it recommends no obj. to NYPD ?? interviewing Timberlake ??

Boston - 3/25/65 (38-39)

38 c/I said at X's funeral he talked w former members of
* Newark NOI Mosque, whose names he didn't know. One of these people, who was present when X was killed, was a lieutenant member of Newark Mosque, whose name he didn't know, who handled the shotgun.

39 On guard at rostrum were Robert 35X & Charles 26X (Charles From Newark),
who, c/I believes, were part of conspiracy to kill X.
c/I believes man who started distraction was member of Newark Mosque.

Undated (41-42)

41 c/I eyewitness

41 c/I IDd H & B, & possibly J

42 Another c/I felt it was inside job.

Undated (49)

49 c/I re p. 49 found dead of natural causes.

K's Aff. of 4/28/78

Airtel 8/29/69 (4 pages)
Re FBI in Miami helping to prepare documentary on NOI

Airtel 8/25/65 (1 page)
~~Apparently~~ re Reuben Francis

Memo 8/25/65 (2 pages)
Apparently re Reuben Francis

Undated (1 page)
Re Charles Blackwell - shotgun + Luger

Memo 3/3/66 ?? (page 2 of memo)

Refers to trial testimony - Dermody qing Butler re Butler's meeting w. John Ali, NOI Natl Sec., night before murder. B said he knew Ali but never met him.

c/I said info was received that H met w. Ali night before murder, but the witness to this meeting was considered undesirable.

Mike Martin - 741-8442
Legal Advisor
N.Y.P.D.

Det. Jean Roberts 50 Pct. - Kingsbridge Ave.
#2940 50 220-5611
220-5621

SUPREME COURT OF THE STATE OF NEW YORK
PART 30

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MUHAMMAD ABDUL AZIZ (Norman 3X Butler),

and

KHALIL ISLAM (Thomas 15X Johnson),
Defendants-Movants

AFFIDAVIT

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

Detective GENE ROBERTS, Shield No. 2940, 50th Precinct, being duly sworn, hereby deposes and says:

1. I am the person depicted in Defendants' Exhibits V, W, X, and Y bending over the body of Malcolm X shortly after he was shot in the Audubon Ballroom in the afternoon of February 21, 1965 (see Trial Transcript, pp. 4258-65, four photographs).

2. I am also the person referred to as "Brother Jean" in Mr. Kunstler's affidavits of December 8, 1977 and December 19, 1977.

3. I was not involved in any manner in the murder of Malcolm X.

4. I had no prior knowledge, information or reason to believe or suspect that anyone intended, or that there was a plan, to kill, shoot or otherwise harm Malcolm X on February 21, 1965.

5. I do not know, believe or suspect that the New York City Police Department or any other governmental or law enforcement body was involved in any manner in the murder of Malcolm X.

6. I do not have any information or reason to believe or suspect that the New York City Police Department or any other governmental or law enforcement body was involved in any manner in the murder of Malcolm X.

7. I do not have any information or reason to believe or suspect that Norman 3X Butler ~~Thomas 15X Johnson were~~ did not murder Malcolm X.

8. I do not have any information or reason to believe or suspect that Thomas 15 X Johnson did not murder Malcolm X.

Dated: New York, New York
January 12, 1978

GENE ROBERTS

R.F. pedigree - ct. papers

871 E 179 St., Bx.

34-200M-701488(77) 346

District Attorney's Office
COUNTY OF NEW YORK

Reuben Francis

873/65

~~5/20/65 - BW Issued~~

5/25/65 - Bail Forf. & BW

Markewich - Decision on Remiss. of Bail Forf. 11/29/66

Δ fled when got word cohorts of killers would kill him.

Δ surrendered to FBI when he heard case on trial

Bail put up by a good samaritan

Reuben Francis aff.

Believed H or cohorts would kill him

Did not come to ct on 5/25/65

Surrendered on 2/2/66

DA's aff - Gerald Ryan

Same info.

8/3/65

Reuben Francis.

Ind 3/10/65 - Assault 1st, 2nd, Poss. loaded Pistol (Felony)

3/12/65 Committed on (BW) bail $9,000

5/20/65 BW issued

6/2/66 - Rf remanded to FBI + mos returned to DA

2/8/66 - Bail set at $25,000

4/19/66

6/2/66 → P.G. Poss of Weap or Misd.

Time Served.

Malcolm X Players

Vince Dermody 2260 University Ave., Bronx
733-4194

Det. Ferdinand Cavallaro #409 30th Sqd. (Retired) - 1976
LE PORTET DE MORAIRA
ALICANTE, SPAIN

Det. John Leeley #1568 MN Hom (Retired to Pa. + Discovered for Perjury in Hugh Mulligan case - 1973)
97 Captain Shankey Drive
Garnerville, N.Y. (as of 1973)

Sgt. Tom Kenney - 5th Hom. 678-1361
530 W. 126 St.
2nd Floor
(Has one box of Mx material at 5th Hom - doesn't know what's in it)

One of his duties was to check known individuals (2800, 2786, 2794)

Charles Morris - did not see B in ballroom (2782, 2802, 2773) or J (2782, 2802, 2779)

No instructions to keep out certain people or to report if certain people entered (2774)

Doesn't know if B or J were there or not (2783)

Scott - not searched (2836)

Ahmed - didn't see B (2900) or J (2874)

Greene - person who fired shotgun did not look like J

Teresa Butler - B home from 1 P.M. on.

Edwards - 7/10

Recieving office gets + retains original.

Airtel - Typed on typewriter - regular mail

The unredacted Memos to Sullivan from others would be summaries of what had already been received. So there'd be no new info in the memos.

Teletype - 2/26/65 - No copy in N.Y.
Original should be available in D.C.

Benjamin Goodman Born: Suffolk, Virginia
DOB: 7/14/32

New York addresses in early 1960's:
1022 Longfellow Ave., Bronx
1008 University Ave, Bronx

Joined Nation of Islam's Manhattan Mosque #7 - 1958
Left Nation of Islam - 1964 (early summer)
Joined Malcolm X's Muslim Mosque, Incorporated - 1964

Sometime near the trial of Malcolm X's murderers in 1966, Goodman left New York and moved to Illinois, probably to Chicago or Evanston. As of May 1978, Goodman was living in Chicago and working at the Evanston Hospital. He was also a member of the World Community of Islam. In June 1978, Goodman moved to Richmond, Virginia.

I would like to know the relationship between the World Community of Islam and the Nation of Islam (commonly known as the Black Muslims and headed, until his death, by Elijah Mohammed). Also, what contacts, if any, Goodman has had with the Nation of Islam from 1966 to the present.

Allen Alpert - x 9323
Rm 804

Superintendent James E. O'Grady
1121 South State St.
Chicago, Illinois 60605

P v Crimmins, 38 NY2d 407 (1975)

Δ claims wrongfully denied a hearing on mot. to vacate judgment re. NDE, + P withheld helpful info.

A.D. affd.
Ct. of A. affirms.

Wit's affidavit was complete on its face, ie, it presented fully, + in best possible light, all the ev. the "wit" could possibly offer on Δ's behalf. But, "the averments did not disclose a probability, as opposed to a mere possibility, that the jury would have rejected the overwhelming ev. of Δ's guilt and returned a verdict more favorable to Δ." (409) Thus, the court below properly denied the motion w/t a hearing." (409)

Harmless error rule for nonconstl error is similar to standard for 440.10 NDE motion.

Nonconstl error is harmless when, "given the overwhelming proof of Δ's guilt, there is no significant probability that the jury would have acquitted the Δ if the error had not been committed." (412)

Mot to vac jvdj. (MVJ on NDE) rests w/n discretion of the ct (415).

(416)*
Whether to hold a hearing is discretionary w. the ct. (416). Ct. should hold hearing, "if the issues raised by the motion are sufficiently unusual and suggest searching investigation" (415). "To grant such a hearing where the court is able to

Crimmins

reach its conclusion on the papers alone would serve no end of justice but would only protract future litigation" (417)

Crimmins ct. stressed importance of making motion in same ct. in which conviction was had. "Moreover, the motion was denied by the very trial ct which... must have been sensitive to the "pulsebeat of the ctrm." Indeed, it is for this reason that the MVJ must be made to the ct. in which it was entered (see CPL 440.10, subd. 1)." (417 n.3)

"Moreover, even fully crediting affiant's sincerity, the denial, w/t a hearing, was proper because the ct. correctly assessed its probable impact upon the jury... There is no probability, as opposed to speculative possibility, that the jury would have returned a verdict more favorable to Δ had they had affiant's testimony" (419) [in our case, "had they [not] had affiant's testimony"].

"In sum, a hearing would only have delayed resolution of the motion supported by an affidavit complete on its face and, therefore, was not necessary. Moreover, there was no significant probability that the ev. in the affidavit if introduced at trial would have resulted in a verdict more favorable to Δ. Thus, the motion was properly denied w/t a hearing." (419).

In NOE, validity of judgment is not attacked; only likelihood of similar verdict "if there were an enlargement of the evidence on the principle issue." (419)

[redacted] Crimmins

Wholding of info helpful to defense (CPL§ 440.10(1)(f)(h)) is in nature of coram nobis. Attack validity of judgment.

Here, affidavit does not contain relevant or competent helpful ev., only elves.

§440.10 (1) At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: ...

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been 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 ...

440.30 (4) Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations ~~of~~ substantiating or tending to substantiate all the essential facts ...; or

(c)

b) Gist of H's affidavit, viz, that B & J didn't do it, is not newly discovered, because H testified to this at trial.

Only "new" part is that H names brothers Lee, Ben, Willie X, & Wilbour as his confederates, & gives a few details.
But this would not have made a more favorable verdict probable, for ev. vs. B & J was overwhelming.

Ev vs Butler

Cary Thomas saw & heard H stand up & say to B, who was seated next to H, "What are you doing with your hand in my pocket?" Recognized B, "right away" - had seen him in Mohammed's Mosque & knew his name (235-9)

Vernal Temple - Saw & heard H say "Nigger, get out of my pocket"

Edward DeLima - Heard someone say, "Take ~~it~~ hand out of my pocket."

Refers to IP -
3145-6
3151-2
3155

EV VS JOHNSON

Cary Thomas - (239-42) heard shot + saw J standing w. shotgun in his hands
Johnson shot M w. sawed-off shotgun
(241-2) had seen J several times before in Muslim Mosque 7

Whitney - just heard shots.

Fred Williams heard shotgun from front + saw J sawed-off w. shotgun in his hand (1517-25)
Had not seen him before (1522)
(1526-7)

Temple - saw J in Audubon (199) - knew him from before 662-5, 799

Wallace - heard shotgun - could not see anything.

As M. started to speak,

B H H, right flo Thomas, stood up + said to B, "Man what are you doing with your hand in my pocket" (235-8)
Thomas had seen H + B before at Muslim Mosque (235-7).

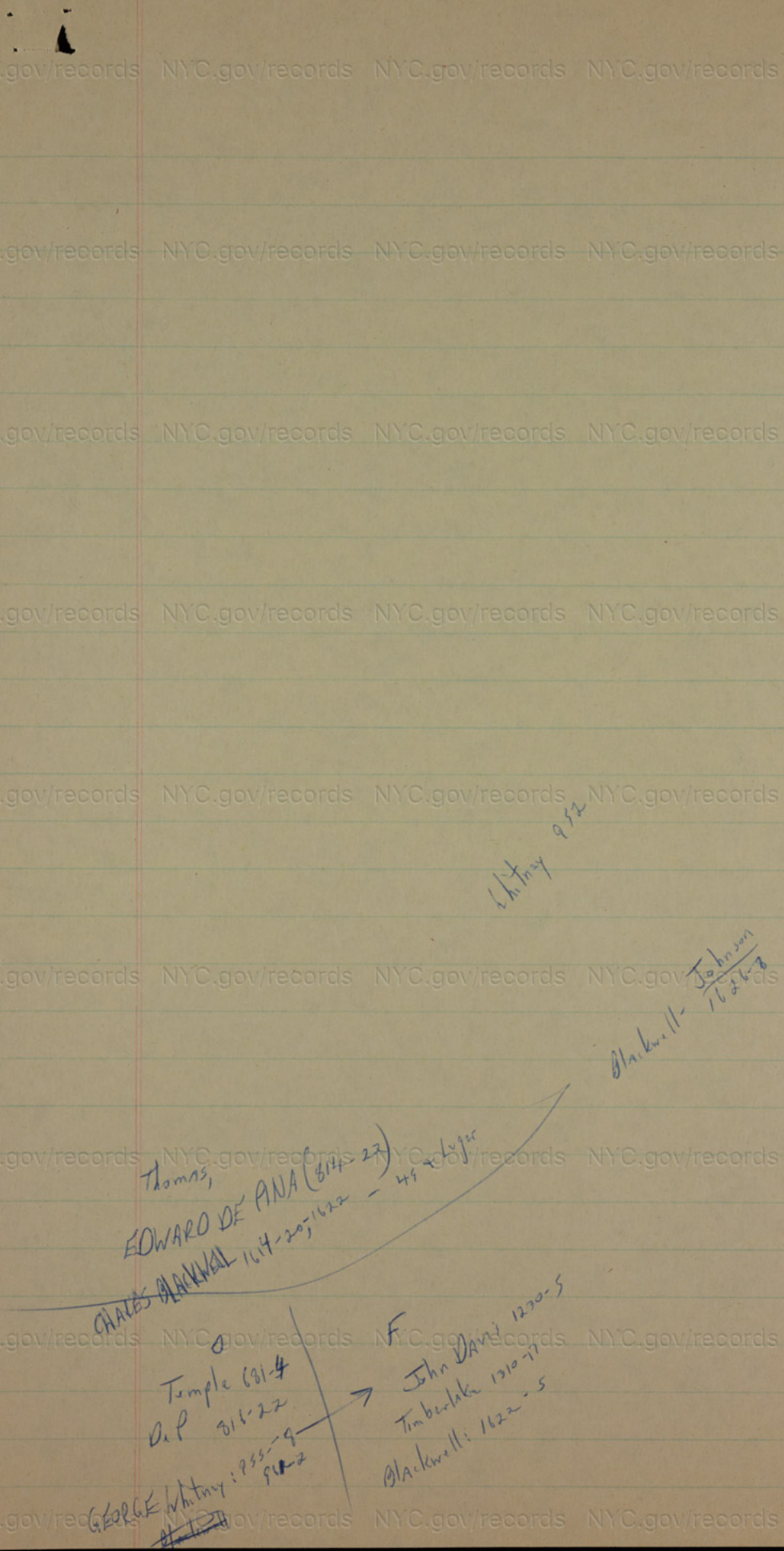
H Temple heard H say it, i.e. that (668-9)
Had seen H 3 times before selling Muslim newspapers + in Mosque (670-3)

B Jasper Davis - B + another man sitting in seats immediately to right of him. H jumped up and said "Take your hand out of my pocket" on the aisle seats (1524-8)

Had not seen B before

B Williams - 2-3 rows behind + to left, two men arguing about one having hand in other's pocket & near one of the men. Had not seen him before (1517-8)

Blackwell


Whitney 952
Blackwell- Johnson
1626-8
Thomas,
EDWARD DE FINA (814-22)
CHARLES BLACKWELL 1614-20; 1622 - 45
Temple 681-4
D. P 814-22
GEORGE Whitney: 955-9
F
John David 1230-5
Timberlake 1310-77
Blackwell: 1622-5

Law Review Commentaries

Post-conviction relief in the New York Court of Appeals: New wine and broken bottles. 35 Brooklyn L. Rev. 1 (1968).

Post-conviction remedies in New York. M. G. Paulsen, 15 Buffalo L. Rev. 309 (1965).

Post-conviction remedy for federal claims. 33 N.Y.U.L.Rev. 164, 178 (1965).

§ 440.10 Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been 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

w Commentaries

w Post-conviction remedy for federal
e claims. 33 N.Y.U.L.Rev. 164, 178
L. (1965).

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favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court

upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

7. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

Source of Section

See, Code Crim.Proc. 1881, § 466, for history, see note under section 330.30.

Practice Commentary

By Richard G. Denzer

The eight grounds for this motion designated in subdivision 1 appear to cover all contentions which formerly could have been raised upon coram nobis (pars. b, c, e, f, h) and a motion for a new trial on the ground of newly discovered evidence (par. g), and all which are still cognizable on state and federal habeas corpus (pars. a, d, h)—and probably other contentions as well (see par. f). No statute of limitations is predicated, even with respect to the newly discovered evidence ground, which formerly had to be raised within one year of judgment (CCP § 466).

Regardless of the ground alleged, the motion must be made in the court of conviction. This does not preclude a defendant with a traditional state habeas corpus contention from suing out a writ at a Supreme Court term of the county of incarceration instead of advancing it upon the proposed motion; and any attempt to abolish the habeas corpus writ as a

entences no right to relief by coram obis where the two receiving the greater sentences had prior criminal ecords, their participation in crime as to far greater degree than that f their codefendant granted probation, and he had had a prior exemplary record. People v. Kenny, 1962, 36 N.Y.S.2d 911, affirmed 19 A.D.2d 48, 245 N.Y.S.2d 320.

Coram nobis proceeding may not be invoked to correct non-jurisdictional error appearing on face of record with respect to sentence. People v. Meyers, 1962, 16 A.D.2d 704, 227 N.Y.S.2d 969.

Prosecutor had duty promptly to expose perjury of witness with respect to witness' understanding with prosecution, that, in exchange for his testimony, prosecution would recommend a plea to lesser degree of homicide for witness, and prosecutor's failure to do so deprived defendant of fair trial and due process of law and he was entitled to have sentence vacated on coram nobis. People v. Podinker, 1961, 27 Misc.2d 282, 210 N.Y.S.2d 174.

A sentence imposed on a 29-year-old defendant in 1938 for murder in the second degree, of 55 years to life, under a statute which then provided for an indeterminate sentence of a minimum of 20 years and a maximum of life, was a lawful sentence not subject to correction in a coram nobis proceeding, in view of fact it was possible that defendant's life could exceed the minimum of 55 years. People v. Gilmore, 1960, 11 A.D.2d 875, 203 N.Y.S.2d 51.

Invalidity of petitioner's sentence as a probation violator subsequent to his being adjudged an incompetent was not conclusively established by fact of such incompetency, and petitioner's remedy, if he contended that sentence imposed was impermissible because of his mental condition, was not by way of habeas corpus but by writ of error coram nobis. People ex rel. Kirk v. Noble, 1959, 23 Misc.2d 949, 195 N.Y.S.2d 435, appeal denied 10 A.D.2d 627, 200 N.Y.S.2d 337, appeal dismissed 11 A.D.2d 923, 209 N.Y.S.2d 263.

Facts, if true, that accused had been unlawfully arrested without a warrant, that there had been an unreasonable delay in his arraignment, that evidence erroneously received and considered had been used as basis for sentence imposed, and that sentence had been made without accused being asked if he had any legal cause to show why judgment should not be pronounced against him did not constitute grounds for relief by way of coram nobis. People v. Butler, 1959, 16 Misc.2d 1100, 185 N.Y.S.2d 51.

17. Expiration of sentence

Mere fact that defendant has served his sentence does not abrogate his right to be properly sentenced. People v. Stroud, 1971, — Misc.2d —, 320 N.Y.S.2d 661.

Where party proceeded on motion in coram nobis attacking validity of indefinite sentence upon plea of guilty to indictment charging him with criminally possessing pistol after prior conviction, and defendant had already served sentence, his failure to promptly challenge propriety of sentence either by means of writ of habeas corpus or appeal, precluded granting of any relief, even if warranted. People v. Vasquez, 1959, 15 Misc.2d 850, 183 N.Y.S.2d 58.

A coram nobis proceeding by a prisoner to recover loss of credit for time served in jail prior to the conviction and before sentence was moot, where the sentence under review had already expired. People v. Burke, 1958, 13 Misc.2d 907, 178 N.Y.S.2d 718, appeal conditionally dismissed 9 A.D.2d 875, 199 N.Y.S.2d 384.

An application for writ in nature of coram nobis on ground that commitment of petitioner to reception center of correction department for classification and confinement on his convictions of third degree burglary and petit larceny did not constitute valid sentence because of absence of language used in section 61 of the Correction Law prior to its amendment in 1954, viz. "sentenced to imprisonment in an institution under the jurisdiction of the department of correction without designating the name of such institution", presented academic question, if treated as motion for re-sentence, where petition showed that sentence had been fully served. People ex rel. Cunningham v. Denno, 1956, 4 Misc.2d 570, 157 N.Y.S.2d 636, affirmed 3 A.D.2d 837, 161 N.Y.S.2d 838.

§ 440.30 Motion to vacate judgment and to set aside sentence; procedure

1. A motion to vacate a judgment pursuant to section 440.10 and a motion to set aside a sentence pursuant to section 440.20 must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file

with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10 or subdivision two of section 440.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

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(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

Source of section: New.

Practice Commentary

By Richard G. Denzer

This section provides procedural rules for the conduct and determination of the indicated motions; this the Criminal Code failed to do with respect to coram nobis and its other post-judgment motions.

In essence, the section requires defense papers asserting legal basis for the particular motion and containing sworn factual allegations supporting the grounds urged (subd. 1); demands or permits summary denial where such is required or authorized by the substantive provisions (§§ 440.10, 440.20) or where the motion papers do not state legal grounds for relief or do not conform to the indicated requirements (subds. 2, 4); and, otherwise, mandates the court to conduct a hearing for the purpose of making findings of fact essential to the determination (subd. 5), placing upon the defendant the

4 for J
different

Johnson -

2 put J in ballroom shortly before murder - (Temple + Thomas)
(both knew J from before)

2 said J fired shotgun (Thomas + Williams)
(Thomas knew J from before)

1 saw J flee from scene + hide in ladies bathroom (Blackwell)

Butler

6 different for B

3 saw Butler in diversion (Davis, Thomas, Williams)
(B sat down next to Davis + talked to him a few minutes)
B sitting 2-3 rows behind Williams)
(Thomas knew B from before)

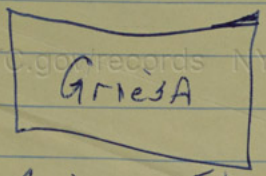
3 saw B race to stage firing handgun at Malcolm (Thomas, DePina, Blackwell
Thomas (knew B from before)

B

saw B flee (DePina, Blackwell, Timberlake

Davis
Thomas
Williams
DePina
Blackwell
Timberlake

RANDOLPH



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Aziz – Islam –
30 day sent to Atty – Gen. 3/26/80

Lee Hansen
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Rm 620

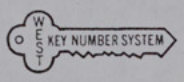
Library
791-1052

~~Clerk 791-0141~~
Unit 3 – 791-0131 – Robert West

In re Weir, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038, 95 S.Ct. 525, 42 L.Ed.2d 315 (1974).

[2] In the case at bar, when Lovato's affidavit is stripped of its opinions, suspicions, and conclusions, his allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien. Lovato's delivery at the United States border into the hands of officers who were undoubtedly expecting him created no bar to his prosecution.

Affirmed.



UNITED STATES of America ex rel. Robert W. LLOYD, Petitioner-Appellee,

v.

Leon J. VINCENT, Superintendent, Green Haven Correctional Facility, Respondent-Appellant.

No. 883, Docket 75-2021.

United States Court of Appeals, Second Circuit.

Argued April 25, 1975.

Decided July 16, 1975.

The State of New York appealed from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, granting petitioner's application for writ of habeas corpus, vacating judgment of conviction in Nassau County Court, and directing new trial within 60 days or dismissal of the indictment. The Court of Appeals, Hays, Circuit Judge, held that interest of State in preserving confidentiality of undercover agents in narcotics cases, preserving their future usefulness, and safeguarding their lives, provided adequate justification for excluding public from trial for limited period while agents were testifying.

Reversed.

Lumbard, Circuit Judge, concurred and filed opinion.

1. Constitutional Law ⇐268(6)

Right to public trial, guaranteed by Sixth Amendment, applies to states by virtue of due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law ⇐635

Right to public trial is not absolute and must be balanced against other interests which might justify closing of courtroom to public. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐635

Interest of State in preserving confidentiality of undercover agents in narcotics cases, preserving their future usefulness, and safeguarding their lives, provided adequate justification for excluding public from trial for limited period while agents were testifying. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐635

Public trial serves both to protect defendant from being dealt with unjustly and to preserve public trust in judicial process by preventing abuses of secret tribunals. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐635

Court's discretion to order exclusion should be sparingly exercised and limited to those situations where action is deemed necessary to further administration of justice. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐635

Better course would have been for court to hold evidentiary hearing on asserted need for confidentiality before excluding public during testimony by undercover agents but court could make finding that exclusion was required on basis of judicial knowledge of role of undercover agents and could properly

take notice that agents live perilous lives and are not easily replaced and that their mere appearance creates risk of exposure of identity.

7. Criminal Law ⇐635

Exclusion of public from trial of narcotics case during testimony of undercover agents was not abuse of discretion where defendant offered no reason for admission of public other than assertion of absolute right to public trial and defense did not have in mind any particular person whom they wanted present.

Eugene Murphy, Mineola, N. Y. (James J. McDonough, Atty. in Charge, Legal Aid Society of Nassau County, Mineola, N. Y., on the brief, Matthew Muraskin, Mineola, N. Y., of counsel), for petitioner-appellee.

Burton Herman, Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen. of N. Y., on the brief, Samuel A. Hirshowitz, First Asst. Atty. Gen., of counsel), for respondent-appellant.

Before LUMBARD, HAYS and MULLIGAN, Circuit Judges.

HAYS, Circuit Judge:

This is an appeal by the State of New York from an order of the United States District Court for the Eastern District of New York, granting petitioner's application for a writ of habeas corpus, vacating the judgment of conviction and directing a new trial within sixty days or dismissal of the indictment. The district court concluded that petitioner had been denied his sixth amendment right to a public trial by the exclusion of the public from the courtroom during the testimony of two undercover agents who were key government witnesses. A stay of the order was granted by the district court pending the determination of this appeal. We reverse the order of the district court.

Appellee Lloyd was convicted of two counts of criminally selling a dangerous drug in the third degree after a jury trial in the County Court, Nassau County. On October 19, 1973, he was sentenced to state prison for two concurrent four year terms. The judgment of conviction was affirmed without opinion by the Appellate Division, 45 A.D.2d 912, 356 N.Y.S.2d 219 (2d Dep't 1974), and leave to appeal to the Court of Appeals was denied. 34 N.Y.2d 519, 359 N.Y.S.2d 1026, 316 N.E.2d 884 (1974).

At trial, the State's primary witnesses were two undercover agents from the Narcotics Squad of the Nassau County Police Department. The prosecutor made an application to close the court to spectators while the undercover agents testified on the ground that the exclusion was necessary in order to maintain the confidentiality of the agents who, at the time of trial, were still actively engaged in undercover work in Nassau County areas. Defense counsel objected to the exclusion, asserting the right to a public trial under the sixth amendment. After ascertaining that neither defense counsel nor his client had in mind any particular person whom they wanted present in the courtroom, the judge granted the state's application and ordered the courtroom cleared of all spectators during the agents' testimony. At this time only one spectator, unknown to all parties, was present.

After his ruling, the judge offered defense counsel an additional opportunity to present reasons why the courtroom should not be cleared. Defense counsel reasserted the right to a public trial. The judge then reaffirmed his ruling stating that he was required to weigh the defendant's constitutional rights against the countervailing need for confidentiality and citing in support of his decision to close the courtroom the need to protect the identity of the agents in view of the continuing investigation they were undertaking and the danger to their lives posed by testifying publicly.

[1-3] In the trial court, defense counsel cast his objection to the exclusion order in terms of defendant's absolute right to a public trial. However, as the defense now concedes, the right to a public trial, guaranteed by the sixth amendment and made applicable to the

states by virtue of the due process clause of the fourteenth amendment, see *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 603 (3d Cir. 1969) is clearly not an absolute right. Rather, the courts have recognized, as did the trial judge here, that the right to a public trial must be balanced against other interests which might justify the closing of the courtroom to the public. Thus the exclusion of the public in whole or in part has been found constitutionally acceptable where closed proceedings were deemed necessary to preserve order, to protect the defendant or witnesses, or to maintain the confidentiality of certain information. *E. g., United States v. Bell*, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972) (public excluded during discussion of skyjacker profile); *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957, 90 S.Ct. 947, 25 L.Ed.2d 141 (1970) (some spectators removed to avoid harassment of witness); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied *sub nom. Orlando v. Follette*, 384 U.S. 1008, 86 S.Ct. 1961, 16 L.Ed.2d 1021 (1966) (all spectators except press removed to protect witnesses and preserve order); *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842, 80 S.Ct. 94, 4 L.Ed.2d 80 (1959) (most spectators excluded in rape case where prosecutrix and two other witnesses were of tender years and a large audience would inhibit testimony); *Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951) (general public excluded by state law in sex crime case where victim was a minor). See also *Sheppard v. Maxwell*, 384 U.S. 333, 358, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (authorizing limitation of the press and media during the trial to protect the defendant); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 539–40 (2d Cir. 1974) (authorizing partial restrictions on access to contempt proceedings when necessary to protect the confidentiality of trade secrets). We are convinced that the interest of the state and of the witnesses in preserving the confidentiality of undercover agents in narcotics cases presents an equally persuasive justification for the exclusion of the public during the limited period while an undercover agent is testifying.

[4, 5] In reaching this decision we are not unmindful of the fact that the right to a public trial fulfills important functions in our system of jurisprudence, serving both to protect the defendant from being dealt with unjustly and to preserve public trust in the judicial process by preventing the abuses of secret tribunals. *Estes v. Texas*, 381 U.S. 532, 538–39, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *In re Oliver*, 333 U.S. 257, 268–73, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Stamicarbon, N.V. v. American Cyanamid Co., supra*, 506 F.2d at 540–41. Nor are we unaware of the precept that the court's discretion to order exclusion should be sparingly exercised and limited to those situations where such action is deemed necessary to further the administration of justice. See *Stamicarbon, N.V. v. American Cyanamid Co., supra* at 542; *cf. United States v. Ruiz-Estrella*, 481 F.2d 723, 725–26 (2d Cir. 1973); *United States v. Clark*, 475 F.2d 240, 246–47 (2d Cir. 1973). These considerations however must be balanced against our recognition of the risks both to the agent and to the law enforcement process attendant upon the public testimony of a police witness who is actively engaged in ongoing narcotics investigations in an undercover capacity. It is obvious that exposure in a public courtroom would not only imperil the agent but would render him useless for any further investigative activities. Moreover, the restriction on public attendance under consideration here is a limited one, covering only the period when an undercover agent is on the stand; we think it highly improbable that an exclusion thus circumscribed will seriously deprive defendants of the benefits of a public trial. See *Stamicarbon, N.V. v. American Cyanamid Co., supra*, 506 F.2d at 541. Accordingly, we conclude, as have the New York courts, that shielding the identity of a police witness, preserving

his future usefulness, and safeguarding his life provides an adequate justification for excluding the public for that limited period while an undercover agent is testifying. *People v. Hinton*, 31 N.Y.2d 71, 75, 334 N.Y.S.2d 885, 889, 286 N.E.2d 265 (1972), cert. denied, 410 U.S. 911, 93 S.Ct. 970, 35 L.Ed.2d 273 (1973); *People v. Pacuicca*, 134 N.Y.S.2d 381 (Bronx County Ct.1954), aff'd, 286 App.Div. 996, 144 N.Y.S.2d 711 (1st Dep't 1955).[1]

[6, 7] Petitioner contends that it was error to exclude the public solely on the basis of the prosecution's asserted need for confidentiality without requiring a showing that the agents' confidentiality would be jeopardized or that their lives would in fact be endangered. While we wish to make it clear that the better course would have been for the trial judge to hold an evidentiary hearing, we think that it was within the court's power to make a finding that exclusion was required on the basis of his judicial knowledge of the role of undercover agents. The trial judge could properly take notice of the facts that undercover agents lived a perilous life in Nassau County and were not easily replaced and that their mere appearance in court as witnesses against appellee who was accused of dealing in narcotics created a risk of exposure of their identities to actual or potential targets of their active investigations. *Cf. United States v. Bell*, *supra*, 464 F.2d at 669. The trial judge repeatedly suggested that defendant's counsel offer some reason for the admission of the public to the trial during the agent's testimony but received no response other than assertions by counsel that defendant was absolutely entitled to a public trial. There was no suggestion that the agents' identities were generally known or that their occupation was not hazardous. Furthermore, in response to the judge's query, it was conceded that neither defense counsel nor his client had in mind any particular person whom they wanted present in the courtroom. Under these circumstances the trial judge did not abuse his discretion by deciding that preserving the confidentiality of the undercover agents who were working on narcotics cases outweighed the limited burden which was placed on the right to a public trial by closing the courtroom only for that period while the undercover agents were testifying.

The order of the district court is reversed.

LUMBARD, Circuit Judge (concurring):

I concur.

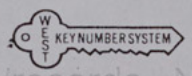
Any judge of a court which is concerned with the prosecution of offenses against the narcotics laws knows all too well the great dangers and difficulties which face law enforcement officers who seek to get evidence and who appear as witnesses before grand juries and in courts of law. In no area of law enforcement have murder, mayhem and terror been more frequently used against disclosure and testimony. Against this background of judicial knowledge and notice, the undisputed assertion of the district attorney that the two witnesses were then "actively undercover agents with the Narcotics Squad of the Nassau County Police Department" was sufficient reason for the county judge's action in closing the court to spectators during their testimony.[1]

1. We see no merit in appellee's attempt to distinguish *Hinton* from the case at bar on the ground that in that case other targets in the narcotics investigations were present in the courtroom. The rationale for the exclusion in both *Hinton* and *Pacuicca* was to minimize the risks to an agent and to the law enforcement process attendant upon the public testimony of a police witness who is actively engaged in other narcotics investigations and whose identity is unknown to the public. The *Hinton* opinion makes it clear that the presence of other investigatory targets in the courtroom was viewed as an "added factor" justifying the exclusion order and was not essential to the decision. See 31 N.Y.2d at 75, 334 N.Y.S.2d at 889.

1. The subsequent testimony of the agents under oath confirmed the prosecutor's assertion that they continued to be active undercover agents in Narcotics Squad of the Nassau County Police Department.

Moreover, the defendant gave the county judge no reason to believe that in this case such action would in any way prejudice the defense. Counsel's only argument in opposing the state's motion was to assert the right to a public trial.

Chief Judge Mishler in granting the writ relied largely on the failure of the state to make any showing, beyond the prosecutor's unsworn assertion, that the confidentiality of the agents would be jeopardized and that their lives would be endangered. In most cases such a showing must be made, preferably by witnesses under oath, regarding the particular dangers and considerations in view of the circumstances of the particular case and the witnesses whose identity the state seeks to safeguard. Indeed, as Judge Hays points out, the better course would have been to hold an evidentiary hearing in this case.



William H. NOLAN, on behalf of himself and all others similarly situated, Appellant,

v.

Richard B. MEYER et al., Appellees.

No. 987, Docket 75-7100.

United States Court of Appeals, Second Circuit.

Argued June 18, 1975.

Decided July 29, 1975.

Former employee brought action to challenge provision in profit-sharing plan which provided for forfeiture of benefits by a participant who engaged in competitive employment. The United States District Court for the Southern District of New York, Harold R. Tyler, J., dismissed complaint for lack of jurisdiction over subject matter, and plaintiff appealed. The Court of Appeals, Gibbons, Circuit Judge, held that neither Internal Revenue Code nor Welfare and Pension Plans Disclosure Act defines a substantive right for enforcement of which a remedy for collection of profit-sharing benefits may be implied, and that district court properly dismissed complaint for lack of jurisdiction.

Affirmed.

1. Courts ⇐299.3(2)

If former employee's complaint challenging provision in profit-sharing plan providing for forfeiture of benefits by participant who engages in competitive employment set forth a federal common-law cause of action to recover the forfeited benefits implied from existence of federal statutes dealing with employee benefit plans, there would be federal question jurisdiction. 28 U.S.C.A. § 1331(a).

2. Federal Civil Procedure ⇐1742

Where complaint alleges existence of a federal common-law cause of action, such allegation may suffice to avoid the granting of a motion to dismiss for lack of jurisdiction over subject matter and may require that court consider claim on merits. Fed.Rules Civ.Proc. rule 12(b)(1, 6), 28 U.S.C.A.

3. Courts ⇐263(3)

A somewhat marginal federal question claim may suffice to support pendent jurisdiction, but there must be some minimum degree of substantiality or nonfrivolity to the federal claim, and if the claim is wholly without merit or wholly frivolous federal court may dismiss for want of jurisdiction.

4. Courts ⇐263(3)

For purposes of pendent jurisdiction, a strong indicator of insubstantiality of federal claim is the resolution of the claimed issue in a prior Supreme Court decision.

5. Courts ⇐263(3)

Any federal cause of action for recovery of benefits lost under a clause in

Statement of Case

part and votes to modify on the dissenting opinion at the Appellate Division.

Order modified in accordance with the opinion herein and, as so modified, affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS HAGAN, Also Known as TALMADGE HAYER, Also Known as THOMAS HAYER, NORMAN BUTLER, Also Known as NORMAN 3X BUTLER and THOMAS JOHNSON, Also Known as THOMAS 15X JOHNSON, Appellants.

Argued January 24, 1969; decided April 16, 1969.

Crimes — murder in first degree — public trial — exclusion of press and public from courtroom during small part of trial, where lawyer for witness stated that witness feared for his life, that threats had been made against him and that he would not testify, did not deprive defendants of right to public trial.

1. The exclusion of the press and the public from the courtroom during a small part of the trial of defendants did not deprive them of their right to a public trial. The lawyer for a witness told the Judge that the witness feared for his life and that threats had been made against him and that he would not testify. The Judge suggested that the witness should be sworn and take his chances on refusing to testify, but defendants objected. They also objected to the court's order closing the courtroom to the public. Part of the problem was thus created by the defendants' objection to the only alternative open to the Judge: to swear the witness and hold him in contempt if he refused to testify. Considering the large number of witnesses for the People, the testimony taken during the period of exclusion was minimal. If, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness and otherwise keeps it open to the press and public, a defendant is not necessarily deprived of a public trial.

2. Even if there were error in the exclusion, it should be held beyond a reasonable doubt that it was harmless.

3. It was not improper for the prosecutor to comment on and offer evidence of hostility of the Black Muslim faction, to which defendants belonged, toward decedent. If, as alleged, the murder did grow out of the hostility of a religious conflict, this conflict became germane to the case. It should not be made inadmissible on general grounds.

People v. *Hagan*, 29 A D 2d 931, affirmed.

APPEALS, by permission of the Chief Judge of the Court of Appeals, from judgments of the Appellate Division of the Supreme Court in the First Judicial Department, entered May

Points of Counsel

22, 1968, affirming judgments of the Supreme Court (CHARLES MARKS, J.), rendered in New York County upon verdicts convicting defendants of the crime of murder in the first degree.

Edward Bennett Williams, Patrick M. Wall, Harold Ungar and *Michael E. Tigar*, of the District of Columbia Bar, admitted on motion *pro hac vice*, for appellants. I. The exclusion of all spectators and members of the press during the testimony of prosecution witnesses Timberlake and Sullivan deprived defendants of their statutory and constitutional right to a public trial. (*Matter of Oliver*, 333 U. S. 257; *Commonwealth* v. *Fugmann*, 330 Pa. 4; *Turner* v. *Louisiana*, 379 U. S. 466; *Pointer* v. *Texas*, 380 U. S. 400; *Gaines* v. *Washington*, 277 U. S. 81; *Gideon* v. *Wainwright*, 372 U. S. 335; *Estes* v. *Texas*, 381 U. S. 532; *People* v. *Jelke*, 308 N. Y. 56; *Douglas* v. *Alabama*, 380 U. S. 415; *United States* v. *Kobli*, 172 F. 2d 919.) II. Reversible error was committed when the trial court permitted the prosecutor to comment upon and introduce evidence of the hostility of the Black Muslim sect toward Malcolm X. (*Toomey* v. *Farley*, 2 N Y 2d 71; *United States* v. *Bufalino*, 285 F. 2d 408; *People* v. *Agron*, 10 N Y 2d 130, 368 U. S. 922; *People* v. *Whitmore*, 45 Misc 2d 506; *People* v. *Brigham*, 226 App. Div. 104; *Schneiderman* v. *United States*, 320 U. S. 118; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.) III. Defendants were entitled to a list of the witnesses who appeared before the Grand Jury, a list of the witnesses intended to be called by the People, a list of the witnesses interviewed by the police in connection with this case, and the detective reports on police interviews. (*People* v. *Nationwide News Serv.*, 172 Misc. 752; *People* v. *Miller*, 42 Misc 2d 794; *People* v. *Walsh*, 262 N. Y. 140.)

Frank S. Hogan, District Attorney (*H. Richard Uviller* of counsel), for respondent. I. The guilt of defendants was established beyond any reasonable doubt. II. The exclusion of the public during the testimony of prosecution witnesses Timberlake and Sullivan was a proper exercise of the court's discretion, and did not deny defendants a public trial. (*People* v. *Jelke*, 308 N. Y. 56; *Sheppard* v. *Maxwell*, 384 U. S. 333; *Estes* v. *Texas*, 381 U. S. 532; *People* v. *Sepos*, 22 A D 2d 1007, 16 N Y 2d 662; *United States ex rel. Bruno* v. *Herold*, 368 F. 2d 187; *People* v. *Pacuicca*, 286 App. Div. 996; *United*

Supreme Court (CHARLES
County upon verdicts
murder in the first degree.

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States ex rel. Orlando v. *Fay*, 350 F. 2d 967; *Tanksley* v. *United States*, 145 F. 2d 58; *United States* v. *Kobli*, 172 F. 2d 919.) III. The testimony concerning defendants' membership in the Black Muslim organization and the former relationship of Malcolm X to that organization was properly received. (*Sam* v. *State*, 33 Ariz. 383; *State* v. *Sing*, 114 Ore. 267; *McManus* v. *Commonwealth*, 91 Pa. 57; *Hester* v. *Commonwealth*, 85 Pa. 139; *Schneiderman* v. *United States*, 320 U. S. 118; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.) IV. The discovery allowed defendants was ample and fair. (*Jencks* v. *United States*, 353 U. S. 657; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395; *People* v. *Rosario*, 9 N Y 2d 286, 368 U. S. 866; *People* v. *Malinsky*, 16 N Y 2d 834; *People* v. "*John Doe*", 47 Misc 2d 975, 24 A D 2d 843; *People* v. *Fein*, 24 A D 2d 32, 18 N Y 2d 162.)

BERGAN, J. The proof that defendants participated in the assassination of Malcolm X is abundant. The main question of law presented is whether the exclusion of the press and public from the courtroom during a small segment of the trial deprived defendants of their right to a public trial. This right is provided both by the Constitution of the United States and by the statutes of New York.

The exclusion occurred during the testimony of a witness, Timberlake, because it was represented to the court that Timberlake believed his life was in danger if he testified publicly and would refuse to testify on this ground. The exclusion included the testimony of an FBI agent relating to Timberlake.

On one hand a trial can be too "public" and defendant be deprived of due process; on the other, it can be too private and defendant be deprived of an open trial. Two Supreme Court cases, each involving a State prosecution, illustrate the extremities of this axis, in one of which (*Estes* v. *Texas*, 381 U. S. 532) there was too much publicity; and the other (*Matter of Oliver*, 333 U. S. 257) in which the whole inquisitory proceeding, including holding the appellant in contempt, was conducted by a State Judge completely *in camera*.

In the balancing of policy and of interest if, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness and

otherwise keeps it open to the press and public, a defendant is not necessarily deprived of a "public" trial.

A very recent case in the Second Circuit, *United States ex rel. Bruno* v. *Herold* (408 F. 2d 125, decided Feb. 14, 1969), is rather similar in principle to this one. The prosecution there was for robbery and other crimes. The Trial Judge was informed that a witness for the people "was in 'mortal fear of the "gang in the courtroom"'" (408 F. 2d, at p. 127), and when the witness was sworn the Judge observed 30 or 40 people in the courtroom.

The Trial Judge testified "some of them" grinned and grimaced and the witness "turned white as a sheet". It was the Judge's judgment, based on many years experience, that this was intimidating the witness and so he closed the court room during this testimony.

The Court of Appeals (per MOORE, J.) observed (*id.*, p. 127): "The Judge had to meet an unusual and unexpected courtroom situation in which the interest of the prosecution, the defendant and the witness equally had to be protected. Discretion * * * had to be exercised by the judge responsible for the conduct of the trial. Thus, petitioner was not in fact denied a public trial. The proof supports a conclusion that there was only a partial exclusion on the first day of trial and none on the second. A Sixth Amendment situation is not reached. There was no *in camera* or secret trial."

In a similar direction is *United States ex rel. Orlando* v. *Fay* (350 F. 2d 967 [2d Cir.]) where it was held that the constitutional right to a public trial is subject to the power of the Judge to preserve the fairness and orderliness of the proceedings in the court.

The landmark New York case on this question is *People* v. *Jelke* (308 N. Y. 56). It is distinguishable. The public and press were excluded throughout the whole of the People's case. The exclusion had nothing to do with the conduct of the trial or the protection or integrity of the judicial process itself. It was aimed at protecting the public from hearing or reading about the details of a sordid case of offensive obscenity (pp. 60–61).

The ground taken by the Trial Judge, this court held, was not justified in the specifics of the New York statute and ran

against the mandate for a public trial (pp. 65–67). It was "not sanctioned by legislation" and "deprived defendant of a substantial right" (FULD, J., p. 67).

Rather similar to *Jelke* in its policy implications are cases in which it is held that desire of a mature witness to avoid the embarrassment of describing a Mann Act violation in public was not a justification to close the court to the public (*United States* v. *Kobli*, 172 F. 2d 919 [3d Cir.]); or rape (*Tanksley* v. *United States*, 145 F. 2d 58 [9th Cir.]).

But the rule is different in the case of a very young girl (*Callahan* v. *United States*, 240 F. 683). Thus, as *United States ex rel. Orlando* v. *Fay* (*supra*) shows, the right to a public trial is subject to the power of the Judge to protect the essentials of the judicial process—in *Fay* interruptions of the trial by defendant and a relative in the courtroom.

There are differences, of course, between this present case and *Bruno*. In the latter there was no objection to closing the courtroom and here there was. But, on the other hand, the witness in *Bruno* did not say he was frightened—the Judge surmised it.

Here, the lawyer for the witness Timberlake told the Judge on the record the witness feared for his life and threats had been made against him and that he would not testify. The Judge suggested that the witness should be sworn and take his chances on refusing to testify; but to this form of proceeding defendants objected. They objected also to the court's order closing the courtroom to the public. Part of the problem was thus created by the defendants' objection to the only alternative open to the Judge: to swear the witness and hold him in contempt if he refused to testify.

This case, then, is stronger in support of a partial closing of the court than *Bruno*. It is very different from *Jelke*, in which the court was closed for the People's whole case because of the Judge's purpose to protect the public from learning or hearing sordid details. The exclusion of the public in this present case was directly concerned with the judicial process itself.

When the proof given by a large number of witnesses for the People is considered, the testimony taken during the period of exclusion is minimal. It concerned defendant Hagan's fleeing

and the recovery of his pistol. But Hagan was captured by a mob of people outside the meeting place and, indeed, himself testified he had shot Malcom X. Even if there were error in the exclusion, it should be held beyond a reasonable doubt that it was harmless (*Chapman* v. *California*, 386 U. S. 18).

The second main point made by appellants is that it was improper for the prosecutor to comment on and offer evidence of hostility of the Black Muslim faction, to which they belonged, toward Malcom X. One basis of objection is that this hostility related to religious faith and observance (*Toomey* v. *Farley*, 2 N Y 2d 71, 82); the other is that it tended to substitute "collective culpability for a finding of individual guilt" (*United States* v. *Bufalino*, 285 F. 2d 408, 417 [2d Cir.]).

But if, indeed, the murder did grow out of the hostility of a religious conflict, this conflict becomes germane to the case. It should not be made inadmissible on general grounds. The relevancy of the relationship is to this specific case. The text and cases cited by the People give general support to a concept which, indeed, seems self-evident (2 Wigmore, Evidence [3d ed., 1940], §§ 389, 390; *Sam* v. *State*, 33 Ariz. 383 [1928]; *State* v. *Sing*, 114 Ore. 267 [1924]; *McManus* v. *Commonwealth*, 91 Pa. 57, 66; *Hester* v. *Commonwealth*, 85 Pa. 139, 155).

The pretrial discovery rulings of the court were not erroneous and the limitations imposed are consistent with New York practice.

The judgments should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Keating, Breitel and Jasen concur.

Judgments affirmed.

In the Matter of Lakeland Water District, Respondent, *v.* Onondaga County Water Authority, Appellant.

In the Matter of Village of Solvay, Respondent, v. Onondaga County Water Authority, Appellant.

Argued March 5, 1969; decided April 16, 1969.

Public authorities — water rates — declaratory judgment — Supreme Court has jurisdiction of proceedings to set aside rates fixed by Onondaga County Water Authority, public benefit corporation, and to have Authority promul-

gate fair, reasonable rates — permission from nonfinal order whether suit is for declarato mination is legislative act not ment action is proper procedu petitioners have right to exami — request for hearing prematu

1. Onondaga County Water power under the Public Autho rates charged by it for the use the water rates of petitioners. Court did not lack jurisdiction and have the Authority promul division 1 of section 1154 of Authority may "sue and be s available to it. In addition, the in cases in which the Supreme involving public authorities w geographical area.

2. The Appellate Division's a inspection and a hearing did not into a declaratory judgment acti

3. Since the order is nonfinal its permission only as an order Even if the court finds an article since it has jurisdiction of the a the questions posed by the Ap question whether Special Term declaratory judgment.

4. An article 78 proceeding and the appellant's rate-making not subject to article 78 review prescribed by statute for review by certiorari or a proceeding in

5. Although not brought in the judicial proceeding" of which the subd. [c]), should not be dism to review a quasi-legislative act o

6. The petition alleges, in part "excessive, arbitrary and capricio that the rates are discriminatory, cause of action for a declaratory was proper.

7. There is no basis for denying lant's officers, employees and reco and, whenever the State or one o its officers and employees, as well

THE CLERK: Jurors, please answer.

(Whereupon, the names of the Jurors and the alternate jurors are called by the Clerk, and each answers present.)

THE CLERK: All called and appear.

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M I L T O N H E L P E R N, Chief Medical Examiner, City of New York, 520 First Avenue, New York, N. Y., called a s a witness on behalf of the People, having been first duly sworn by the Clerk of theCourt, was examined and testified as follows:

MR. DERMODY: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. DERMODY:

Q Doctor Helpern, I'm going to ask you to please try to keep your voice up in responding to all questions so that everybody at least within this enclosure can hear your answers. Will you try to do that, doctor? A Yes, Mr. Dermody.

Q Sir, are you duly licensed to practice medicine in the State of New York? A Yes.

MR. CHANCE: If Your Honor pleases, at this time on behalf of Butler, may I offer a concession that Doctor Helpern is quite able and his qualifications and for this purpose I concede that he's qualified for all other purposes that relates to medicine.

MR. DERMODY: Your Honor, I want to establish the doctor's background and qualifications for the benefit of the jury.

MR. CHANCE: I concede his background as being the best.

MR. SABBATINO: We concede that Malcolm X is dead.

MR. DERMODY: Now, Your Honor --

THE COURT: Wait a minute. No one has asked for that concession. Unless the district attorney asks for a concession, no one should volunteer anything. For reasons that the district attorney has, he wishes the jury to hear the background of Doctor Helpern.

MR. CHANCE: I was only interested in saving time and stating a fact, Judge, that he is duly qualified and very able.

THE COURT: I understand that.

BY MR. DERMODY:

Q Doctor, you say that you are duly licensed to practice medicine in the State of New York? A Yes.

Q How long have you been so licensed, doctor? A Since 1926.

Q Now, doctor, at the present time do you have any official position in connection with the City Administration? A Yes.

Q And what is thatposition? A Chief Medical Examiner of the City of New York.

Q Doctor Helpern, how long have you been connected as a doctor with the medical examiner's office? A Thirty-five years.

Q And how long have you been the Chief Medical Examiner of the City of New York? A Twelve years.

Q Now, Doctor Helpern, would you describe briefly to the Court and jury what your duties are as the Chief Medical Examiner of the City of New YOrk? A As Chief Medical Examiner, in addition to supervising the work of the office of Chief Medical

Examiner, I personally make investigations of sudden, suspicious and violent deaths and also determine the cause of death in such cases.

Q And how do you determine the cause of death in this type of case, doctor? A In determining the cause of death, I perform an autopsy on the body of the deceased person.

Q Now, doctor, for the benefit of those jurors who may not be completely familiar with the use of the word "autopsy," would you describe briefly what an autopsy is? A An autopsy is a systematic examination of a dead body for the purpose of determining what is normal and what is abnormal or what injuries are present in the body, on the body. It involves making an external examination and then opening the body to systematically examine all of the organs. And during the course of the autopsy, the findings are recorded and this results in accumulation of a lot of data; and from this information,we draw a conclusion as to the cause of death.

Q Doctor, in the course of your official career in connection with your association with the

Medical Examiner's Office, how many such autopsies as you have just described would you yourslef have performed? A About sixteen thousand.

Q And how many autopsies have you witnessed and assisted in? A Oh, I would say that I have been present at and either assisted or supervised approximately fifty thousand additional autopsies.

Q Now, doctor, as a result of your experience in the performance of the autopsies as you have just described and your connection in the supervision of other autopsies, are you able in a given case to give an opinion with reasonable medical certainty as to the cause of death? A Yes.

Q Now, doctor, in the course of your official duties, did you have occasion to perform an autopsy upon the body of a man identified to you as Malacolm X Little also known as -- I'll spell this -- M-a-j-j-m-a-i-k-e-l-s-h-a-b-a-z-z?

A yes.

Q And when and where was the autopsy performed upon this person so identified to you? A The autopsy was performed at the Medical Examiner's Office at 520 First Avenue on February 21st, 1965.

Q And did you perform the autopsy yourself?

A yes.

Q Will you tell us, Doctor Helpern, by whom the body was identified to you? A The body was identified to me by Betty Little also known as Betty Shabazz, the wife of the deceased, who gave her address as 35 -- 34-50 110th Street, Queens, New York. That identification was made to me, to Doctor Segal and to Doctor Sturner on February 22, 1965.

Q At the City Morgue? A At the Medical Examiner's Office.

Q Now, doctor, was the body also identified to you by any member of the Police Department?

A Yes, it was.

Q Will you tell us who that was, please?

A Thebody was identified to me by -- and also to Doctor Segal and Doctor Sturner by Patrolman Gilbert Henry, shield number 3916 of the 34th Precinct. That identification was made on February 21st, 1965, at the Medical Examiner's Office Mortuary.

Q Now, Doctor Heleprn, would you describe the

physical appearance of the body -- I'll withdraw that. Would you give us a brief physical description of the dead body at the time you started your autopsy?

A the body of the deceased was that of an adult male Negro. It was well-nourished, well-developed, rather slender, muscular. It was six feet, three inches tall and weighed 178 pounds.

Q Now, doctor, did you examine this dead body externally? A I did.

Q Now, will you tell us what you observed during the course of your external examination of the body? A The external examination of the body disclosed that the deceased had been shot. There were many shotgun wounds on the chest and in addition there were also bullet wounds on the lower extremities and also a bullet wound was found on the right forearm and there was another wound on the right hand, but there were multiple wounds on the lower extremities and many obvious wounds on the left side of the chest in front.

Q Were there any wounds on the face of the deceased? A There was one wound on the right side of the chin.

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Q Now, doctor, would you point out the location of these wounds that you have just testified to as you saw them externally on the body? Would you care to use the services of one of the court attendants to facilitate the description?

A Yes, I think that would be a very good way to do it.

MR. DERMODY: With the Court's permission, of course.

THE COURT: Certainly.

A Physically point it out.

MR. DERMODY: Yes.

THE WITNESS: I might say that I have the exact location of all these wounds in my report, and I shall not give all the precise measurements unless you ask for them, but I will give you the general location of each wound.

Q Let us start first with the general location of each wound externally as you point them out on the body of the court attendant.

A (Indicating on court attendant) One wound was located on the right side of the chin and went back a short distance. And in the soft tissues of the

chin, I found a small fragment of metal which was quite deformed.

Q All right, doctor. A Then ~~x~~ there was a wound located --

Q Are these bullet wounds you are ~~xxxx~~ referring to? A I'm referring to gunshot wounds in general now.

Q Yes. A And this wound of the chin produced a small deformed fragment, and this was turned over to the Ballistics Bureau as were all the others.

Q All right, doctor. A And I simply described it as a metallic fragment. It was not characteristic of either a bullet or a shotgun slug, and I didn't try to differentiate that.

Q We will get to that at a later point, doctor. A Right. Now, there was another wound in and out on the right forearm, and this wound had a perforation of entrance and another one of exit. It went through the soft tissue and within the track of this wound I found a small fragment of yellow metal, which I interpreted as part of the casing of a bullet.

Q All right, doctor. A Now, there was

another wound on the right hand. I might say another track on the right hand, because the wound that I described as number 2 actually had an entrance and an exit. So we might refer to that as track number 2.

Now, track number 3 had an entrance in the web between the thumb and the index finger and it had an exit wound near the wrist. So that was also an in and out track through the soft tissues.

Q And is this a -- are these all bullet wounds or gunshot wounds that you are referring to? A I would say that the ~~xxxx~~ track number 2 through teh forearm represented a bullet wound, because I was able to identify the casing of a bullet; but with track number 3, through the right hand, I found no remnant of the missile. So I was not able to identify it as one of the other.

Q But in connection with track number 3 that you have just referred to, you had a wound of entrance and a wound of exit? A Correct.

Q Would you continue, doctor. A Now, then the next track that I described, I listed as track number 4 --

A By the way, doctor, if I may interrupt

for a moment, in enumerating these wounds by number, you do not mean to indicate in any way that this was the order of entrance or infliction of the wounds, do you? A No, this is simply my cataloging of these wounds, and I do not mean to imply any sequence as to the infliction of these wounds.

Q Thank you, doctor. With that understanding, would you continue, please. A Now, track 4 was the next one that I described, and that was located on the right thigh, right knee. The entrance portion grazed the front surface of the knee.

Q You are indicating now on your own body.

A I'm indicating on my own knee, on the front surface of the right knee. There was a deep furrow. The wound -- the missle, bullet produced this and then scraped away. As it continued upwards, it scraped away some of the surface of the skin and it then entered or re-entered the front surface of the thigh traveling in an upward direction and then it came out again.

So this wound or this track had three components and passed in an upward direction. The bullet first producing a furrow on the front

of the knww, then entering the lower part of the thigh in front and then exiting a little bit above that. So, in essence, it was an in and out track and no bullet was recovered.

Q And/track going in an upward direction?

A That's right.

Q Is that correct? A Yes.

Q Thank you, doctor. Would you continue, please. A Now, the next track is number 5 and that was located on the left leg. The bullet entered the left leg near the back surface and five and a half inches above the heel on the left leg and toward the outer surface. Now, that track was easily traced. It also went upwards, that is from the heel toward the upper part of the thigh. It penetrated the leg leg and then went above the leg, and I found that bullet in the upper portion of the thigh, toward the back, in among the muscles at a point which was twenty-eight inches above the point of entrance. At that point, twenty-eight inches from the entrance wound, I found a .45 caliber bullet with a metal jacket.

MD-6

Q Now, doctor, would you be good enough to point out, either on your own body or the body of the court attendant, the location of the entrance of that bullet? A Let me get down here.

(The witness leaves the witness stand.)

Q What number track is this you are referring to? A I'm referring to track number 5.

Q Thank you. A Which entered on the lower part of the left leg (indicating), I think I said two and a half -- rather 5 and a half inches above the heel, and that bullet, after entering, passed up the leg through the knee, up the thigh, and I found the bullet in the muscles on the -- from the tissue just under the skin at a point 28 inches above the level of the entrance wound. In other words, the direction was almost directly upward. And I removed a 45 caliber metal jacketed bullet from that track.

Q Do you want to resume your seat, doctor?

A Well, I think I might -- if we are going to use the attendant, these tracks are --

MR. DERMODY: All right. Does the Court have any objection to the doc tor standing there/

THE COURT: That is all right, stay where you are.

THE WITNESS: Thank you.

Q You have just -- A I am finished number 5.

Q You have just finished -- you have just given us number 5. Now will you give us --

A Track number 6 had an entrance wound on the front of the left thigh in the lower third. And the bullet wound was located 26 and a half inches above the level of the heel, and it was found to pass upwards and slightly toward the back, and this bullet passed into the lower surface of what is known as the neck of the left thigh bone. In other words, the left thigh bone articulates or is -- forms a joint with the hip bone, and right in that angular portion near the hip I found this bullet, which was 9 millimeters in diameter. In other words, the caliber was not the same as the previous bullet; it was a 9 millimeter bullet.

Q Now, doctor -- A And that also passed in an upward direction.

Q Now, you say this was on the left side of

the body of the deceased? A On the left -- yes, in the left thigh.

Q Now, would you indicate by pointing out on the body of the court officer? A Well, it entered about here (indicating), and I am pointing to an area in the lower third of the thigh, and it went upwards and was found somewhere about here (indicating), but toward the back and under the portion of bone of the thighbone which is called the neck of the thigh bone, which is close to the hip.

Q Now, you say the direction of the track in connection with this wound was upwards, is that right, doctor? A Upwards too, yes.

Q All right, doctor, will you continue, please?

A I might say that the bullet I just described traveled a distance of 13 inches.

Q That was a 9 -- A And it was imbeded in the lower part of the bone.

Q That was a 9 millimeter bullet? A A 9 millimeter bullet.

Q All right, doctor. Would you continue, please? A Now, the next track --

Q That is number what? A Which I desig-

nated as number 7, had as its point of entrance the inner surface of the left thigh at about the juncture -- if you divide the thigh up into three segments, this would be at the junction of the upper and middle segment and more toward the center of the thigh. There was a distinct bullet hole there, and this wound traveled also in an upward direction, and continued through the thigh and entered the abdomen, and went toward the back of the abdomen, and along the spine, and as it went upwards it tore up the aorta, which is --

Q Will you tell us what the aorta is, doctor?

A The aorta is the large artery that comes down the body which carries blood from the left side of the heart downward to nourish all the tissues in the trunk and in the lower extremities. This bullet continued upwards, and I recovered a 9 millimeter bullet at a point in what is known as the posterior mediastinum, which is simply an area in the chest. In other words, this bullet went upwards along the aorta, from the belly cavity into the chest cavity, and the bullet was found again, a 9 millimeter bullet, in the tissues near the midline in the back of the

chest, and the length of the track of that bullet from its point of entrance on the upper inner portion of the thigh to the point where it was found, was 25 inches.

Q All right, doctor. Would you continue, please? A Now, that --

Q Was that track number 7 you have just given us? A That was track number 7. Now, track number 8 was what I described as a composite track which involved the under surface or the inner surface of the left middle finger. The bullet, or the missile rather -- it wasn't a bullet -- went from the -- near the tip of the finger, of the middle finger, and then it went into the index finger. The same track. You could line up this one (indicating), and it smashed into and imbedded itself in the bone of the middle segment of the index finger of the left hand.

Q And did you recover any object? A Yes. In that bone and firmly imbedded in it were a number of small metallic fragments, and also a larger fragment which could be easily recognized as a shotgun slug. In other words, that was not a bullet, it

was a slug that tore through the middle finger and imbedded itself in the bone of the index finger of the left hand.

Q Does that complete your description of track number 8, doctor? A Yes.

Q Would you go on, please? A I have many more details here that you can ask me about if you want them, but I think I'm giving you sufficient detail, am I not?

Q In connection with track 8? A Yes.

Q All right. A Now, track number 9 was located on the outer surface of the left arm. It consisted of an entrance perforation or hole, and an exit hole. In other words, the track went completely through the soft tissues on the outer portion of the left arm (indicating), just went through the tissues under the skin, and at a point 5 -- or rather at a location 5 and 3 quarter inches below the level of the shoulder. That was an in-and-out wound, and no missile was recovered.

Q And would you give us the direction of that track, doctor? A The direction of that track was backwards.

Q All right, doctor, would you continue, please? A Now, the remaining wounds that I will describe are perforations on the left, predominantly on the left front portion of the chest (indicating), and there were evidences -- there was evidence there of 10 holes, 10 perforations of the type produced by shotgun slugs. And they occupied a rather large area which I have measured but which I will not mention right now.

Q Well, doctor, would you mind giving us the --

A Do you want the details of that?

Q Yes, while you are at it, may we have it?

A Then I might do that. There was a cluster of performations, 10 in number, and there were also two small abrasions. These were located on the front left side of the chest. So thatthis group of perforations includes the 10 perforations and the two abrasions would make 12 in all. And as I said before, they were perforations due to shotgun slugs and they were rather conspicuous and varied in size -- in appearance, from round to oval shape. The most lateral one, that is, the one which was most to the side of the chest, was one and a half inches to

the left of the left nipple. And there were several lying at a point one ~~and~~ half inch to the left of the mid-line, and the one which is most to the right was located three quarters of an inch to the right of the center line of the body. They were predominantly in this left area. They lay in an area in a diameter, in a circle or roughly in a circle seven inches in diameter. In other words, an area of the chest seven inches in diameter contained all of these perforations.

Q All right, doctor, would you contin ue, please? A Between these perforations there was also a surgical incision which had been made by one of the doctors at the hospital in an attempt to ~~resus~~ resuscitate the deceased. And that resuscitation incision went through the soft tissues and also between the ribs. So that the surgical incision separated the skin a little bit in that area, but when that surgical incision was brought together, the area of shotgun slug perforations was seven inches in diameter. Now, when the body was turned over I felt a hard object under the skin, and when I incised the back of the right side of the chest I found a

shotgun slug.

Q When you say incised, doctor, does that mean when you opened the -- A When I opened it up in order to get it out I made an incision in the skin with a scalpel and I removed a slug in the right posterior portion of the chest, and similarly I also felt a hard object in the back of the chest on the left side, and I removed another shotgun slug from that area.

Q Doctor, let me interrupt for a moment. You are referring to what I would call the back of the court attendant? A That's right.

Q But in your testimony you characterized it as the posterior chest. A The back of the chest.

Q In other words, when you point to the back it's part of the chest? A Yes, this portion is the chest,and this would be the small of the back (indicating). So I'm referring to the back of the chest (indicating).

Q I see. A This being the front of the chest (indicating) where the perforations of entrance were located, and on the back I found these two perforations.

Q Thank you, doctor. And you recovered two bullets? A Two slugs.

Q One in each location? A That's right.

Q All right, go ahead, doctor. A Then I -- also, when the body was opened in connection with the autopsy, slugs of the group of 12 which entered or which made injuries or wounds on the front of the chest, 7 of the 10 perforations actually penetrated through the pericardial sac, which is the sac enclosing the heart, and also perforated the heart itself. And these were very evident.

Q And these seven slugs you found? A Seven perforations. No, some of these went all the way back. Some went into the spine and some went into the chest cavity.

Q Were these shotgun slugs, doctor?

A These were shotgun slugs similar in size to those which I removed from under the skin on both sides of the chest in back. Now, some of the slugs, in addition to perforating the heart, also perforated the aorta, which is the large blood vessel that I already had mentioned that had

been torn by the upward course of one of the bullets that entered the right thigh. The slugs which I removed, I removed 9 in all, and one of these slugs had passed out of the left chest cavity and then in one in and out of the arm. The slugs going backwards passing in a backward direction, through the chest, perforated the left lung, the pericardium, the heart, the aorta, and the right lung. And only one of them had gone through the chest in back, which I had mentioned before. One slug went out through the chest.

(Continued on following page.)

Q You mean passed right through the body?

A Right. Now, some of these slugs I found in the spinal canal, which is the canal that holds the spinal cord. Some of them were imbedded in the bone of the spine. These are details of where these slugs were found, and again I would like to say that I recovered at the time of the autopsy, I recovered five slugs, and the three bullets which were delivered to one of the detectives from the Ballistics Bureau, after I had marked them. I kept the slug in the bone of the left index finger, and then I had a tedius time recovering the slugs from the bone of the spine and in the spinal canal, but they were all recovered. Nine slugs in all were recovered. Five were delivered to the Ballistics Bureau Detective at the time, and the four that were removed later on I retained.

Q Is there anything else -- does that complete your description, Doctor? A I think that that --

Q Of your autopsy? A I think that completes it.

Q Thank you, doctor. Would you resume the stand?

(Witness resumes witness stand)

Q Doctor, can we make you more comfortable?

A No, I'm all right.

Q Doctor Helpern, as a result of the performance

of the autopsy that you have just testified to upon the body of the deceased identified to you as Malcolm X, are you able at this time to give us your opinion as to the cause of death in this case with medical certainty? A Yes.

Q What, in your opinion, Doctor Helpern, was the case of the death in this case? A In my opinion the cause of death was multiple shot gun slug and bullet wounds of the chest, the heart and the aorta.

Q Doctor Helpern, was there a chemical analysis made on the brain of the deceased to determine the presence or absence of alcohol? A Yes.

Q What did that examination disclose? A The test was negative. There was no alcohol present.

Q Doctor Helpern, during the course of your testimony you have referred to finding certain bullets, slugs and the like.

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it for identification.

(Lead fragment marked People's Exhibit 52, for Identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(Lead fragment marked People's Exhibit 53, for Identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(Two bullets marked People's Exhibit 54, for Identification.

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(Three bullets marked People's Exhibit 55, for Identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(One bullet marked People's Exhibit 56, for Identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(One bullet marked People's Exhibit 57, for Identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(One bullet marked People's Exhibit 58, for identification)

MR. DERMODY: May we have this marked for identification?

THE COURT: Mark it.

(One bullet marked People's Exhibit 59, for Identification)

BY MR. DERMODY:

Q Doctor Helpern, I show you People's Exhibits 52, 53, 54, 55, 56, 57, 58 and 59, for Identification, and ask you to examine the contents of each exhibit separately and tell me if you recognize them. In relation to People's Exhibit 52, for Identification, that you have just examined, do you recognize it? A Yes. This is the fragment which I removed from the right side of the chin. It is an irregular fragment of metal which is not characteristic.

Q Metallic fragment? A That's right.

Q And did you turn this over to a detective

from the Ballistics Squad who was present at the time of the autopsy? A Yes.

Q Do you recall that detedtive's name? Do you have it listed? A No. I have it listed here, I'm sure.

Q Is that Detective Scaringe? A Yes, James A. Scaringe, Shield Numxer 1715.

Q Would you direct your attention to Exhibit Number 53, for Identification, People's Exhibit 53? A These are the two fragments of bullet casing which I removed from the forearm.

Q Did you also turn that over to Detective Scaringe of the Ballistics Squad at the time of the autopsy? A Right. Right forearm.

Q Thank you, doctor. Would you look at Exhibit 54. Do youcognize those exhibits? A Yes. These are two shot gun slugs commonly known as buck shot, and they were taken from the right side of the back, recovered by me and given to the Ballistics Bureau.

Q Did you mark those? A These were marked by me with the initials of the deceased, "M.X.," and my own initials, M.H."

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z Q And that's how you are now able to recognize them? A Yes.

Q Did you also turn those two shot gun -- what was the word? A Slugs.

Q -- slugs over to Detective Scaringe?

A Yes, sir.

Q You are now looking at People's Exhibit 55, for Identification. A Yes.

Q Do you recognize them? A This is Exhibit 55. These are three additional slugs, or slugs which I described as having been removed from the back of the chest of the deceased, and I gave these to Detective Scaringe.

Q Did you mark them appropriately, doctor, before you turned them over? A Yes. These slugs are deformed and they were all marked by me.

Q These are shot gun slugs? A Shot gun slugs, yes.

Q Thank you. Would you look at 56? Do you recognize that? A Yes. This is one of the .29 millimeter bullets which I removed and marked at the time, "M.X.," and "M.H.," on the face, and this was the bullet that entered the upper portion of the right

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thigh and went through the body and lodged in the back of the chest towards the midline.

Q Did you mark it with your initials and with the initials of the deceased? A Yes; I did.

Q And, likewise, turned that over to Detective Scaringe at the time of the autopsy? A I did.

Q Thank you, doctor. You are now looking at 57; is that correct? A Right. This is the other nine millimeter bullet also marked on the base with my initials and the initials of the deceased, "M.X.," and this bullet was recovered from the undersurface of the thigh bone, the neck of the thigh bone, the upper part of the thigh bone.

Q Did you mark it with your initials and the initials of the deceased? A Yes.

Q And also turn that over to Detective Scaringe?

A Yes.

Q Thank you. Would you now look at People's Exhibit 58, for Identification? Do you recognize tdhat?

A Yes.

Q What is that, doctor? A This is a .45 caliber metal jacketed bullet which I marked on the base with the initials of the deceased, with my initials, "M.X.," and "M.H.," respectively, and this

is the bullet that entered the lower part of the leg and was found in the upper part of the thigh.

Q And after marking it, did you likewise turn that bullet, this .45 caliber bullet over to Detective Scaringe of the Ballistics Bureau? A Yes.

Q Finally, Doctor, would you look at People's Exhibit 59, for Identification? A Yes. Now, these are three of four slugs which I removed from the spine and from the bone. They had to be sought after, and one of these is no longer here. I have only three to show you, so I must confess all of these slugs -- one of these slugs -- one was lost in my custody. It was in my drawer. It was locked up. But, these things have a habit of eluding one, but these are three of the four that I removed and marked - well, no, these were not marked, these were placed in this envelope.

Q By yourself? A By myself, and marked.

Q And that's how you are now able to recognize these three? A Yes.

Q These are shot gun slugs? A These are shot gun slugs, or commonly known as buck shot. They were not found at the time when the Ballistics

Detective left.

Q Thesewere removed from the spinal column by you? A That's right.

Q After the detective had left? A That's right.

Q. Is that right? A That's right.

Q Yes. A We had to exray the spine in order to find the location of them, but we eventually did.

Q Thank you, doctor. Now, Doctor Helpern, directing your attention to the tracks that you have referred to in your testimony -- I definitely recall tracks 5, 6 and 7 -- and it might have been track 3 - but certainly 5, 6 and 7, where you described the direction of the track upward. For the sake of clarity, would you refer to your report and tell us how many tracks there were that went in an upward direction? A Four. Number four and number five, and number six and number seven.

Q Now, doctor, in connection with those four tracks, that travelled in an upward direction, four, fiv, six and seven, would you say that those tracks, the direction of those tracks would be consistent with the body of the deceased being in a

horizontal or prone position?

MR. CHANCE: Objected to as leading.

MR. DERMODY: May I finish the question?

MR. CHANCE: So far it is leading. I don't think he needs finish it.

THE COURT: Wait until he finishes his question before you make your objection.

BY MR. DERMODY:

Q Can you say, from the observations you made of the direction of those tracks, four, five, six and seven, whether, in your opinion, the direction of those tracks would be consistent with the deceased being in a horizontal or prone position at the time the wounds were inflicted?

MR. CHANCE: Objected to as leading.

THE COURT: Objection overruled.

A Well, all of these tracks went upwards, so that one would have to reconstruct the position of the body with reference to the position of the assailant; and assuming a person, the assailant, was standing and firing in the usual way, and the only way these bullets could travel in this direction is to put the body of the victim in a horizontal position - in other words, the gun would have to be directed so that

the bullet would enter from below and travel upwards. That can be done in several ways, but in the ordinary circumstances where the assailant would be standing and where the victim would be lying, this is the way the bullets would travel. Now, there are other ways in which you can reconstruct that, but you will have to tell me the position of the assailant, and you will have to tell me the position of the victim, then I can tell you the interpretation.

Q Doctor, let me ask you this question: If you were to assume that the victim was standing at the time that tracks 4, 5, 6 and 7 were inflicted, what would the position of the assailant have to be in order to inflict the wounds that traveled in the direction that you described on the body of the victim? Do you understand my question? A Yes; I understand your question. I just want to make it clear that in any -

MR. CHANCE: Objected to, your Honor, as no proper foundation having been laid.

THE COURT: Objection is overruled.

MR. CHANCE: Exception.

A I would say that if these tracks - if the deceased were standing at the time the assailant would have to be on the floor below in order for these bullets to travel

in an upward direction, and if both victim and assailant were on the same floor, for example, then the only way these wounds could be inflicted would be - would require the victim to be in a horizontal position.

MR. DERMODY: Thank you doctor. No further questions.

CROSS EXAMINATION

BY MR. SABBATINO:

Q The assailant would also have to be horizontal. A Sorry.

Q Under the last circumstances, the assailant would also practically have to be in a horizontal position. A No. I am referring to the relevant position. In other words, assuming the assailant is standing and shooting in the conventional way, with his arm stretched out.

Q I am just interested in your last example. A Well, actually, I am talking about the general direction. The assailant would not have to be horizontal. The assailant could be horizontal. In other words, you can shoot from a horizontal position. Your fire is from a lower level, but assuming an assailant is standing and holding the gun in the ordinary way, to inflict wounds such as tracks 4,5 and 6, indicate the victim would have to be horizontal;

otherwise, the bullets would not go in that direction, but if you want to tell me that the assailant is down --

Q No. A I have no theory.

(CONTINUED ON NEXT PAGE)

BY MR. SABBATINO:

Q I just want to ask you, doctor: From your knowledge in handling bullets being removed from the human body, could you tell from the examination of these various bullets how many different weapons were used? You want to look at them? A I saw them. I removed them.

Q How many different firing weapons were used? A I would say at least three.

Q Could there be more? A Well, let me say it this way: That one has shotgun ammunition here, slugs, which are fired out of a shotgun and one has bullets of two calibers.

Now, from these three types of ammunition, I need at least three different types of weapons, two pistols and one shotgun.

Now, I can't say that all these slugs were necessarily fired out of one shotgun or two, but I'm just giving the minimum number of weapons that would have to be involved in this shooting and the fact three different types of weapons would have to be involved.

Now, of course, I'm only speaking from it in

view of the missiles which --

Q Actually took effect? A -- too effect, yes. Theoretically, a person might -- seventeen people might be shooting, and I can't tell anything about the --

MR. DERMODY: Your Honor, I'm going to object to --

THE COURT: Yes.

MR. DERMODY: I still have a right to object to that.

Q You wouldn't be interested from --

MR. DERMODY: I'm sorry, Mr. Sabbatino, I can't hear you.

Q I say, in order for you to perform your autopsy, it doesn't interest you how many other bullet holes were made in the place, if any were made?

MR. DERMODY: Your Honor, I object to the form of the question.

You are talking about the place of occurrence?

MR. SABBATINO: Yes.

MR. DERMODY: Your Honor, I object to the form of the question.

THE COURT: I will allow it.

MR. SABBATINO: I'm sharing your point of view.

THE COURT: I will allow him to answer.

THE WITNESS: From an autopsy --

BY MR. SABBATINO:

Q You wouldn't be interested -- A I would draw conclusions from the missiles which I find, from the bullets and slugs which I recover. I'm basing my opinion on that.

MR. SABBATINO: Yes.

I have no further questions.

CROSS EXAMINATION

BY MR. CHANCE:

Q Doctor, let me ask you two questions. Some of the bullets that didn't strike [redacted] may also have been a part of the cause of death also; is that correct?

MR. DERMODY: Now, just a moment, Your Honor. I object.

THE COURT: Did you say that some of the bullets --

MR. CHANCE: That did not strike the deceased may also have been a part of the cause of death.

MR. DERMODY: Your Honor, I object to that

question. I'm frank to say I don't understand what he's talking about.

THE COURT: I will allow him to answer it.

MR. DERMODY: Well, Your Honor, I object to it.

THE COURT: Objection overruled.

Go ahead.

THE WITNESS: The answer is no.

THE COURT: Did you hear the question?

THE WITNESS: I heard it. The answer is no.

BY MR. CHANCE:

Q And the other answer that you say -- you have examined some sixty thousand persons; is that correct? A I have performed autopsies.

THE COURT: He performed autopsies.

A (continuing) On sixteen thousand people.

MR. CHANCE: I was just lost for the word.

A (continuing) And witnessed and supervised and assisted at, perhaps, three times that many.

Q Right. And none or all of them have not assisted you in arriving at who caused the cause of death of Malcolm X; is that right?

MR. DERMODY: Oh, Your Honor, I object to the form of the question.

THE COURT: Objection sustained.

Unless he was present there, how could he know?

BY MR. CHANCE:

Q Doctor, you don't know who killed Malcolm X, do you?

MR. DERMODY: Your Honor, I object to --

Q Do you know who killed Malcolm X?

MR. DERMODY: I object to the form of the question, Your Honor.

THE COURT: Objection sustained.

MR. CHANCE: That's all.

MR. PINCKNEY: Thank you, Doctor Helpern, no questions.

THE WITNESS: Thank you.

MR. DERMODY: Your Honor, just --

MR. PINCKNEY: -- on behalf of Johnson.

MR. DERMODY: Your Honor, just this one additional question.

REDIRECT EXAMINATION

BY MR. DERMODY:

Q Doctor, in connection with your examination of the dead body of the deceased at the time of autopsy, did you also have occasion to examine the

clothing? A Yes.

Q -- that came down from the hospital with the deceased? A Yes.

Q Do you recall what the clothing consisted of? A I have a list of the clothing.

Q Would you read it to us, doctor?

MR. CHANCE: I concede that he was clothed, Judge.

MR. DERMODY: Your Honor, he certainly wasn't clothed at the time he was autopsied.

THE COURT: I don't want to make any comments. Counsel volunteers things. I don't know why.

A The clothing which was removed from the body of the deceased consisted of a black sweater vest in which there were twelve perforations on the left side.

MR. WILLIAMS: I object to the reading of the condition.

THE COURT: Did you see it?

THE WITNESS: Yes. I mean, I examined the clothing.

THE COURT: He examined the clothing.

Q I want you tell tell us, doctor, what your --

what the clothing consisted of and what your examination of the clothing revealed. A A black sweater vest with twelve performations on the left side, an undershirt, a T-shirt with blood-staining of the front of the garment and multiple perforations corresponding to the perforations of the chest wall.

There were long underdrawers with bloodstaining of the upper part of the leg on the left side, a suit coat of a dark brown fabric. The right sleeve has been ripped open.

There were multiple perforations on the front of the coat on the left side corresponding to the slug perforations. Also a pair of perforations in the left sleeve and on the right forearm, that is on the right forearm of the coat. An undershirt of a white fabric, bloodstained and now stiffened, with multiple slug perforations on the leftside, and also an in and out perforation of the left sleeve and perforation of the right sleeve. A brown tie with a pair of perforations through both ends. Brown trousers similar to the coat fabric. A dark brown belt. A fabric of the

right trouser leg -- a portion of the right trouser leg is ripped longitudinally. There is a bullet perforation in the upper part. There are multiple perforations on the left trouser leg.

Now, I marked all the clothes at the time of the examination with my initials and the initials of the deceased and the date.

Q Doctor, just one other question: From your autopsy, did you see any bullet wounds of entrance on the back of the deceased, bullet wounds of entrance on the back of the deceased?

A No.

MR. DERMODY: Thank you.

THE COURT: Anything else?

MR. CHANCE: Yes.

RECROSS EXAMINATION

BY MR. CHANCE:

Q Doctor, we have the clothing thatyou just read about. Did he have the clothing on at the time the body was brought to your place, to the Medical Examiner's Office? A I frankly don't recall whether the clothing was on the body or with the body at the time but these were the clothes that

were -- it's my recollection -- I can't recall.

MR. CHANCE: Well, then, I move to strike that testimony as tends to make the holes in the clothing correspond to the holes in the body.

THE COURT: Objection overruled.

All right, step down, doctor.

MR. DERMODY: That's all.

(Witness excused.)

MR. DERMODY: May we have a short recess at this point?

THE COURT: We will recess for about five minutes.

Members of the jury, you are admonished not to discuss this matter amongst yourselves, nor permit anyone to speak to you concerning the same, nor shall you discuss it with anyone, nor shall you form any judgment or opinion as to the guilt or innocence of the defendants or many of them until the case is finally submitted to you by the Court.

(Whereupon, there was a brief recess as declared by the Court.)

* * *

(After recess.)

(The defendants enter the courtroom and take their seats at defense counsel table.)

(The jurors enter the courtroom and take their seats in the jury box.)

(Defense counsel and the assistant district attorney are present.)

(The Clerk called the names of the jurors seated in the jury box and each answered present.)

THE COURT: I understand you were ready to call a witness, for cross-examination.

MR. DERMODY: I have another witness inside.

THE COURT: Counsel stated that they have had no opportunity to examine the testimony of this witness, and under the circumstances we cannot very well go on any further today. Therefore, we are compelled to adjourn at this hour until Monday morning at 10:30 a.m. And you are requested to be present by that time because I am informed that the calendar is a little smaller for Monday, and we will be able to start, I hope, by 10:30. And I request all counsel to be present by that time, 10:30 Monday morning.

Colloquy

You are again admonished by the Court, you are not to discuss this case amongst yourselves or permit anyone to speak to you about it, nor shall you speak to anyone concerning it, nor shall you form any judgment or opinion as to the guilt or innocence of the defendants or any of them until the case is finally submitted.

(Case adjourned to Monday, February 14, 1966, at 10:30 o'clock a.m.)

PEOPLE vs. THOMAS HAGAN, ETC.

100 Centre Street,
New York, N. Y.
February 14, 1966.

TRIAL CONTINUED

B e f o r e:

HON. CHARLES MARKS, J.

and a Petit Jury.

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(All counsel on both sides and defendants present in courtroom.)

(The jurors and the alternate jurors enter the courtroom and take their respective seats in the jury box.)

THE CLERK: Thomas Hagan, Norman Butler, Thomas Johnson, on trial, continued from Friday last.

Defendants and counsel present in court, district attorney present.

Jurors, please answer.

(Whereupon, the names of the jurors and the alternate juorrs are called by the Clerk, and each answers present.)

THE CLERK: All called and appear.

MR. DERMODY: Your Honor, ordinarily I'll be able to proceed with my next witness who would be a