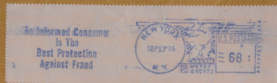


NEW YORK STATE
ATTORNEY GENERAL
LOUIS J. LEFKOWITZ
TWO WORLD TRADE CENTER
NEW YORK, N. Y. 10047



Asst D. A. Robert Pittler
c/o NY City D. Atty.
155 Leonard Street
New York, NY 10013

NEW YORK STATE
ATTORNEY GENERAL
LOUIS J. LEFKOWITZ
TWO WORLD TRADE CENTER
NEW YORK, N. Y. 10047

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Is The
Best Protection
Against Fraud



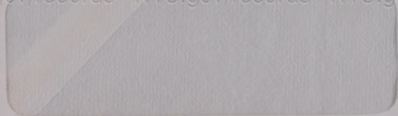
Hon. Robert Morgenthau
District Attorney
New York County
155 Leonard Street
New York, New York 10013

PRO SE

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UNITED STATES COURTHOUSE
FOLEY SQUARE, N. Y. 10007

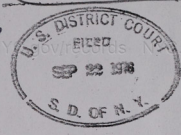
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER, Petitioner

-v-

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Action Number

76 CIV 534
W.K.

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Notice is hereby given that Norman Butler
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from the * decision and order
of U.S.D.C.-S.D.N.Y. (KNAPP J.) dismissing his
petition for a writ of habeas corpus on 7/26/76

Sept 22, 1976, 197

Notice to:

NORMAN BUTLER
#24091
BOX 149
ATTICA N.Y. 14011

Signed J. Blum

By: J. BLUM
Deputy Pro Se Clerk

ATTORNEY GENERAL
STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047

Deputy Clerk - 791-0106
Mr. O'Connor
Denies

10/6 - by letter Mr. O'Connor. He
said if in 1 month Butler doesn't
move for Act. of P.C., we should
move to dismiss appeal.
If Butler does move, he will
send us a letter asking us to
reopen the motion. Our answer
should be by affidavit.

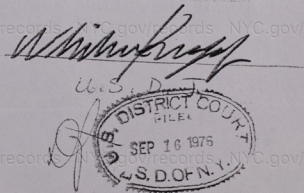
(21)

Although I have ruled that
I find no substantial question
for appellate review, I have
no doubts that the petitioner
believes his cause to be
just. Therefore, I do not
characterize his appeal
as frivolous and have no
objection to his proceeding
in forma pauperis.

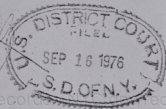
MICROFILM

SEP 16 1976

September 14, 1976



15
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

CERTIFICATE OF ^{NO}
PROBABLE CAUSE

76 Civ. 534

Upon reading all of the papers heretofore filed

in this case, and upon this court's order of July 26, 1976,
denying petitioner Butler's application for a writ of
habeas corpus, and upon this court's determination that
petitioner's application for reconsideration should (if
the court had jurisdiction) be denied, a certificate of
probable cause is hereby denied on the ground that no
substantial questions of law are presented in this case.

Dated: New York, New York

September 14, 1976.

Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

MICROFILM

SEP 16 1976

Martin Jelt Patrick

STATE OF NEW YORK)
COUNTY OF WYOMING)

ss.:

Martin Jelt Patrick, being duly sworn,
deposes and says, that on the 28th day of September,
1976, he served the within APPLICATION FOR A CERTIFICATE OF
PROBABLE CAUSE, LEAVE TO APPEAL IN FORMA PAUPERIS: AFFIDAVIT
OF SERVICE:
on the U.S. Court of Appeals and the Attorney General,
by enclosing a true copy thereof in a securely sealed postage
paid wrapper and depositing the same in a post office box
regularly maintained by the United States Government at Attica
Correctional Facility Box 149, Attica, New York 14011 directed to
said:

United States Court of Appeals
For the Second Circuit
U.S. Court House, Foley Square
New York, New York 10007

Attorney General of the
State of New York
2 World Trade Center
New York, New York 10047

that being the address within the State designated by them for that
purpose on the proceeding papers in this action.

Sworn to before me
the 28th day of September 1976

Anthony C. Fici

NOTARY PUBLIC

ANTHONY C. FICI
Notary Public, State of New York
Qualified in Livingston County
My Commission Expires March 30, 1978

Martin Jelt Patrick

RECEIVED

1 MAR 1978

ATTICA

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER, Petitioner

-v-

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Action Number

76 CIV 534
W.K.

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Notice is hereby given that Norman Butler
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from the * decision and order
of U.S.D.C.-S.D.N.Y. (KNAPP J.) dismissing his
petition for a writ of habeas corpus on 7/26/76
Sept 22, 1976, 197

Notice to:

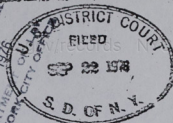
NORMAN BUTLER
#24091
BOX 149
ATTICA N.Y. 14011

Signed

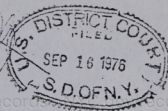
By: J. BLUM
Deputy Pro Se Clerk

ATTORNEY GENERAL
STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047

RECEIVED
OCT 11 - 1976
MAIL
DISTRICT COURT
NEW YORK CITY OF



20
(15)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

CERTIFICATE OF NO
PROBABLE CAUSE

76 Civ. 534

Upon reading all of the papers heretofore filed in this case, and upon this court's order of July 26, 1976, denying petitioner Butler's application for a writ of habeas corpus, and upon this court's determination that petitioner's application for reconsideration should (if the court had jurisdiction) be denied, a certificate of probable cause is hereby denied on the ground that no substantial questions of law are presented in this case.

Dated: New York, New York

September 14, 1976.

Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

MICROFILM

SEP 16 1976

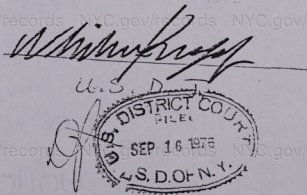
(21)

Although I have ruled that
I find no substantial question
for appellate review, I have
no doubts that the petitioner
believes his cause to be
just. Therefore, I do not
characterize his appeal
as frivolous and have no
objection to his proceeding
in forma pauperis.

MICROFILM

SEP 16 1976

September 14, 1976



FORMA PAUPERIS AFFIDAVIT

(see instructions, page 1 of this form
(make a general statement explaining your financial status
and why you are unable to pay the costs of prosecuting this
action.)

I have been in prison for eleven years
now and unable to acquire the kind of money
that it takes to get good counsel. There-
fore, I am seeking the courts assistance

Norman 3x Butler
Signature of Petitioner

STATE OF NEW YORK X
COUNTY OF X ss

Norman 3x Butler, being first sworn under oath,
presents that he has subscribed to the above and does state that
the information therein is true and correct to the best of his
knowledge and belief.

Norman 3x Butler
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

13 day of Jan., 76
(month) (year)

Samuel J. Corp
Notary Public

My commission expires

3 30 76
(month) (day) (year)

STATE OF NEW YORK)
COUNTY OF WYOMING)

ss.:

Martin Fitzpatrick, being duly sworn,
deposes and says, that on the 19 day of July,
1976, he served the within PETITIONERS REPLY MEMORANDUM
on United States District Court Judge WHITMAN KNAPP; District
Attorney ALLEN ALPERT ESQ.

by enclosing a true copy thereof in a securely sealed postage paid
wrapper and depositing the same in a post office box regularly
maintained by the United States Government at Attica Correctional
Facility Box 149, Attica, New York 14011 directed to said

United States District Court
Chambers of
Judge Whitman Knapp
United States Courthouse
Foley Square
New York, New York 10007

District Attorney's
Allen Alpert Esq.
155 Leonard Street
New York, New York
10013

that being the address within the State designated by them for that
purpose on the proceeding papers in this action.

Sworn to before me, the 19

day of July, 1976

[Signature]
NOTARY PUBLIC

DAVID J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

Martin Fitzpatrick

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent,

Attica Correctional Facility,

Respondent.

REPLY MEMORANDUM TO

RESPONDENT'S MEMORANDUM

OF MARCH, 1976

Pro Se

76 Civ. 0534 (jwm)

State of New York)
County of Wyoming) ss.:

NORMAN BUTLER'S PRO SE REPLY MEMORANDUM

PRELIMINARY STATEMENT

On March 10, 1965 a New York County Grand Jury returned a one count indictment against the Petitioner and others. The trial commenced on December 6, 1965 (LAKES, J., and a jury). The Petitioner and others were found guilty of Murder in the First Degree on March 10, 1966 and on April 14, 1966 Petitioner and others were sentenced to life imprisonment. On May 22, 1968 the Appellate Division, First Department affirmed the judgment of conviction (People v Hagan 29 A.D.2d 931, 1st Dept 1968), and the Court of Appeals unanimously affirmed the judgment on April 16, 1969 (People v Hagan, 24 N.Y.2d 395 1969). On October 27, 1969 the United States Supreme Court denied certiorari (Hayer a/k/a/ Hagan et al v New York, 396 U.S. 886. The petitioner on August 8th, 1975 put in a motion to the Supreme Court New York County requesting the trial record to be furnished free of charge to him, this motion was never ruled on. On February 3rd, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York. On March 3rd, 1976 the Petitioner served an affidavit for entry of default in the above action (76 Civ. 0534) which by law should of been granted, but was not. On March 10th, 1976 the proposed

order and supporting affidavit of Allen Alpert requesting a extension of time until March 30, 1976 was put before the court, and an undigned and undated order was received from the court granting the extension until March 30, 1976. On April 2nd, 1976 the Petitioner received the respondents brief which contains 57 pages plus appendix, with over 247 references to the record on appeal. On April 12, 1976 the Petitioner made a motion for an extension of time to receive the complete record which is six volumes under #2099A which was the number assigned in the Court of Appeals. On May 10, 1976 a letter was received from Carolyn Sternchein law clerk to Judge Knapp stating that FIVE volumes of the record will be sent here to Attica Prison to be used during the day at the law library but Volume SIX was never sent. In a letter dated June 11, 1976 Judge Knapp quoted and made part of the record the requests in behalf of petitioner that have been received concerning retained counsel and another extension of time was received. On July 3rd, 1976 a motion was made to dismiss the writ of Habeas Corpus Without Prejudice because Attorneys are involved in a case that will take some weeks to conclude and the fact Volume SIX is still missing. On July 13, 1976 a Memorandum and order was issued in the case 76 Civ 534 by Judge Whitman Knapp which denied petitioners motion to dismiss the petition without prejudice. The order by Judge Knapp states that petitioner has not "...proffered no meritorious reason for granting the relief requested..." and that "...allegations of prejudice in the court's charge- not heretofore made in the petition itself- are not the proper subject of a Reply brief" and that "...this Court has searched in vain for any remarks which might arguably be considered prejudicial in that part of the charge contained in Volume vl."

The first conclusion of the court that petitioner has not proffered no meritorious reason for granting the relief requested is disputed by the fact assistance of counsel is a basic guarantee in this

country. This point was made part of the record and was the pivot point of motion that petitioner has retained counsel now who are involved in another case and will take petitioners case as soon as possible which could be many weeks or months from now. This standing by itself is ground enough and a meritorious reason to have granted petitioners motion. This prison was the scene again of another disturbance on July 11th, 1976 where officers and prisoners were injured. The prison has been closed down since Sunday July 11th, 1976 and of this date July 17, 1976 the law library has been closed so petitioner has no access to incomplete record that are here. What better meritorious reason is there than seeing the petitioner can not pro se have a full record to review, have access to them because of this shut down because of this new riot, have counsel take over his case?

The next point this court mentions in denying petitioners motion is that allegations of prejudice in the courts charge-not heretofore made in the petition itself-are not the proper subject of a Reply brief. It must be considered that a prisoner has only a limited knowledge of the law, rules of procedure of a Federal Court. A denial of due process is evident if a point of relief is denied petitioner because of a rule or procedure. A point in the petition is that the trial court rebuked defense counsel's in the presence of the jury and deprived the defendants of an impartial trial. The trial court must of mentioned this in his charge, and petitioner is entitled to read the charge. What reason could be put forth for not giving petitioner the complete six volumes? One more volume would weigh to much -more than five? One more volume couldn't fit in the box? Five is an odd number and it would be bad luck to ship six because its an even number? Assistant District Attorney Allen Alpert said not to give petitioner the six volumes ? It is

submitted it is unheard of in modern American Jurisprudence to deny petitioner to borrow under strict conditions all six volumes of his own trial record, not just five. The difference of this one volume may mean the difference of life in prison or freedom.

The last point this court gives is most interesting : " the Court has searched in vain for any remarks which might arguably be considered prejudicial in that part of the charge contained in volume vl " . Why did the court choose to keep this volume for its personal reading ? With all due respect given to the court it is submitted by petitioner that it is for the petitioner to have the opportunity to review this mysterious-elusive six volume and come to his own conclusions about the contents of the volume. The court should not "help" at this point as it "may" influence its decision in the case. The petitioner would like to "search " this volume for OTHER mistakes as well, not limiting its search to the trial counts words about the defense counsels conduct which would be interesting to read I'm sure, but all other words by the trial court that would pertain to the other points raised in the petition.

For the above reasons the petitioner requests this court to reconsider its determination of the July 13, 1976 and if this is not possible, which again could be possibly true according to procedure in the Federal Courts, at least stipulate the above is a key part of this record in this case.

Accordingly, because of this order by the court dated July 13, 1976, the petitioner has completed a pro se unskilled reply brief to be put against one from a well run skillful District Attorney's Office of Counsel. It is acknowledged by the petitioner that his limited knowledge and access to the law library, the missing sixth volume, and being up against a full-staffed District Attorney's Office has put

this petitioner at a clear disadvantage. But according to the courts order this Reply Brief is submitted and mailed on July 19, 1976 at Attica Correction Facility so it can be processed here, money taken out of prisoners account for postage, and hopefully sent out of the prison by authorities to the post office in Attica New York to be delivered to this court before July 22nd, 1976 as the court order stated it must be.

HISTORY AND EVIDENCE OF THE CASE

Malcolm Little, also know as Malcolm x, died of multiple bullet and shotgun pellet wounds at approximately 3:30 p.m. on February 21, 1965. Tr.2091-92. The assassination on February 21, 1965 was carefully planned. All the previous public meetings addressed by Malcolm were covered by large numbers of police visible for all to see. On this day there was a different procedure followed by the police. No uniformed policemen were visible, in fact Lawyer Chance during the trial realized this and brought it out on page 2450 but the judge won't allow him to continue along these lines. On this day, instead of being visible, we find officer Henry and his partner hidden inside the building. They were in walkie-talkie communication with a police detail concealed across the street in the hospital where Malcolm's body was later taken. Officer Henry said he was told to notify the detail "if anything happened In charge of the detail that day is a Sgt. Devaney p. 1451, 2411.

As Malcom x began to speak a disturbance started. There were many guards there that day to protect Malcolm as he had been living with the fear that someone would kill him as he spoke out about the American political, economic, and social atmosphere. The guards were former members of another organization, and knew the defendants in this case.

It has always been a question how Malcolm's guards could have let any well-known members of the other organization into the ballroom that afternoon, or at the best, search them. It was highly unlikely that any member of the former organization was there that day. But there was a five man assassin team there, and it was reported police had film of the incident. This film never got into the case because it would show that the defendants were not there that afternoon. We find out about this assassin team if we put all the pieces together in the case and read the papers carefully. As the New York Times and the Herald Tribune reported two men were almost killed by the crowd. One was identified as Talmadge Hayer, the other was caught by a Patrolman Hoy and taken to the Wadsworth Avenue station. The interesting point is Patrolman Hoy was never called to testify as to just who this second man he rescued was. Also we find a Police Sergeant "standing on the corner" when Police Sergeant Aronoff and Patrolman Angelos happened to be driving by, who it is found out later happened to be assigned to not this precinct, but the adjoining precinct the 30th. These policemen take Hayer away. We can only speculate what would of happened to the two men if the angry crowd was not stopped at that time by these two policemen driving by. Would they have been a member of the special police detail, a police agent, or a member of Boss killed along with Hayer?

During this time it must be pointed out that the audience had panicked and terror affected many people. Although the District Attorney never explains the smoke bomb Tr. 3156-57, 3176-78, 3228, we find that someone threw a smoke bomb toward the rear of the

auditorium. This as anyone can see is a fourth person in the plot. The District Attorney can never explain this as he has three people participating, not four. As this confusion continued the bewildered people ran, fell on the floor, and tried to save their lives as men were shooting into this crowd. As far as identification is concerned, these poor befuddled people couldn't really be expected to be of any help in this area. As the trial record discloses they were not and no one really can identify anyone but Hayer who was outside. It must be remembered that in this crowd there were several undercover plainclothes policemen.

The defendants Butler and Johnson denied guilt and introduced evidence of an alibi. Hayer testified confessing guilt and exonerating his co-defendants Tr 3144-51

The prosecution called Ronald Timberlake who was in fear to testify in open court as "threats have been made on his life" 1273-74. Timberlake said he received telephone calls. The court asked who they were ? Timberlake said he didn't know Tr 1282. He first said threats came from fellow workers but now he says the were over the telephone. After a lengthy discussion between the court, Timberlake, his counsel, the prosecutor then suggested that the courtroom be cleared of all spectators in the interest of justice Tr 1285, a suggestion opposed by counsel for all three defendants Tr 1287. The court ordered total exclusion Tr 1298. Again the court ordered total exclusion during the testimony of F.B.I. agent John Sullivan Tr 1768-72.

The opening statement by the prosecutor was prejudicial to the defendants as he used the defendants religion against them. The defense counsel objected Tr 170. The court overruled all objections and denied motions to strike and for a mistrial.

The trial judge all through this trial rebuked defense counsel's for one thing or another. To just cite a few, Tr 759 where Judge asks counsel to ask witness to tell elevator operator. Again when counsel asked for a short recess the judge said every time a paper is offered there is a recess Tr 1168-69. Another time the judge said he would discuss counsels conduct at the close of the trial. Tr 3637-38. Once the judge called them "children", Tr.2832 Harmful comments appear on the following pages: 279, 575, 580, 612, 690, 857, 998, 1023, 1122, 1154-55, 1172, 1246, 1533, 1729, 1752, 1874, 1909, 1915, 1956, 2036, 2113; 2300-01, 2362, 2648-49, 2709, 2796, 2798, 2809-11, 2819, 2831, 2858, 3126, 3362-64, 3415, 3458, 3560, 3562, 3808, 3809, 3394, 3402, 3140, 4017. * (It must be noted this comment comes in the judges charge which the petitioner never had.)

The court denied motions for access to grand jury minutes, for a list of the peoples witnesses Tr. 64-70, 108, 179-80, 285-86, 643-44. Also denied were list of the witnesses interviewed by police and for grand jury testimony and detectives reports of those witnesses, Tr. 180-83. The courts interpretation of the law of criminal discovery was error.

POINT ONE

THE EXCLUSION OF ALL SPECTATORS AND MEMBERS OF THE PRESS DURING THE TESTIMONY OF PROSECUTION WITNESSES TIMBERLAKE AND SULLIVAN DEPRIVED THE DEFENDANTS OF THEIR STATUTORY AND CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL

In this case the trial court violated the right of the defendants to have a public trial, a right guaranteed by common law, by statute,

and by the New York and United States Constitutions. The reserves and guarantees to the right to a public trial are found in Article one section one of the New York Constitution, which is identical to Article XIII of the 1777 Constitution and speaks in the language of the Magna Carta to guarantee that no one shall be condemned but "by the law of the land, or the judgment of his peers." IN RE OLIVER, 333 U.S. 257, 278 (1948) holds the right to a public trial a part of "the law of the land."

In TURNER V LOUISIANA, 379 U.S. 466 (1965) the court noted that "in the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a PUBLIC COURTROOM where there is full judicial protection of the defendant's right of confrontation, cross-examination, and of counsel." 379 U.S. at 472-73 .

In another leading case, PEOPLE V JELKE, 308 N.Y.56 (1954) the right to a public trial was clearly defined and pointed out the right is precisely the quality which has caused other Sixth Amendment provisions to be applied to the states E.g. POINTER V TEXAS, 380 U.S. 400 (1965); DOUGLAS V ALABAMA, 380 U.S. 415 (1965); GIDEON V WAINWRIGHT 372 U.S. 335 (1962). The court in JELKE said:

"Of uncertain origin, but nevertheless firmly rooted in the common law, the right to a public trial has long been regarded as a fundamental privilege of the defendant in a criminal prosecution"

In this case Timberlake had no right to refuse to testify even if he believed in good faith that it might endanger his life. In the case of FLEMONTE V UNITED STATES, 276 F.2d 148, 150 (7th Cir. 1960), the court, noting the district court's determination that a refusal to testify had actually been based on fear, affirmed a judgment of contempt, saying:

"(T)he District Court was on solid ground in holding that fear of the underworld retaliation is no reason to excuse the appellant from his obligation to testify under a complete grant of immunity."

In UNITED STATES V DAVIS, 247 Fed. 394 (8th Cir. 1917), the record showed some disorderly incidents outside the courtroom and considerable ill-will on the part of the defendants and their friends against some of the prosecution witnesses; the trial court excluded most spectators but permitted relatives of the defendants, members of the bar and the press to remain. The court of appeals nonetheless reversed the conviction for denial of a public trial saying:

"...individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character." 247 Fed. at 395.

In the case of PEOPLE V LEVELL, RICHARD, 369 N.Y.S.2d 162, App. Div. 1st Dept. (6-12-75), unanimously reversed the judgment on the law and as a matter of discretion in the interest of justice on the issue of the right to a public trial. The court said:

"Moreover we believe reversible error was committed when the court excluded the public during the testimony of the undercover officer because he was still engaged in a similar activities in the same "General Area". ... "We find no "Unusual circumstances presented in the instant case sufficient to sanction the violation of defendant's general right to a public trial."

The court's in other states have held the right to a public trial is a fundamental right. In the case of STATE V SCHMIT, 139 N.W.2d 800, (Minnesota), the court held:

"Defendant is entitled to new trial without showing prejudice where trial judge unconstitutionally excluded public from courtroom."

The beneficial effects of public presence at a trial in general is an ancient tradition and this benefit cannot be taken away from the defendant in this case by the total exclusion of the public. The court had already taken all the necessary security measures, all the spectators were searched and extra court personell were on duty to see that all security measures were carried out. A major principle

of a public trial was sacrificed by the courts exclusion of the public thus making the proceeding a secret "star chamber" proceeding which made the defendant suffer overwhelming prejudice which made it impossible for him to receive a fair trial. The damage to the jury's attitude against the defendant was predicated by this exclusion. The jury's attitude against the defendants was damaged beyond repair. They found themselves in a serious dangerous position because of this exclusion and it overwhelmed them into AT THAT POINT judging the defendants guilty before all the evidence was in.

POINT 11

THE JURY WAS INFLUENCED BY THE IMPROPER RECEIPT OF EVIDENCE OF THE DEFENDANT'S RELIGIOUS BELIEFS WHICH WAS INTRODUCED IN ORDER TO SHOW A MOTIVE FOR THE MURDER THIS WAS ERRONEOUSLY ADMITTED AND TENDED TO INFLAME THE JURY AND PREJUDICE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In the opening statement by the prosecutor he used the defendants religion against them and this was the principal theme throughout the trial. The prosecutor's conduct and the trial court's statements violated the rule laid down by the Court of Appeals in TOOMEY V FARLEY 2 N.Y.2d 71, 82 (1956):

"In all but the rarest of cases, the religious faith and observances of a party are matters entirely irrelevant to the issue presented, and their intjection into a trial is improper and constitutes reversible error..."

In TOOMEY the Court of Appeals cited both criminal and civil cases dealing with the misuse of a party's or witness's race, nationality or religion. In the civil case of ABBATE V SOLAN ET AL, 257 A.D. 776, 15 N. Y.S.2d 33, questions clearly intended to discredit plaintiff and her

witness with the jury because of their nationality led to the judgment being reversed on the law and a new trial granted. The court held:

"Even if done in good faith, it was an appeal to prejudice without any foundation therefor and, of itself, requires a reversal of the judgment. 2 Wigmore on evidence, 2d ed. sec. 937; Zobel Co. v Canals, 188 A.D. 231, 176 N.Y.S. 537; Skuy v U.S. 8 Cir. 261 F. 316; Commonwealth v Kazules 246 Mass. 564, 141 N.E. 584; Yee Chung v U.S. 9 Cir 243 F. 126."

Along the same line of cases is PEOPLE V HEARNS, 18 A.D.2d 922 (1963), 283 N.Y.S.2d 173, the prosecutor in his summation stressed that two of the principal witnesses, namely, a police officer and a correction officer, had testified against the defendant despite the fact that such officers were of the same color or race as the defendant. The court reversed on the law and a new trial was ordered as it said:

"In our opinion such a plea to the jury, based on color and race no matter how artfully phrased, constitutes an appeal to prejudice and passion; it violates every basic concept of a fair trial; and it vitiates the resulting judgment of conviction (Abbate v Solan, 257 A.D. 776, 15 N.Y.S.2d 332; People v Castellano 273 A.D. 978, 78 N.Y.S.2d 356; Bowen v Mahoney Coal Corp. 256 A.D. 485, 10 N.Y.S.2d 454; Saunders v Champlain Bus Corp. 263 A.D. 683, 34 N.Y.S.2d 447; Skuy v U.S. 10 Cir. 261 F.316; Commonwealth v Kazules, 246 Mass 564, 141 N.E. 584; Annotation, 45 A.L.R.2d 303; Zobel Co. v Canals, 188 A.D. 231, 176 N.Y.S. 537; 2 Wigmore on Evidence (3ded.) sec. 937)".

The prosecutor in this case with his comments about the defendants Black Muslim Beliefs had the effect of inference and the jury did infer collective guilt of the Black Muslims to defendants denied them of a fair trial. In PEOPLE V CASTELLANO, 273 A.D. 978, 78 N.Y.S.2d 356, the prosecutor deprived the defendant of a fair trial by the adverse and improper comments during the course of summation upon the race of the deceased and defendant. In reversing his second degree murder conviction the court held:

"...defendant was deprived of a fair trial... Malinski v People of the State of New York 324 U.S. 401, 65 Set 781, 89 L.Ed 1029; People v Eposito 224 N.Y. 370, 373, 121 N.E. 344, 345; Abbate v Solan 257 A.D. 776, 15 N.Y.S.2d 332; Saunders v Champlain Bus Corp, 263 A.D. 683."

In the same line of cases the Court of Appeals has recognized in *PEOPLE V AGRON*, 10 N.Y.2d 130, cert. denied 368 U.S. 922 (1961), permitted discussion of race, creed or nationality purely for the purpose of identification, and with appropriate cautionary instructions by the trial judge. Even in this case the judges wrote:

"While it would undoubtedly have been better to have avoided references to defendants nationality or ancestry where at all possible..."

The above case points out the very narrowly defined limits a prosecutor has and a reading of the petitioners minutes will prove the prosecutor in the instant case did abuse his discretion at every chance he got. It would of been possible in this case to have a complete trial without testimonial reference to the previous common associations of Malcolm X. The man Malcolm was killed, not the associations he did or did not belong to. Evidence of the defendants active membership in a religious group as the cases cited above point out, are not proper evidence to be considered by the jury.

POINT THREE

THE TRIAL COURT BY REBUKING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY, DEPRIVED THE DEFENDANT OF AN IMPARTIAL TRIAL.

Whenever a trial judge rebukes defense counsel in the presence of the jury, the jury is led ineluctably to discredit the defendant's case. In the skillful Respondents Brief, he says there are only two examples of the judge rebuking defense counsel, but there are so many it seemed it was not necessary to fill a brief with them. To point to a few, I submit the following pages: 118; 155; 185; 190; 249; 574; 613; 630; 690; 1753; 3364; 3638; 3808; 3837; 3857; 3890; 3910.

A jury must not be permitted to hear comments from the court. In SMITH V STATE, 12 Okla. Crim. 513, 159 Pac. 941, 944 the court held:

"(T)o reprimand counsel for a defendant in the presence of a jury is highly prejudicial. If counsel's conduct is improper, the court must excuse the jury before administering a rebuke, or threatening to fine or imprison him for contempt."

In the case of STARR V UNITED STATES, 153 U.S. 614, 626 (1894). the court held:

"...it is obvious under any system of jury trial, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may be controlling."

In PEOPLE V KEPNER, 267 A.D. 838, 46 N.Y.S.2d 111, (1944) defendants counsel was hampered and embarrassed. The court in reversing the judgment and ordering a new trial stated:

"Had defendant received a fair trial, the evidence if credited, would have warranted his conviction. Here his rights to such a trial has been infringed not in respect of mere technicalities but in substantial matters. His counsel was hampered and embarrassed;..."

Along the same line of cases is PEOPLE V ADLER, 274 A.D. 820, 80 N.Y.S.2d 210, (1948), where the judgment was reversed and a new trial was ordered. The court held:

"...its disparaging remarks directed to defendants counsel constituted prejudicial error and deprived defendant of a fair and impartial trial. Any new trial should be had before another judge."

According to respondents brief there are 4, 414 pages in the record which petitioner was allowed to see only the first 3, 900 or so, and if they are an example of the complete record-it is plain to see petitioner was denied a fair trial. The first of the record reeks of inappropriate behavior by the trial judge. Defense counsels were treated in a disgraceful, discreditable way and this deprived the defendants of a fair and impartial trial.

POINT FOUR

THE 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.

Defendant Butler moved before trial for access to grand jury minutes; for a list of the peoples witnesses; for a list of those interviewed by the police; for grand jury testimony and detectives reports of those witnesses. All these motions were denied. But at a point 12 days before defendants were to begin there part of the case the judge and prosecutor realizing that the were making a reversable error, gave the list of witnesses over to the defense- a justure much to late for the proper preparation of a case. In *PEOPLE V MILLER*, 42 Misc. 2d 794, 796-97 (1964) the court held:

"where there is evidence in possession or control of the prosecution which is of such a nature that may require lengthy inspection or examination by experts to determine whether it is favorable to the accused, the court will afford to the accused an adequate opportunity, pretrial, to examine the evidence."

In the case of *PEOPLE V NASSAR*, 301 N.Y.S.2d 678(1969) the rule in *MILLER*, supra, was followed when the court said:

"The concept of fairness inherent in due process imposes a duty upon the prosecution to apprise the defense of evidence favorable to the accused, ... (People v Fein, 18 N.Y.2d 162, 172, 272 N.Y.S.2d 753, 759, 219 N.E.2d 274, 278 (1966)). In this Court's view those 'special circumstances' exist here***." People v Chambers, 56 Misc2d 683, 687, 289 N.Y.S.2d 804, 808 (Supreme Court, Oneida County 1968, Cardamone, J.)

In Respondents brief he says that petitioner doesn't claim that he suffered any harm, nor is there any claim that anyone on any of the lists possessed information beneficial to any of the defendants. It is submitted the mere fact petitioner alleges a point is enough to infer he has been harmed in a constitutional way. As far as the lists themselves the District Attorney wins the point for petitioner as he states there was no claim that "anyone on any of the lists possessed information beneficial to any defendants" -naturally the whole point is that defendants did NOT HAVE TIME to check these lists properly as they were in the middle of the trial. So it is a surprise but a fact that Respondents brief wins this point for the petitioner. The actions of the trial judge constituted an exercise of judicial discretion that gave rise to constitutional violations.

CONCLUSION

The petition for a writ of habeas corpus should be granted.

JULY 19, 1976

Respectfully Submitted,

NORMAN BUTLER
24091
Attica Correctional
Facility
Box 149
Attica, New York
14011

State of New York)
County of Wyoming) ss.:

MARTIN FITZPATRICK, being duly sworn,
deposes and says, that on the day of , 1976, he served
the within NOTICE OF APPEAL AND CERTIFICATE OF PROBABLE CAUSE
on United States District Court Judge Whitman Knapp; District Attorney
Allen Alpert; United States Court of Appeals; New York State Attorney
General.

by enclosing a true copy thereof in a securely sealed postage paid
wrapper and depositing the same in a post office box regularly
maintained by the United States Government at Attica Correctional
Facility Box 149, Attica, New York 14011 directed to said:

United States District Court
Chambers of
Judge Whitman Knapp
United States Courthouse
Foley Square
New York, New York 10007

District Attorney
Allen Alpert Esq.
155 Leonard Street
New York, New York 10013

United States Court of Appeals
For the Second Circuit
U.S. Court House, Foley Square
New York, New York 10007

New York State Attorney General
Two World Trade Center
New York, New York 10047

that being the address within the State designated by them for that
purpose on the proceeding papers in this action.

Sworn to before me

the 12 day of Aug, 1976
[Signature]

NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Exp. in Five County
Notary Commission Expires March 30, 1978

28

[Signature: Martin Fitzpatrick]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A., ex rel. NORMAN BUTLER,

Appellant,

-vs-

HAROLD J. SMITH, SUPERINTENDENT,
Attica Correctional facility,

Respondent.

NOTICE OF APPEAL

Civ. 76 Civ 0534 (JK)

Notice is hereby given that NORMAN BUTLER, appellant
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from the order denying his application
for a writ of habeas corpus entered in this action on July 26, 1976.

Dated August 9, 1976

Norman Butler

NORMAN BUTLER
Box 149 #24091
Attica, New York
14011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A., ex rel. NORMAN BUTLER,

Appellant,

-vs- HAROLD J. SMITH, SUPERINTENDENT,
Attica Correctional facility,

Respondent.

NOTICE OF APPEAL

Civ. 76 Civ 0534 (JK)

Notice is hereby given that NORMAN BUTLER, appellant
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from the order denying his application
for a writ of habeas corpus entered in this action on July 26, 1976.

Dated August 9, 1976

Norman Butler

NORMAN BUTLER
Box 149 #24091
Attica, New York
14011

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

: NOTICE OF MOTION
:
: FOR
:
: REARGUMENT AND
:
: RECONSIDERATION
:
: Pro Se
: 76 Civ. 0534 (JK)

State of New York)

County of Wyoming)

NOTICE is hereby given that the attached motion will
come on for hearing before this Court at _____ o'clock, _____
M., _____, 19____, under the provisions of Rule _____ of the
Court.

Norman Butler

Appellant Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT

NORMAN BUTLER,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

OF MOTION FOR
REARGUMENT AND
RECONSIDERATION
Pro Se
76 Civ. 0534 (JK)

State of New York)
County of Wyoming) ss.:

NORMAN BUTLER, being duly sworn, deposed and says;

1. That he is the Petitioner in the above action.
2. On February 3re, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York.
3. On July 3rd Petitioner sent a motion to Dismiss the Writ of Habeas Corpus Without prejudice for many reasons some of which were:
 - (a). that volume six (6) of the record is missing.
 - (b). that in the order dated June 11, 1976 Judge Knapp quoted and made part of the record the requests in behalf of petitioner that have been received concerning retained counsel. The counsel said they needed time because they were working on another case.
 - (c). That the missing sixth volume of the record contained the judges charge and as the record and points in the writ show this judge was a prejudiced party in this action which denied the Petitioner a fair trial.
4. That in an order dated July 13, 1976 Judge Knapp denied the motion for dismissal without prejudice and ordered all reply's due by July 22, 1976 "the matter will be considered fully submitted as of that date.

5. On July 19, 1976 the petitioner had notarized his Reply Memorandum and handed it to the department in charge of mailing. On July 20, 1976 a certified Mail slip # 612526 form 3800 was issued and the same is put forth as an exhibit for this motion.

6. On July 22, 1976 the certified mail # 612526 was received and signed for by Judge Whitman Knapp, this is made part of this motion by being attached as an exhibit.

7. On July 26, 1976 a nine page order with footnotes was issued which denied the petitioners writ.

8. In #1 of the footnotes the following is found:

"It is perhaps necessary also at this point to outline the history of the instant proceeding as petitioner in his Reply brief questioned the good faith of the Court."

The point is that the court failed and continues to fail to make part of the record that retained counsel requested the time and they pointed out that a motion to Dismiss the Writ would be best as the case they are working on would be a lengthy one. This shows where the "good faith" of the court is.

9. The request of this motion is to have this court consider the entire petition and ALL the moving papers and to reconsider its decision and make part of the record that this court did consider the request for retained counsel.

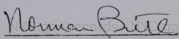
10. That this petitioner prays this court grant this motion for ~~extension of time to consider~~ the complete consideration from this court to reconsider its decision and make part of the record all the moving papers and for such other and just relief that this court deems just and proper.

Sworn to before me,

this 12 day of Aug, 1976


NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978



NORMAN FUTLER
Box 149 #24091
Attica, New York
14011

7-2 No. 61253 RECEIPT FOR CERTIFIED MAIL

SENT TO JUL 20 1970		POSTMASTER ATTENTION JUL 20 P.M. 1970 14011
ZIP CODE AND NO. P.O. STATE AND ZIP CODE N.Y. 10011		
OPTIONAL SERVICES FOR ADDITIONAL FEES		
RETURN RECEIPT SERVICES	1. Shows to whom and date delivered 2. Shows to whom, date and where delivered With restricted delivery	
RESTRICTED DELIVERY SPECIAL DELIVERY (extra fee required)		

PS Form 3800
Jan. 1976

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See other side
PSN 1075-0-500-45)

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

- Print your name, address and ZIP Code in the space below.
- Complete items 1, 2, and 3 on reverse side.
- Mention registered items and attach to back of article.

PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300



RETURN
TO

NY
Butler 24091
Box 149 ACP
Attica, N. Y. 14011

1. **SENDER:** Complete (optional, 2, and 3)
 Add your address in the "RETURN TO" space on reverse.

2. The following service if requested (check one)

☒ Show to whom and date delivered 15¢
☐ Show to whom, date, & address of delivery 35¢
☐ RESTRICTED DELIVERY
 Show to whom and date delivered 35¢
☐ RESTRICTED DELIVERY
 Show to whom, date, and address of delivery 65¢

3. ARTICLE ADDRESSED TO:
 William Knapp
 US Courthouse Foley Sq.
 N. Y. N. Y.

4. ARTICLE DESCRIPTION:
 REGISTERED NO. 612526 CERTIFIED NO. INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE ☐ Addressee ☐ Authorized Agent

DATE OF DELIVERY
 JUL 22 1976

5. ADDRESS: (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CARRIER'S INITIALS

U.S. POSTAL SERVICE

10c

PS Form 3811, Jan. 1975

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).

☒ Show to whom and date delivered..... 15¢
☐ Show to whom, date, & address of delivery.. 35¢
☐ RESTRICTED DELIVERY.
Show to whom and date delivered..... 65¢
☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Whitman Knapp - U S Courthouse
Foley Square
N. Y. N. Y. 10007

3. ARTICLE DESCRIPTION:
REGISTERED NO. 128524 CERTIFIED NO. INSURED NO.

(Always obtain signature of addressee or agent)
I have received the article described above.
SIGNATURE: [Signature] No such address ☐ Authorized agent
No such address
No such return

4. DATE OF DELIVERY:
AUG 16 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

POSTMARK: NEW YORK NY 10007
AUG 16 1976
NEW YORK AIRMAIL
INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

☆ GPO : 1975-O-568-047



NORMAN CENTER
24093
Box 149
KILLICK, New York
14011

CERTIFIED

No. 125574

MAIL

AUG 13 76
N.Y.

1120-1121
1120-1121

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE WILLIAM KNAPP
UNITED STATES COURTHOUSE
FOLLY SQUARE
NEW YORK, NEW YORK 10007

RECORDED
INDEXED
SEP 1976
FBI - NEW YORK

CERTIFIED MAIL
RETURN RECEIPT

CLERK'S OFFICE
U. S. COURT OF APPEALS

UNITED STATES COURT HOUSE

FOLEY SQUARE

NEW YORK, N. Y. 10007

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE \$300

POSTAGE AND FEES PAID
UNITED STATES COURTS



Alan Alpert
Assistant District Attorney
155 Leonard Street
New York, N.Y. 10007

PRO SE
5/24/77
76-8455

UNITED STATES COURT OF APPEALS

Second Circuit

2 Copies
ALP/RT
ENTERED BY
APPEALS CLERK

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of May, one thousand nine hundred and seventy-seven.

Norman Butler,

Appellant,

v.

Harold J. Smith,

Appellee.

Appellant

A motion having been made herein by ~~motion~~ pro se for a certificate of probable

cause, for leave to proceed in forma pauperis, ~~for admission of the certificate of the~~
and
~~was presented to the United States~~ for the assignment of counsel ~~and~~

Upon consideration thereof, it is denied.

Ordered that said motion be and it hereby is

Wilfred Feinberg
WILFRED FEINBERG

John A. Danahey
JOHN A. DANAHEY, Circuit Judge

WF Dooling Danahey

John F. Dooling, Jr.
JOHN F. DOOLING, JR., District Judge

District Attorney's Office
COUNTY OF NEW YORK

*Supplementary notice of
motion re Roberts*

William A. Kunstler

ATTORNEY AT LAW

853 BROADWAY

NEW YORK, NEW YORK 10003



District Attorney
155 Leonard Street
New York, N.Y.

Rec'd 12/12/77

To me 12/14/77

Hunt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

-v- :

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUT- :
LER) and KHALIL ISLAM (THOMAS 15X :
JOHNSON), :

Defendants. :
-----X

Ind. No. 871/65

SIRS:

PLEASE TAKE NOTICE, That defendants wish to supplement their notice of motion dated December 5, 1977, and served and filed on December 6, 1977, praying for certain relief pursuant to §440.10, 1, subdivision (g), Criminal Procedure Law, to include therein the failure of the People to notify said defendants prior to or during the trial of this indictment that one of the men who appear in Defendants' Exhibits V, W, X and Y, formerly marked People's Exhibits 36, 37, 38 and 39 for identification, specifically the man allegedly giving mouth-to-mouth resuscitation to the victim herein, was, in fact, a police officer of the City of New York, namely one Gene Roberts, apparently then a member of what is now referred to as the Intelligence Division of said Police Department, and to include the statutory grounds contained in subdivisions 1(b), 1(f) and 1(h) of the said §440.10, Criminal Procedure Law, as a basis for the relief sought in said notice of motion.

Yours, etc.,

Dated: New York, N.Y.
December 8, 1977

TO:

Criminal Motion Clerk
District Attorney

WILLIAM M. KUNSTLER
853 Broadway
New York, N.Y. 10003
(212)674-3303

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK :PART 30

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

-v-

Ind. No. 871/65

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUT- :
LER) and KHALIL ISLAM (THOMAS 15X :
JOHNSON), :

Defendants. :
-----X

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

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

1. I am the attorney for the defendants and I am making this affidavit in support of their supplemental notice of motion herein.

2. During the trial, eight photographs, which had been marked Grand Jury Exhibits 1 through 8, were marked People's Exhibits 31 through 38, for identification. TT. 1720-21. They were offered into evidence as Defendants' Exhibits R through Y by the attorney for defendant Hagah and so received. TT. 1721. In four of these photographs a man is depicted kneeling over the victim's body on the stage of the Audubon Ballroom moments after the victim's shooting, presumably giving him mouth-to-mouth resuscitation. TT. 4258 through 4265.

3. During the cross-examination of Charles H. Blackwell, a witness for the People, it developed that this witness had testified before the Grand Jury that he had picked up a Luger after the shooting, wrapped it in a jacket that he saw on the floor and handed

it to a "Brother Jean." TT. 1663. He further testified at the trial that he did not know the identity of "Jean," TT. 1727, and that he had been mistaken in stating that he had handed the Luger to that person. TT. 1743. Instead, he said that he had tried to give "Jean" the weapon but that the latter had told him to give it to someone else and that he had then handed it to Ruben Francis. TT. 1744. He also testified that he had "called Brother Jean" after having picked up the weapon. TT. 1750. Later, he said that he had not been told anything by "Jean," but merely been waved away by the latter. TT. 1756. "Jean" was the man allegedly giving resuscitation. TT. 1723

4. At all times, the People must have known and the police certainly did know the identity of "Brother Jean" as well as the fact that he was a police officer and this vital information was never given to the defense but was, instead, deliberately withheld from it.

5. This is particularly significant in that one of the defenses asserted during the trial was that the authorities, and particularly the New York City Police Department, might have been involved in the murder. See eg., summation on behalf of defendant Butler on pp. 3725-26, Trial Transcript. To hide from the defendants the identity of an eyewitness who was an undercover police agent violates every principle of fair play as well as all of the decisional law in this area. It was done wilfully and deliberately and undercut one of the thrusts of the defense.

WILLIAM M. KUNSTLER

Sworn to before me this

8th day of December 1977

District Attorney's Office
COUNTY OF NEW YORK

Hiding of Roberts

Roberts' Panther 21 Testimony

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30
----- -x

THE PEOPLE OF THE STATE OF NEW YORK :

-v-

Ind. No. 871/65

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUT-
LER) and KHALIL ISLAM (THOMAS 15X
JOHNSON), :

Defendants. :

----- -x
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

1. I am the attorney for defendants herein and I am submitting this affidavit in support of their motion, pursuant to §440.10, subdivision 1(b), (f), (g) and (h), Criminal Procedure Law, for orders vacating their judgments of conviction and dismissing the within indictment as to them or, in the alternative, granting them new trials and other related relief.

2. In a previous affidavit, submitted herein on or about December 8, 1977, in connection with a supplemental notice of motion bearing the same date, I made reference to the fact that a "Brother Jean" who was on the platform of the Audubon Ballroom as a security guard at or about the time that Malcolm X was killed on February 21, 1965, was, in fact, an undercover agent of the Police Department of the City of New York by the name of Gene Roberts and that his true identity was never revealed to the defense during the within trial. Since submitting said affidavit, I have obtained the portion of the transcript of People of the State of New York v. Shakur et al., Ind. No. 1848 1/2 - 1969,^{*/} which refers to the said Roberts' testimony therein in which he admits that he was indeed ^{*/} New York County

present at the time and place when Malcolm X was assassinated and observed a great deal of what happened thereat. Pp. 5724-5736 of said transcript are attached hereto and made a part hereof as Exhibit A.

3. Detective Roberts, who had been a patrolman on February 21, 1965, Exh. A, p. 5732, testified fully at the Shakur trial about what he termed "the truth about the assassination." Ibid. at p. 5726.

Q. You are going to tell us the truth about what happened to Malcolm X?

A. Yes.

Q. And this is the truth that you observed?

A. Yes.

Q. Did you testify at the trial of three people who were charged with the assassination?

A. No.

Q. But you saw it happen?

A. Yes.

Q. But you didn't testify?

A. No.

Q. Didn't you want the truth to come out there?

A. Yes.

Q. Why didn't you testify?

A. I wasn't called.

Q. But you knew what happened?

A. Yes.

Q. And you didn't testify?

A. No.

4. Prior to taking the stand in the Shakur trial, he had been informed by the prosecutor that "Mr. Lefcourt. . .or. . . somebody" was going to ask him about Malcolm X. Exh. A at p. 5728. He had then told him "what really happened there." Ibid. at p. 5729. He then proceeded to testify at great length as to what had happened at the Audubon Ballroom on February 21, 1965. Among other things, he said that he had been a member of the first rostrum security guard which had been relieved after the speech of one Benjamin Goodman. Ibid. at p. 5730. When Goodman finished, he had introduced Malcolm X who then "approached the platform and gave the Muslim greeting." Id. At that time, "two individuals near the front of the auditorium jumped up, one hollering, 'Get your hand out of my pocket,' at which time there was a small commotion." Id. He had "started down the aisle where the commotion was," Id., when he heard shots. He had seen "[T]wo individuals" fire at Malcolm and then run down the middle aisle of the auditorium. Id.

5. Roberts, after seeing Malcolm clutch his chest, went down "one aisle", Id., arriving at the rear of the auditorium simultaneously with the two men he had seen shoot at the victim. Ibid. at pp. 5730-1. As one passed him, Roberts had "grabbed a chair," Ibid. at p. 5731, when "[T]he individual who was subsequently caught, named Hayer. . .", Id., looked in his direction and fired "what looked like a .45. . .", Id., at him. Because Roberts had sidestepped, the bullet had missed his body but hit his jacket. Id. He had then thrown the chair in his hand at Hayer, knocking him to the floor, but the latter had gotten to his feet and hobbled

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"out the front," Id., at which time another security guard had arrived in the vicinity and taken "a shot at the same individual." Id.

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6. Roberts had then gone out the front door where he saw a large crowd "kicking and stomping. . . an individual." Id. He had then returned to the stage of the ballroom where "I proceeded to give Malcolm mouth to mouth resuscitation," Id. Some twenty minutes later, the police "finally got there and took him over to Medical Center." Id.

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7. He also testified that he had been a member of "Malcolm's organization," Ibid. at p. 5732, for some time, that he had attended "various meetings", Id., at which the victim had spoken at that same ballroom, and that, on every such occasion "prior to that night" there had always been "large contingents of uniformed police" present. Id.

Q. But that night there were none, right?

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A. This afternoon there was only a few on the outside. Id.

Moreover, he had not seen any other police officers "around" on the day of the assassination. Ibid. at p. 5726.

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8. The standard applying to new evidence is that it must be "discovered since the entry of a judgment. . . [and] could not have been produced by the defendant. . . even with due diligence on his part" and must be "of such a 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." \$440.10, subdivision 10

1(g), Criminal Procedure Law. That the willingness of Thomas Hagan, after years of soul searching, to testify as to the identity of his confederates in the assassination of Malcolm X and the detailed plans relating thereto meets every aspect of this standard hardly requires further discussion on movant's part. If Mr. Hagan had been prepared to so testify at the original trial, it is highly probable that the verdicts as to these defendants would have been more favorable, to say the very least. The prosecutor well understood the potential effect of Hagan's testimony and thoroughly undetermined it at the trial. See TT. 3147-3180 and 3211-3241.

9. The new evidence relating to the identity of Detective Gene Roberts also fully meets the statutory standard for a variety of reasons. The hiding of his identity deprived movants of a potential witness who (a) observed the assassination and the events immediately succeeding it, (b) could have exculpated these defendants, (c) would have added substance to the defense theory that the murder of Malcolm X was brought about or instigated by the New York City Police Department and other law enforcement agencies, and (d) would have discredited many of the prosecution's crucial witnesses by the sharp variances between his testimony at the Shakur trial and that given by the former at this one.

10. Furthermore, it makes very little difference whether it was the police, the prosecutor or both who concealed this vital information. The only relevant consideration is that the state did not disclose it to the defense, even when requested, and the

onus falls on the entire prosecution which was thoroughly tainted by the failure to inform.

11. Just a cursory reading of the trial transcript reveals the enormous extent of the disparity between Roberts' testimony in Shakur and that given by many witnesses at the within trial. For example, Cary Thomas, the People's first significant witness, testified that, just as Malcolm X began to address the audience at the Audubon Ballroom, one man stood up "in the rear" and said, in effect, "Man, what are you doing with your hand in my pocket?" TT. 236, 386. This is in sharp contrast to Roberts' version that "two individuals near the front of the auditorium jumped up, one hollering, 'Get your hand out of my pocket'..." Shakur TT. 5730. Additionally, although Roberts testified to knocking Hagan down with a chair after being shot at by him, counsel does not recall any other trial witness so stating. Shakur TT. 5731. In this connection, see the testimony of Vernal Temple, Edward De Pina, George Whitney, Jasper Davis, John Davis, Ronald Timberlake, Fred Williams and Charles Blackwell.

12. Moreover, Roberts' testimony that, although there had always been "large contingents of uniformed police" at all of Malcolm X's previous meetings at the ballroom, there were "only a few on the outside" on this occasion, Shakur TT. 5732, would have substantially buttressed the defense contention that the police were somehow involved in the assassination. In this connection, see the startling testimony of Patrolman Gilbert Henry that he had been concealed in the Rose Room at the Audubon Ballroom at the time of the Malcolm X

meeting with another officer, Patrolman John Carroll, at the direction of their superior officer, a Sergeant Devaney, TT. 2443, 2451, who had given them specific instructions "to remain where [they] would not be seen." TT. 2442. At this time, Patrolman Henry had with him a walkie-talkie which was "connected with another walkie-talkie" in the possession of an officer in the Columbia University Presbyterian Medical Center. TT. 2414. After hearing the first shots, Henry had entered the main ballroom where he did not see any other uniformed officers or recognize any detectives. TT. 2438. ^{*}/

13. It must be kept in mind that, at this time, the FBI's COINTELPRO operation was in full swing, beginning in 1956 and continuing, according to the Bureau, until 1971. Book III, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, April 23, 1976, p. 3, hereinafter sometimes referred to as the Church Committee Report. One of the techniques employed in this program was the instigation of enmity or factionalism within rival Black groups. Ibid. at pp. 40-54. Included within this technique was the use of hostile third parties against targeted groups. Ibid. at pp. 49-50. Moreover, the then Nation of Islam was designated as a "primary target." Ibid. at p. 21, fn. 93, as was the Hon. Elijah Muhammed. Id.

14. Instigating or encouraging the murder of Malcolm X would

^{*}/ The strange absence of police on February 21, 1965, is doubly puzzling in view of the fact that Malcolm X's home had been bombed the previous week.

have fitted the aforementioned COINTELPRO techniques to a T. As former Assistant to the Director William C. Sullivan testified before the Church Committee, "[N]o holds were barred. . ." 11/1/75, pp. 97-98. That these techniques created serious risks of physical harm to their targets is fully documented in the Church Committee Report which concluded that "[W]hen the willingness to use techniques which were concededly dangerous or harmful to the targets is combined with the range of purposes and criteria by which these targets were chosen, the result is neither 'within bounds' nor 'justified' in a free society." Church Committee Report, at p. 9, Testimony James B. Adams, 11/19/75, Vol. 6, Hearings, pp. 73, 75. At the very least, defendants were entitled to the testimony of Detective Roberts to buttress this claim and to lead to further witnesses to sustain it.

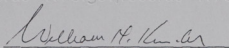
15. Interestingly enough, the FBI was involved in the investigation of the Malcolm X killing, despite the fact that it was a case ostensibly not within that agency's jurisdiction. At the trial, Special Agent JOHN C. Sullivan testified that he had been contacted by another agent shortly after the assassination and that, following that conversation, he and another agent named Joseph T. Quigley had gone to a Brooklyn address where they had been shown one of the murder weapons by a Ronald Timberlake, one of the People's other witnesses. People's Exhibit 12, a .45 cal. revolver, was taken by Agent Sullivan. That evening, after Sullivan had telephoned the New York City Police Department, he was visited an inspector, a deputy inspector and a detective and, after a conversation, had

turned the weapon over to the detective in question. Sullivan had returned to Timberlake's home the next evening and had a further conversation with him which was terminated when New York City police officers arrived. Moreover, the FBI had received some thirty photographs from the Police Department of "people who were in the area when Malcolm was killed." TT. 1773-93.

16. The hiding of the identity of a key witness to a murder is such a denial of due process of law that it is difficult to think of a more heinous one. Fundamental justice would require the granting of a new trial on this ground alone. It is obvious that the defense never knew of the existence of this witness, other than by the designation of "Brother Jean," and that he would have been called if his identity had been made known to it. Even if the People did not know the identity, it can hardly be questioned that the Police Department certainly did and that it had the responsibility and obligation to make it known, particularly when the defense constantly inquired about it. See eg. TT. 1727.


17. For all of the above reasons, as well as those set forth in previously filed and served affidavits, defendants are entitled to the vacation of their judgments of conviction and the dismissal of the indictment as to them or, in the alternative, to a new trial, or, in the further alternative, to an evidentiary hearing to prove the allegations set forth in this and the other affidavits heretofore served and filed herein.

WHEREFORE, it is respectfully requested that this Court grant all or some of the relief prayed for herein as well as such other and further relief as may seem just and proper in the premises.


WILLIAM M. KUNSTLER

Sworn to before me this

19th day of December, 1977


NOTARY PUBLIC

JOAN L. WASHINGTON
Notary Public, State of New York
No. 31-4508439
Qualified in New York County
Commission Expires March 30, 1979

L11

Roberts - People - cross

Q The security section?

A Yes.

Q And what was your particular assignment?

A I can't remember, offhand.

Q To protect the speakers or anything like that?

A I can't recall.

Q Who were the speakers?

A Ozzie Davis was one of the speakers. I can't remember any of the others.

Q And it was the job of the security section to be security at that meeting?

A Yes.

Q That was a memorial for Malcolm X?

A Yes.

Q And Malcolm X is a very important figure in relation to the Black Panther Party, is he not?

A Yes.

Q All of these defendants, you've heard talk of Malcolm X, haven't you?

A Yes.

Q Now, after -- now, you've attended lots of rallies and meetings while you were in the Black Panther Party concerning Malcolm X?

Exhibit A

Roberts - People - cross

A I've attended lots of rallies, yes, not all concerning Malcolm.

Q But there have been many concerning Malcolm?

A Yes.

Q Were you ever asked to speak at one of those memorials for Malcolm?

A Yes.

Q And you didn't, did you?

A I didn't hear you.

Q You didn't speak?

A The one I was asked to speak at was back at -- back at 2026 Seventh Avenue. There I did speak.

Q You did speak at one, but you didn't speak at another, is that your testimony?

A I didn't speak at the one at Cooper Junior High School.

Q Oh, you were asked to speak that day?

A Yes. I didn't speak at that one, mainly because I don't like talking in front of large groups. Arriving back at 2026 Seventh Avenue I was asked by Afeni Shakur to give a brief speech on Malcolm. Over there they had a PA system set up, but then the office, they were playing a lot of Malcolm's speeches, recorded speeches, and I gave about a five-minute talk on what happened at the -- what

L13

5725a

Roberts - People - cross
happened there at the assassination of Malcolm.

(Continued on the next page.)

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Roberts - People - Cross

BY MR. LEFCOURT:

Q You were there, weren't you?

A At the assassination of Malcolm X?

Q Yes.

A Yes, I was.

Q Did you help do it?

A No, I did not.

Q You were his bodyguard that night, weren't you?

A ~~MEN~~ That afternoon, yes, I was.

Q And there were no other police around but you were there?

A I really don't know.

Q You didn't see any, did you?

A No.

Q Isn't it a fact that you helped murder Malcolm

X?

A No, it isn't. But would you like to know the truth about the assassination?

A. SHAKUR: Yes.

Q We all would like to know the truth about the assassination.

THE COURT: Counselor, you behave yourself.

MR. PHILLIPS: I think the admonition -- may the witness answer the question?

Roberts - People - Cross

THE COURT: Does the counsel wish the question to be answered?

A. SHAKUR: Yes.

MR. PHILLIPS: Yes; he said so.

BY MR. LEFCOURT:

Q You are going to tell us the truth about what happened to ~~ME~~ Malcolm X?

A Yes.

Q And this is the truth that you observed?

A Yes.

Q Did you testify at the trial of ~~EMEE~~ three people who were charged with the assassination?

A No.

Q But you saw it happen?

A Yes.

Q But you didn't testify?

A No.

Q Didn't you want the truth to come out there?

A Yes.

Q Why didn't you testify?

A I wasn't called.

Q But you knew what happened?

A Yes.

Q And you didn't testify?

Roberts - People - Cross

A No.

Q Isn't it a fact that during that trial two Muslims were put on trial; do you recall that?

A Yes.

MR. PHILLIPS: Your Honor, there were three defendants in that case. Mr. Lefcourt again has everything confused.

MR. LEFCOURT: I don't have --

THE COURT: All right. Proceed.

Q And the third one was not a Muslim, was he?

A I don't know whether he was or not. It was stated that he had been in the Newark mosque. I didn't know whether he was or wasn't.

Q Now, you discussed this whole testimony with Mr. Phillips about Malcolm X, haven't you?

A Yes.

Q And Mr. Phillips told you that there is a time that Mr. Lefcourt is going to ask you about Malcolm X or that somebody is going to ask you about him; isn't that right?

A Yes.

Q And you are prepared to give us an answer, aren't you?

A Yes.

NYC.gov/records Roberts - People - Cross

Q And he is not objecting, he is?

A No.

Q Does it have anything to do with your undercover work in the Black Panther Party?

A No.

Q But you ~~was~~ prepared this point, didn't you?

A The question was asked and I gave what I thought was a suitable answer.

Q And ~~HEMM~~ didn't Mr. Phillips say, "Tell that in court"?

A No.

Q Did you discuss your testimony about this subject in court?

A About what subject?

Q About the assassination of Malcolm X.

A I don't quite understand the question.

Q Well, with Mr. Phillips, didn't you plan what your testimony was going to be concerning this matter?

A No.

Q But you told him what it was going to be if you were asked?

A I only told him what really happened there.

Q Okay. What happened?

A When the meeting started, one of his lieutenants,

Roberts - People - Cross

Benjamin Goodman, was the first one to speak.

At the end of Benjamin Goodman's speech, the rostrum security was relieved. I had been on the first rostrum security. So I proceeded to the back where we met the security captain who told us to just sit around and in a half hour we would be on post again.

At that time there was another group that was on security. After Goodman finished his speech, he introduced Malcolm X.

Malcolm approached the platform and gave the Muslim greeting, at which time two individuals near the front of the auditorium jumped up, one hollering, "Get your hand out of my pocket," at which time there was a small commotion.

I started down the aisle where the commotion was, and the next thing I knew chairs were being overturned, shots were being fired.

Two individuals were running past the front stage, firing at Malcolm and then proceeding down the middle aisle of the ballroom.

As I turned, I saw Malcolm grasp his chest. I didn't see him fall. And I followed down one aisle, and by the time I got to the back of the auditorium the two individuals that was in the middle aisle, we arrived at

Roberts - People - Cross

the same time.

One went by and at that particular time I grabbed a chair. The individual who was subsequently caught, ~~XXXXX~~ named Hayer, he looked in my direction and pointed his-- what looked like a .45, at which time I made a side step, and as I stepped to the side he fired, the bullet missing but hitting my -- hitting my jacket.

I then threw the chair, knocking him down. After a couple of seconds elapsed, I turend around, I saw the same individual that I knocked down with the chair getting to his feet and hobbling out the front, at which time another member of Malcolm's security group came down the far aisle and took a shot at the same individual.

I then turned, proceeded out the front door. I saw a large group of people and they had an individual, kicking and stomping him.

I came back into the ballroom, went to the stage where I proceeded to give Malxcolm mouth to mouth resuscitation.

What appeared to be twenty minutes later that the police finally got there and took him over to Medical MEM Center.

Q Now, you were in Malcolm's organization at the time, were you not?

Roberts - People - Cross

A Yes.

Q And were you a police officer then?

A Yes.

Q Patrolman or a detective?

A Patrolman.

Q That was in 1965?

A Yes.

Q February 21st?

A Yes.

Q And you had been been at various meetings that Malcolm spoke at, had you not?

A Yes.

Q At the ~~MUSEUM~~ Audubon Ballroom where that happened?

A Yes.

Q And every time prior to that night that he spoke it was always large contingents of uniformed police there, were there not?

A Yes.

Q But that night there was none, right?

A This afternoon there was only a few on the outside.

Q There was no uniformed police in five hundreds like there usually was when he spoke?

THE COURT: Counselor, at this time we will

Roberts - People - Cross
recess for lunch, and I suggest--

MR. CRAIN: Your Honor, can the witness ~~him~~
please answer the question mbefore we recess?

THE COURT: Mr. Crain, will you please be
seated.

I suggest to counsel that when we resume we
do not try the Malcolm X case. This is a case in
which these defendants are on trial. I have permitted
this deviation only because you asked the witness
whether he killed Malcolm X.

MR. LEFCOURT: I think it should be only be-
cause the witness and Mr. Phillips had agreed--

THE COURT: Your sarcasm again, Mr. Lefcourt,
will --

We will declare a luncheon recess.

The jury is cautioned not to discuss the case
among yourselves or with anyone else. You are to
continue to maintain an open mind as to the guilt
or innocence of the accused.

Should anyone approach you to discuss this
case, please avoid conversation. If he persists,
report the incident to the Court.

You are in no way to discuss this case outside
of court. You are to refrain from all discussion

Roberts - People - Cross

of the case during the time you serve as jurors.

You are to continue to avoid reading newspaper accounts. You are to continue to avoid listening to radio reports or viewing reports on television.

We will resume at two-fifteen.

[Whereupon, the jurors and the alternate jurors leave the courtroom, and the following proceedings take place:]

THE COURT: All right. The Court is in recess.

[Whereupon, there was a luncheon recess as declared by the Court]

[Continued on next page]

TRIAL CONTINUED

(All the defendants, their counsel and the assistant district attorneys were present in the courtroom.)

THE COURT: All right, have the jury out.

(Whereupon the members of the jury enter the courtroom and take their respective seats in the jury box.)

THE COURT: All right, we may resume.

MR. LEFCOURT: May I apologize to those jurors who sometimes only view my back because of of inadvertence in walking up front?

DETECTIVE GENE ROBERTS, previously sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION (continued)

BY MR. LEFCOURT:

Q Now Detective Roberts, did you ever testify before any grand jury or investigating body concerning the testimony you gave this morning about the assassination of Malcolm X?

THE COURT: Counselor, I thought I suggested and now I direct that we not go into the Malcolm X case. That has nothing to do with the case on trial.

MR. LEFCOURT: Your Honor, that was my last

point. That's all I just wanted to ask that question and move on to something else.

THE COURT: All right, manifestly there can be good reasons for not using a witness in a trial. Now please get on with something that's relevant to the issues before the Court.

MR. LEPCOURT: Well, your Honor, may we have just that question answered?

THE COURT: No.

Q Now that morning that you went to the Malcolm X memorial at Cooper Jr. High School, do you recall what time you woke up that morning?

A No.

Q Well, do you recall that the meeting, the memorial was about 9.30 a.m. at the school?

A Yes.

Q And after that, later on in the day, you returned to 2026, did you not?

A Yes.

Q And at that time, you saw Massadou from the National office of the Black Panther Party, did you not?

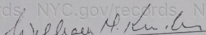
A I think he was there at that time, yes.

Q And others were there?

A Yes.

CERTIFICATE OF SERVICE

The undersigned, an attorney duly admitted to practice as such in the State of New York, hereby certifies, under the pains and penalties of perjury, that, on the 19th day of December, 1977, he served the within affidavit upon the District Attorney, New York County, by prepaid, first class United States Mail addressed thereto.


WILLIAM M. KUNSTLER

Dated: New York, N.Y.
December 19, 1977

District Attorney's Office
COUNTY OF NEW YORK

Chance & Pinckney

NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30
-----X

THE PEOPLE OF THE STATE OF NEW YORK :

-v- :

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUTLER) and KHALIL ISLAM (THOMAS 15X JOHNSON), :

Defendants. :

-----X

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

WILLIAM C. CHANCE, Jr., being duly sworn, deposes and says:

1. I was the attorney for MUHAMMAD ABDUL AZIZ (NORMAN 3X BUTLER), one of the movants herein, at his trial in 1966 on the within indictment.

2. As such, I am convinced that there would have been a different result insofar as my then client was concerned had THOMAS HANGAN, one of his co-defendants thereat, furnished the names of his confederates in the assassination of Malcolm X as well as the full details of the planning and execution of the crime.

3. Moreover, I did not know the identity of the "Brother Jean" who was depicted giving mouth-to-mouth resuscitation to the said Malcolm X, nor, I am sure, did any of my co-counsel in the case, even though we had asked for such information before and during the trial.

4. Furthermore, now that I know that "Brother Jean" was an undercover member of the New York City Police Department named Gene Roberts and that he was an eyewitness to the assassination, I feel that his testimony on my defendant's behalf would have buttressed his case by (1) contradicting many of the People's witnesses; (2) exonerating my defendant; and (c) furnishing significant evidence that

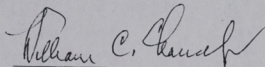
Ind. No. 871/65

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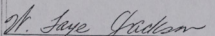
the New York City Police Department and/or other law enforcement agencies were deeply involved in the said assassination.

5. I am firmly convinced that the identity of this police officer was deliberately kept from the defense in order to prevent it from producing highly relevant and material evidence that would, in my opinion, have probably changed the verdict against my client to a more favorable one.

6. I believe that, given the existing state of the law, defendants herein are clearly entitled to a new trial for all of the grounds set forth above.


WILLIAM C. CHANCE, Jr.

Sworn to before me this
31st day of December, 1977


NOTARY PUBLIC

W. FAYE JACKSON
NOTARY PUBLIC, STATE OF NEW YORK
NO. 199360
QUALIFIED IN BRONX COUNTY
COMMISSION EXPIRES MARCH 30, 1979

79

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30
-----x

THE PEOPLE OF THE STATE OF NEW YORK :

-v-

: Ind. No. 871/65

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUT-
LER) and KHALIL ISLAM (THOMAS 15X
JOHNSON), :

Defendants. :

-----x
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOSEPH P. PINCKNEY, being duly sworn, deposes and says:

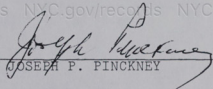
1. I was one of the attorneys for KHALIL ISLAM (THOMAS 15X JOHNSON) at his trial on the within indictment. Charles Beavers, my co-counsel, died some seven or so years ago.

2. I have been informed by WILLIAM M. KUNSTLER, my ex-client's present attorney, that THOMAS HAGAN, one of his co-defendants at the trial, is now prepared to reveal the names of his confederates in the assassination of Malcolm X and furnish the full details of the planning and execution of the crime. I feel that, if Mr. Hagan had been prepared to do this during the trial, it would probably have resulted in a more favorable verdict insofar as Mr. Johnson was concerned.

3. Mr. Kunstler has also informed me that the identity of "Brother Jean," a security guard who gave mouth-to-mouth resuscitation to Malcolm X after the latter was shot, is now known and that he was, in fact, one Gene Roberts, an undercover police officer of the City of New York. I am convinced that, had defense counsel

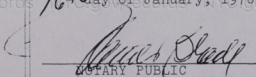
known this man's identity before or during the trial, he might well have been called as a witness for one or more defendants. Among other things, he might have exonerated my client as well as explained the strange absence of police security at the Audubon Ballroom meeting of February 21, 1965. The withholding of his name, clearly known to the authorities, deprived all defendants of an eyewitness who might have been immeasurably helpful to them at the trial.

4 It is my professional belief that, given the present willingness of Mr. Hagan to testify fully about his role and that of his confederates in the assassination of Malcolm X, and the now known identity of "Brother Jean," these defendants are clearly entitled to a new trial under New York law.


JOSEPH P. PINCKNEY

Sworn to before me this

16 day of January, 1978


NOTARY PUBLIC

JAMES BRAUDE
Notary Public, State of New York
No. 31-0381600
Qualified in New York County
Term Expires March 30, 1979

District Attorney's Office
COUNTY OF NEW YORK

*Movants original reference
to Reuben Francis*

william m. kunstler
attorney at law
853 broadway
new york, new york 10003



150TH ANNIVERSARY
ON-CAMPUSTRAINING
ARMY ROTC



ADA Allan Alpert
Appeals Bureau
District Attorney
155 Leonard Street
New York, N.Y. 10013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30

----- -x
THE PEOPLE OF THE STATE OF NEW YORK :

-v- :

Ind. No. 871/65

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUTLER) :
and KHALIL ISLAM (THOMAS 15X JOHNSON), :

Defendants. :
----- -x

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

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

1. I am the attorney for defendants herein and I am submitting this supplemental affidavit in support of their motion for new trials pursuant to §440.10, Criminal Procedure Law.

2. On December 19, 1977, I served and filed an affidavit supplemental to others previously served and filed by me in this matter. In ¶15 of said affidavit, I supplied information as to the involvement of the Federal Bureau of Investigation in the investigation of the assassination of Malcolm X. Since that time, other information has come to light which, in my opinion, requires the drafting of another supplemental affidavit in this case.

3. During the trial of the within indictment, both from eyewitness testimony and ballistics evidence, it was clear that a Luger had been used in the slaying of Malcolm X. As pointed out in my affidavit of December 8, 1977, this gun was picked up by Charles H. Blackwell, wrapped in a jacket, and, according to his Grand Jury testimony, then turned over to a "Brother Jean." TT. 1663. "Brother Jean" was later identified, long after the trial, as Gene Roberts, a New York Police Department undercover agent. At the trial,

however, Blackwell said that his Grand Jury testimony was wrong and that he had handed the Luger to one Rueben Francis. TT. 1743-44.

4. Despite this fact and the additional one that Rueben Francis had shot and wounded Hagan while the latter was attempting to escape from the Audubon Ballroom after the shooting, he was never called as a witness at the trial. Francis was arrested on the day of the assassination and indicted on March 10, 1965, for assaulting Hagan and related charges. He was freed on bail two days later, bond having been set at \$10,000.00. When he didn't appear in court on May 25, 1965, an order of forfeiture was entered three days later.

5. On or about February 2, 1966, while the trial of this indictment was in progress, Francis voluntarily surrendered himself to the Federal Bureau of Investigation. It might be pointed out that at the time of Francis' surrender, the People were still presenting their case, yet he was not called to testify. On information and belief, no notice was given to the defense that Francis was now available.

6. It should be kept in mind that one witness who was called by the People, namely Ronald Timberlake, was permitted to testify in a closed courtroom from which all spectators and the news media were excluded. TT. 1289. It was Timberlake who ^{had} removed the .45 caliber pistol attributed to Hagan from the Audubon Ballroom, taken it to his home, "broke the gun down, inspected the chamber . . . took the bullets out of the clip." TT. 1318. He had then called not the New York City Police Department, but the FBI. TT. 1323. When the agents arrived at his home, he gave them the weapon and "[T]hey marked it, tagged it and slipped it in a bag." TT. 1325.

7. All of the above information is contained in either the trial transcript or in the file of People v. Frances, Ind. No. 873/65, New York County.

WHEREFORE, defendants repeat their prayers as set forth in the Notice of Motion and papers submitted subsequent thereto.

181
WILLIAM M. KUNSTLER

Sworn to before me this
19th day of January, 1978

181
NOTARY PUBLIC

MARGARET L. RATNER
NOTARY PUBLIC
OF NEW YORK
JAN 19 1978
COMM. EX. 1000