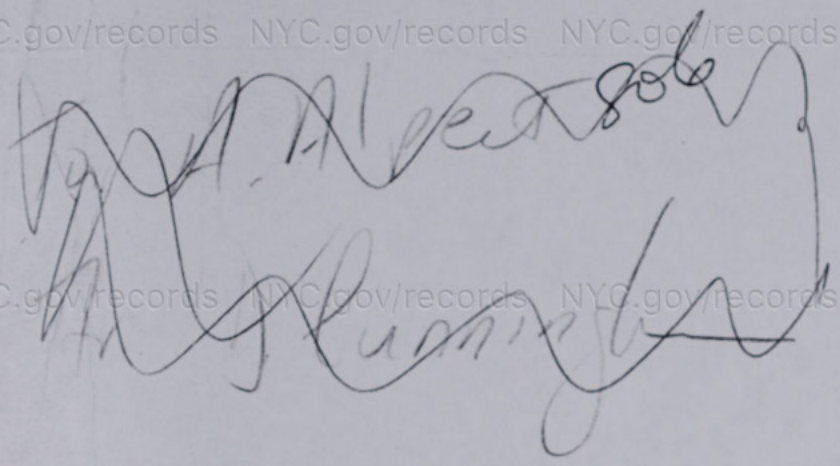

Δ - AZIZ & ISLAM
(BUTLER & JOHNSON)

Draft - Long Papers

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SUPREME COURT : NEW YORK COUNTY

GENERAL TRIAL TERM: PART 35

THE PEOPLE OF THE STATE OF NEW YORK

-against- Indictment No. 0871/65

MUHAMMED ABDUL AMIM (NORMAN 3X BUTLER)
and
KHALIL ISLAM (THOMAS 15X JOHNSON),

Defendants.

APPEARANCES

For the People: Robert Morgenthau, Esq.
District Attorney, New York County
By Allen Alpert, Esq., of counsel

For the defendants: William Kuntsler, Esq.
New York, N. Y.

ROTHWAX, J.:

On Sunday, February 21, 1965, at the Audobon Ballroom in Manhattan, Malcolm X, leader of the Organization of Afro-American Unity and Muslem Mosque, Inc., was gunned down as he addressed a meeting of his followers. An extensive police investigation ensued, with the cooperation of the FBI. One Thomas Hagan was wounded in the altercation and was arrested by police outside the Audobon Ballroom. Subsequently, on March 10, 1965, Hagan and the petitioners here were indicted for the murder of Malcolm X. They were tried before a jury and convicted on March 11, 1966. The convictions were upheld on appeal, first by the Appellate Division First Department (29 AD2d 931) and finally

by the State Court of Appeals (24 NY2d 395). The United States Supreme Court denied certiorari sub. nom.(Hayer v New York, 396 US 886).

The petitioners, presently serving their sentence, now move to vacate the judgments of conviction on the basis of exculpatory evidence newly discovered and for reasons of prosecutorial misconduct (CPL 440.10 [1] [f] [g]). In the alternative, petitioners request a hearing to determine whether, in fact, their convictions should be set aside and a new trial ordered.

This court has had these motions under consideration since February 1978. During that period, petitioners have submitted numerous documents, including affidavits and FBI memoranda pertaining to the investigation and prosecution of this case. The question to be resolved by the court at this time is whether these exhibits create a probability that the original verdict in this case would have been otherwise had the jury considered any evidence therein contained, or whether the documents disclose prosecutorial misconduct which may have deprived petitioners of a fair trial (People v Crimmins, 38 NY2d 407).

Two affidavits are in issue. The first, an original and a supplementary affidavit, is that of Thomas Hagan. Mr. Hagan affirms that it was he and four others, not the petitioners here, who murdered Malcolm X in February 1965. The information contained in Mr. Hagan's affidavit is a recapitulation, although somewhat more specific, of his testimony at the original trial. Petitioners argue that by virtue of the specifics which affiant Hagan now relates, his testimony would be much more credible in

its present form so as to affect the outcome of a second trial. The court notes that the information Mr. Hagan now proffers is uncorroborated by the testimony of any other witness either at present or at the time of the original trial. The court also finds that it is unlikely that the persons whom affiant Hagan names would corroborate his allegations of their own accord. The petitioners suggest that the district attorney be directed by this court to conduct an investigation in corroboration of affiant Hagan's allegations, including lineups, fingerprint comparisons and other techniques. The court must question the reliability of any identification which comes thirteen years after the events in question to inculpate persons who apparently were never the object of suspicion despite the thorough efforts of local, state and federal law enforcement officials. The rights of those at whom affiant Hagan points the finger of suspicion must also be considered. The facts adduced by petitioners do not rise to the level of probable cause to believe that those named were in any way connected with this crime. Accordingly, this court cannot order the district attorney to interrogate these persons, nor subject them to court ordered identification procedures. The district attorney has an obligation to the fair administration of public justice independent of the authority of this court. His is the prosecutorial discretion. The court notes that the prosecutor has been forthcoming with government documents and has in no way obstructed the reevaluation of this case. Were there reliable evidence which tended to support the conclusions that petitioners suggest, this court is confident that the district attorney would undertake to

ensure that no miscarriage of justice had occurred. However, the burden on a motion to vacate judgment is the petitioners'.

The second affidavit upon which petitioners rely is that of Benjamin Goodman. Mr. Goodman was present in the Audobon Ballroom when the murderous acts occurred. He now affirms that from his vantage on the dais he would have necessarily seen the petitioners whom he knew, and that he can therefore testify that petitioners were not present at the time of the crime. Mr. Goodman's affidavit contradicts his verbatim testimony before the grand jury that indicted the petitioners. Mr. Goodman testified before the grand jury that he did not know and could not say whether or not the petitioners were present in the Audobon Ballroom at the time in question. Mr. Goodman's offer of proof is consequently subject to impeachment from his own contemporaneous testimony. There is no likelihood that his present testimony would affect the original verdict upon a new trial (People v Crimmins, supra at 417).

These affidavits, complete on their face, conclusively demonstrate that the offer of proof they contain is neither new nor so reliable as to create a probability of a more favorable verdict. Accordingly no hearing is required (People v Crimmins, supra at 417).

The coram nobis portion of petitioners' motion relates that one Gene Roberts, who was listed among those witnesses available to the defense at trial, was, unknown to the defense, an undercover officer. Mr. Roberts' status was revealed in 1971

when he testified in an unrelated case. Petitioners argue that the jury would in all probability have given more credence to the claim of law enforcement involvement and less credence to the prosecution's case had the presence of an undercover officer at the crime scene been disclosed. The court notes that there is no evidence which in any way connects Mr. Roberts or the police or the FBI generally to the murder of Malcolm X. Mr. Roberts' status as an undercover officer has no direct relation to the issue of guilt or innocence. See, People v Goggins, 34 NY2d 163, 170. Nor is there any indication that the prosecution purposefully deceived the defense counsel as to the presence of undercover police officers at the time of the murder.

The probability of a different verdict upon a new trial must necessarily depend, in part, upon the nature and strength of the evidence of guilt at the original proceeding. The Appellate Division characterized the proof of petitioners' guilt, based upon numerous eyewitness identifications, as "overwhelming." (29 AD2d at 931.) The court's review of the submitted documents corroborates the existence of numerous witnesses who identified Mr. Hagan and the petitioners as the murderers.

Other points raised by the petitioners have been considered; including the disappearance and return, before trial, of Ruben Frances and the disappearance of the Luger pistol; the existence of other suspects during the investigation; and the questionable actions of the FBI toward the Organization of Afro-American Unity disclosed in the submitted documents. None of these factors, however, has a direct bearing on the issue of

petitioners' guilt or innocence or on the quality of the prosecutor's case in the original trial.

Despite the best efforts of courts, prosecutors, and the most able defense counsel, the spectre of justice denied cannot ever be laid entirely to rest. No criminal case is ever proved beyond all doubt. We may approximate, but may never duplicate, the ideal of perfect justice.

Nonetheless, this court being mindful of the responsibility which the discretionary nature of these motions places upon it, is convinced to a high degree of certainty that the facts which petitioners present do not suggest a miscarriage of justice in their case.

The motion to vacate judgment or alternatively for a hearing on these motions is accordingly denied.

Dated: November 1, 1978

_____

J.

ORIGINAL

JUDGE GRIESA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Petitioners,

-against-

SUPERINTENDENT OF OSSINING AND CLINTON CORRECTIONAL FACILITIES,

Respondents.

---

80 CIV. 1946

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE DISTRICT JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of MUHAMMAD ABDUL AZIZ and KHALIL ISLAM, pursuant to 28 U.S.C. §2241 and 2254, alleges as follows:

1. Petitioners are two Black men who are presently illegally, unlawfully and unconstitutionally incarcerated in the following New York State penitentiaries, namely, Ossining Correctional Facility, Ossining, New York (AZIZ) and Clinton Correctional Facility, Dannemora, New York (ISLAM).

2. The alleged reason for their said incarceration is their conviction by a jury on March 11, 1966, for the assassination of Alhaji Malik Shabazz (Malcolm X), in the Main Ballroom of the Audubon Ballroom, New York, New York, at approximately 3:00 p.m. on February 21st, 1965, and the resultant sentences of life imprisonment imposed upon them by the trial judge on April 14, 1966.

c. Subsequently, two other men, petitioners herein, were arrested at their homes, on the following dates:

February 26, 1965 - AZIZ
March 3, 1965 - ISLAM

d. On or about March 10, 1965, petitioners and the said Mujahid Abdul Halim (Halim) were indicted by a New York County Grand Jury for the murder of Malcolm X. (A. 95, 99).

e. On February 28th and March 1st, 1966, Halim, after having previously testified in his own behalf during the joint trial of the three said defendants and denied his own guilt, was recalled as a witness for AZIZ and now admitted that he had participated with four accomplices in said murder but insisted that neither petitioner had been involved therein. (A. 12).

f. However, he refused, on cross-examination by the prosecution, to name or describe his said accomplices or give anything but the sketchiest of details about the crime. (A. 12).

g. In the fall of 1977, Halim decided to furnish more details about the assassination and did so in an affidavit given to petitioners' counsel, which said affidavit did not contain the names of his accomplices. (A. 5-7).

h. On February 25, 1978, Halim amplified his earlier affidavit, now giving the names of his accomplices as follows:

(1) Ben or Benjamin Thomas or Thompson, residing on Hamilton Avenue, Paterson, New Jersey, and a member of Mosque #25, Newark, New Jersey(A. 74).

(2) Leon Davis, residing on Hamilton Avenue, Paterson, New Jersey, across the street from Ben, and a member of Mosque #25, Newark, New Jersey. Id.

(3) William X, residing on South Orange Avenue, Newark, New Jersey, directly across the street from the aforesaid Mosque. Id.

(4) Wilbur or Kinley, residing in Newark, New Jersey (A. 74-75).

i. Halim was the first approached in the summer of 1964 by Ben and Leon with reference to the assassination of Malcolm X. He was soon joined by William X and Wilbur. (A. 73-74).

j. Thereafter, a number of meetings about the project were held, either in automobiles or at the homes of Ben or Leon. (A. 75).

k. On one occasion, the five men drove to the home of Malcolm X in East Elmhurst, Queens, New York, but found it too heavily guarded to carry out the project. (A. 75).

l. They eventually decided that the assassination would take place at the Audubon Ballroom and, during the winter of 1964-65, attended a speech there given by Malcolm X and discovered that nobody was being searched at the door. Id.

m. Driving back from the Ballroom in Ben's car that day, they discussed the fact that, given the number of people who would be attending one of Malcolm's speeches at that location, they would have a good chance to escape after the assassination. Id.

n. They visited the Ballroom again on the evening of February 20, 1965, attending a dance being given there, and looked the place over. (A. 76).

o. On the way back to New Jersey that evening in Ben's car, they decided to commit the crime the next day and to meet at Ben's house the next morning to formalize their plans. Id.

p. The next morning, they decided to get to the Ballroom early and that Leon and Halim would sit in the front left side of the Main Ballroom, facing the stage, with William and Ben directly behind them. Wilbur/Kinley was to sit in the rear of the room and acuse someone of picking his pocket and throw a smoke bomb when Malcolm began to speak. Id. (See also A. 105-106).

q. All of the weapons possessed by the assassins were purchased by Halim who also made the smoke bomb. (A. 77).

r. Halim had a .45 caliber automatic pistol, Leon a 9 mm. Luger pistol and William a 12-gauge shotgun. As soon as Wilbur created the disturbance referred to in ¶p above, the three men with the weapons were to rush to the podium, fire at Malcolm X, and then run to the exit. (A. 76).

s. On the day of the crime, the five assassins drove to New York in Wilbur's car, a blue, approximately 1962 Cadillac, and parked a few blocks from the Ballroom, facing in the direction of the George Washington Bridge. (A. 77).

t. They then committed the crime as set forth in ¶r above. (A. 116-119, 120 and 123).

6. On March 27, 1979, Halim furnished counsel for petitioners with much more complete descriptions of his confederates.

These are as follows:

a. Benjamin Thomas

Secretary or Assistant Secretary of the Newark Mosque; 30 years old; 5'8" or 5'9" tall; 170 pounds; wore glasses with black frames; thin with brown complexion; close-cut hair; well-spoken; married with four or more children; lived in a second-floor 4-5 room apartment in a wooden building on Hamilton Avenue, Paterson, New Jersey; worked in an envelope manufacturing company in Hackensack, New Jersey as a cutter; attended public schools in Paterson, New Jersey, and possibly Tuskegee Institute in Tuskegee, Alabama; played basketball; member of the Fruit of Islam (FOI); may have driven a black Chrysler.

b. Leon Davis

20-21 years old; 5'9" tall; 175 pounds; dark brown complexion; no glasses; well-spoken; close-cropped hair; used to reside on lower Market Street, Paterson, New Jersey; married and lived on second floor of same kind of an apartment house as Benjamin Thomas on Hamilton Avenue, Paterson, New Jersey, diagonally across the street from him; attended public schools in Paterson, New Jersey; worked in an electronics plant in that city; member FOI.

c. William X

27 years old; stocky build; 5'10" or 5'11" tall; dark brown complexion; close-cropped hair; lived in Newark, New Jersey; member Newark Mosque and FOI; known as a stick-up man. (This man,

whose last name is Bradley, is, upon information and belief, presently incarcerated in the Essex County Jail, Caldwell, New Jersey, and will not discuss the matter with a representative of petitioners.)

d. Wilbur Kinley

Over 30 years old; 5'9" tall, on the thin side; brown complexion; close-cropped hair; thick moustache; married; had own construction business and did work around the Newark Mosque; member FOI; lived in Newark; owned a light blue Cadillac; long-time member of the Newark Black community.

7. Halim's version of what happened on February 21, 1965, at the Audubon Ballroom and who was involved in the events of that day concerning the killing of Malcolm X is amply buttressed by reports of the Federal Bureau of Investigation (FBI) concerning the assassination. In this respect, the Court's attention is respectfully called to A. 98, 108, 109, 110, 112, 116, 118, 123, 126, 127, 132, 136, 138 and 139. */ For example, compare the description of the man who wielded the shotgun in the FBI report at A. 126, namely, "a tall dark-skinned Negro . . . a member of the Newark Temple," with that given by Halim, who had never read such reports, in ¶6c, supra. There is also attached hereto, as Appendix C, a page of an FBI report dated March 12, 1965, which refers to "a member of the NOA from Paterson, New Jersey . . . sitting in the last seat on the rightside, facing the stage and is believed . . . to be one of the assassins. ¶3.

---

*/ One FBI report refers to a statement by a Life Magazine reporter who was overhead saying that "the killers of Malcolm X were possibly imported to NYC." (A. 112).

8. In addition to petitioners' alibis (each was at home with his family on February 21, 1965, a Sunday), there is disinterested evidence that neither was present at the Audubon Ballroom at the time of the murder. See, e.g., Affidavits of Benjamin Karim (Goodman) who introduced Malcolm X that day (A. 153-159), and that of attorney William M. Kunstler (A. 160-164).

9. Despite the voluminous documentation submitted by petitioners in their efforts to obtain a new trial, their motion was denied. (A. 169-174). In addition, they were denied leave to appeal to any of the New York appellate courts on December 19, 1978 (Appendix D, A. 176), thus exhausting all available state remedies.

10. Halim and Benjamin Karim are prepared, if subpoenaed, to testify at an evidentiary hearing herein, and William X. Bradley is easily locatable in Caldwell, New Jersey. Moreover, the rather full descriptions now furnished by Halim make it highly probable that the other three accomplices can easily be found.

11. Petitioners do not know of any comparable case in American jurisprudential history when one accomplice in a murder has not only furnished the names and descriptions of his confederates, but has fully described the planning and execution of the crime, without a thorough investigation by the prosecution ensuing thereby.*/ It would be an unforgiveable and unconscionable travesty of justice if, given the amount of information now available, no efforts were undertaken to ascertain the accuracy thereof while

*/ On November 8, 1979, six Philadelphia homicide detectives began serving federal prison terms for violating the civil rights of witnesses and subjects in a 1975 fatal firebombing case in that city. Prior to their conviction, it was discovered that a person other than the defendant had confessed committing the crime but that his statement had been disregarded. New York Times, 11/11/79, p. 52, col. 1

two innocent men rot in jail, now into the fifteenth year of their incarceration. Although the contents of Halim's second affidavit, which was sealed at petitioner's request, were divulged to the prosecution with a request that it investigate the allegations contained therein (A. 166-168), it refused to conduct any investigation thereof other than to check its own files, a position unfortunately sustained by the court considering the motion to vacate petitioner's sentences. (A. 171).

12. Since petitioners, having been incarcerated for almost fifteen (15) years, possess no tangible property and are indigent, they pray that they be granted in forma pauperis status.

13. No previous application for the relief sought herein, other than as indicated above, has been made to this or any other Court.

WHEREFORE, petitioners respectfully pray that this Honorable Court issue its Writ of Habeas Corpus discharging them from custody or, in the alternative, grant them an evidentiary hearing to prove the allegations of their petition.

Respectfully submitted,

Muhammad A. Aziz

MUHAMMAD ABDUL AZIZ

Sworn to before me this
30 day of Oct., 1979.

NOTARY PUBLIC

KHALIL ISLAM

Sworn to before me this
___ day of _____, 1979.

NOTARY PUBLIC

RALPH LIVELI
Notary Public of Dutchess County
Certificate filed in Westchester County
Notary Regulation No. 2381740
Commission Expires 3/30/80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUTLER) and KHALIL ISLAM (THOMAS 15X JOHNSON), Petitioners, -against- SUPERINTENDENT OF OSSINING AND CLINTON CORRECTIONAL FACILITIES, Respondents.	80 Civ. 1346 PETITION FOR WRIT OF HABEAS CORPUS Judge Gries

TO: THE HONORABLE DISTRICT JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of MUHAMMAD ABDUL AZIZ and KHALIL ISLAM, pursuant to 28 U.S.C. §2241 and 2254, alleges as follows:

1. Petitioners are two Black men who are presently illegally, unlawfully and unconstitutionally incarcerated in the following New York State penitentiaries, namely, Ossining Correctional Facility, Ossining, New York (AZIZ) and Clinton Correctional Facility, Dannemora, New York (ISLAM).

illegal incarceration

2. The alleged reason for their said incarceration is their conviction by a jury on March 11, 1966, for the assassination of Alhaji Malik Shabazz (Malcolm X), in the Main Ballroom of the Audubon Ballroom, New York, New York, at approximately 3:00 p.m. on February 21st, 1965, and the resultant sentences of life imprisonment imposed upon them by the trial judge on April 14, 1966.

3. Neither the courts of the State of New York nor those of the United States have exclusive jurisdiction over petitioners.

4. For the convenience of the Court, there are attached hereto as Appendix A copies of all papers submitted to the Supreme Court of the State of New York, County of New York, Parts 30 and 35 thereof, in support of their motion, pursuant to §440.10, Criminal Procedure Law, to set aside their judgments of conviction, and, as Appendix B, the decision of the said court on November 1, 1978, denying said motion. For easy reference, these appendices, as well as C and C, infra, have been numbered consecutively from pages 1 to 176, inclusively.

§440.10

5. The background facts upon which petitioners primarily rely are as follows:

a. At approximately 3:00 p.m. on February 21, 1965, Malcolm X was shot to death while addressing a meeting of the Organization of Afro-American Unity (OAAU), a non-sectarian group formed by him in 1964, in the Main Ballroom of the Audubon Ballroom, located at 166th Street and Broadway in the County and City of New York. (A. 11).*/

b. One man, namely Mujahid Abdul Halim (Thomas Hagan, a/k/a Talmadge Hayer), was, after being shot by followers of Malcolm X, captured outside the Audubon Ballroom shortly after the assassination had taken place. Id. (A. 91).

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*/ All references to the Appendices attached hereto and referred to in ¶4 above, will be indicated by the letter A, followed by the appropriate pagination.

c. Subsequently, two other men, petitioners herein, were arrested at their homes, on the following dates:

February 26, 1965 - AZIZ
March 3, 1965 - ISLAM

d. On or about March 10, 1965, petitioners and the said Mujahid Abdul Halim (Halim) were indicted by a New York County Grand Jury for the murder of Malcolm X. (A. 95, 99).

e. On February 28th and March 1st, 1966, Halim, after having previously testified in his own behalf during the joint trial of the three said defendants and denied his own guilt, was recalled as a witness for AZIZ and now admitted that he had participated with four accomplices in said murder but insisted that neither petitioner had been involved therein. (A. 12).

f. However, he refused, on cross-examination by the prosecution, to name or describe his said accomplices or give anything but the sketchiest of details about the crime. (A. 12).

g. In the fall of 1977, Halim decided to furnish more details about the assassination and did so in an affidavit given to petitioners' counsel, which said affidavit did not contain the names of his accomplices. (A. 5-7).

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q. All of the weapons possessed by the assassins were purchased by Halim who also made the smoke bomb. (A. 77).

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by MMI + OAAU

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8. In addition to petitioners' alibis (each was at home with his family on February 21, 1965, a Sunday), there is disinterested evidence that neither was present at the Audubon Ballroom at the time of the murder. See, e.g., Affidavits of Benjamin Karim (Goodman) who introduced Malcolm X that day (A. 153-159), and that of attorney William M. Kunstler (A. 160-164).

9. Despite the voluminous documentation submitted by petitioners in their efforts to obtain a new trial, their motion was denied. (A. 169-174). In addition, they were denied leave to appeal to any of the New York appellate courts on December 19, 1978 (Appendix D, A. 176), thus exhausting all available state remedies.

10. Halim and Benjamin Karim are prepared, if subpoenaed, to testify at an evidentiary hearing herein, and William X. Bradley is easily locatable in Caldwell, New Jersey. Moreover, the rather full descriptions now furnished by Halim make it highly probable that the other three accomplices can easily be found.

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two innocent men rot in jail, now into the fifteenth year of their incarceration. Although the contents of Halim's second affidavit, which was sealed at petitioner's request, were divulged to the prosecution with a request that it investigate the allegations contained therein (A. 166-168), it refused to conduct any investigation thereof other than to check its own files, a position unfortunately sustained by the court considering the motion to vacate petitioner's sentences. (A. 171).

12. Since petitioners, having been incarcerated for almost fifteen (15) years, possess no tangible property and are indigent, they pray that they be granted in forma pauperis status.

13. No previous application for the relief sought herein, other than as indicated above, has been made to this or any other Court.

WHEREFORE, petitioners respectfully pray that this Honorable Court issue its Writ of Habeas Corpus discharging them from custody or, in the alternative, grant them an evidentiary hearing to prove the allegations of their petition.

Respectfully submitted,

Original petition only signed by Aziz

_____
MUHAMMAD ABDUL AZIZ

Sworn to before me this
___ day of _____, 1979.

_____
NOTARY PUBLIC

_____
KHALIL ISLAM

Sworn to before me this
___ day of _____, 1979.

_____
NOTARY PUBLIC

WILLIAM M. KUNSTLER
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

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Dated: New York, N.Y.
November, 1979

Original Draft

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ (Norman 3X Butler) and KHALIL ISLAM (Thomas 15X Johnson) Petitioners, -against- SUPERINTENDENTS OF OSSINING and CLINTON CORRECTIONAL FACILITIES, Respondents.	AFFIDAVIT IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS 80 Civ. 1346 (TPG)

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

ALLEN ALPERT, being duly sworn, deposes and states that:

1. I am an Assistant District Attorney, of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, and am duly admitted to practice in this Court.

2. I am familiar with the prior papers and proceedings had in this matter, and I am submitting this affidavit, and the accompanying memorandum of law which is attached hereto

and made a part hereof, in opposition to the above-captioned petition for a writ of habeas corpus.

3. The statements in this affidavit are based upon the minutes of the petitioners' trial, and upon documents submitted to the courts of New York State regarding proceedings in those courts following petitioners' convictions.

4. In the afternoon of February 21, 1965, as he began to address an assemblage of his followers inside the Audubon Ballroom in Manhattan, Malcolm X (born Malcolm Little), a former leader of the Nation of Islam (also known as the Black Muslims) who had left that organization to form his own, was murdered by three men who rose from the audience, created a diversion to draw Malcolm's bodyguards away from him, and then shot Malcolm repeatedly with a shotgun and pistols.

5. One of the men, Thomas Hagan (now apparently known as Mujahid Abdul Halim), was wounded by one of Malcolm's bodyguards and was captured as he fled from the ballroom. The other two assassins made good their escape from the ballroom. However, on February 26, 1965 Norman 3X Butler (now known as Muhammad Abdul Aziz), and on March 3, 1965 Thomas 15X Johnson (now known as Khalil Islam), were arrested at their homes.

6. On March 10, 1965, a New York County Grand Jury charged Butler, Johnson and Hagan with Murder in the First Degree. Indictment No. 871/65.

7. Trial commenced on December 6, 1965 in the Supreme Court, New York County, before the Honorable Charles Marks and a jury. At trial, Hagan admitted that he was one of the killers, and he provided details regarding the manner in which the murder originated and was planned and excecuted. He claimed, though, that Butler and Johnson had nothing to do with the murder, and that he, Hagan, had planned and carried out the assassination with three or four men whom he refused to identify. Butler and Johnson each claimed that they were at their respective homes when Malcolm was murdered. Butler contended that he left his home early in the morning of February 21, 1965, returned by ~~mid-morning~~ early afternoon, and remained there the rest of the day. Johnson maintained that he stayed at home all day and did not leave until evening. Each presented friends and family members to support their alibis.

8. The People, however, presented eyewitness testimony to establish the guilty of Butler and Johnson.

Two witnesses, both of whom had previously known Johnson, saw him inside the ballroom on the day of the murder

shortly before the murder. VERNAL TEMPLE testified that when he arrived at the Audubon Ballroom at 11:00 a.m. on the morning of the murder, he saw Thomas 15X Johnson, a man whom he had previously seen at a Muslim Mosque in Chicago, and whom he knew as "15X," already seated inside the ballroom (Temple: 662-5, 799). CARY THOMAS testified that when he arrived at the ballroom at 2:20 p.m., he saw Johnson, whom he had seen several times in the Muslim's Manhattan Mosque, and whom he knew by the name "Thomas 15X," sitting in a rear booth facing the stage (Thomas: 229-31, 241-2).

Several witnesses, one of whom previously knew Butler, identified Butler as the person who, with Hagan, created the diversionary "pocket-picking" incident which was designed to, and did, draw Malcolm X's body guards away from him. JASPER DAVIS testified that he was sitting towards the front of the auditorium in the third seat from the aisle waiting for Malcolm's speech to begin when a man he identified as Butler sat down next to him and talked with him for a few minutes. Then another man arrived and sat in the aisle seat next to Butler. Several minutes later, as Malcolm began to speak, this other man jumped up and said to Butler, "Take your hand out of my pocket" (Davis: 1093-1100). Cary Thomas testified

that Butler, whom Thomas had seen in the Muslim's Manhattan Mosque, whom he knew by the name "Norman 3X Butler," and whom he recognized "right away," was sitting directly in front of him when, just as Malcolm began to speak, Hagan stood up and asked Butler, "Man, what are you doing with your hand in my pocket?" (Thomas: 235-8). FRED WILLIAMS testified that, two or three rows behind him, two men, one of whom he identified as Butler, got into an argument when one accused the other of trying to pick his pocket (Williams: 1513-6).

Similarly, eyewitnesses testified that as the attention of the crowd was drawn to this disturbance, Johnson fired a sawed-off shotgun at Malcolm X from the front of the auditorium near the stage. Cary Thomas testified that he heard the blast of the shotgun coming from near the stage. Thomas looked toward the stage, and saw a man facing the stage, standing just under where Malcolm had been. The man then turned and faced the audience, and Thomas saw that he was holding a sawed-off shotgun in his hand. Thomas identified this man as Thomas 15X Johnson (Thomas: 239-42). Fred Williams testified that as Malcolm tried to quell the disturbance, he heard a shotgun blast from the front near the stage, and immediately shoved his wife to the floor and protectively bent over her. When he

looked up, after hearing another shotgun blast and some pistol shots, he saw a man, whom he identified as Johnson, twelve to fourteen feet away from him and six to eight feet from the stage, facing the audience and holding a sawed-off shotgun in his hand (Williams: 1517-22).

Likewise,a number of witnesses testified that immediately after the shotgun blast, Butler and Hagan raced toward the stage firing handguns at Malcolm X. Cary Thomas testified that he saw Butler and Hagan run to the stage and shoot at the prostrate body of Malcolm X as shells ejected from the gun Butler was firing and fell to the floor (Thomas: 242-3, 249, 576-7). EDWARD DE PINA testified that Butler and Hagan repeatedly shot at Malcolm on the stage (De Pina: 814-22, 910). And CHARLES BLACKWELL testified that the same two men who had engaged in the diversionary disturbance raced toward the stage, shooting at Malcolm X. Blackwell identified these men as Butler and Hagan. Blackwell further testified that Butler was firing a German Luger and Hagan a .45 calibre automatic pistol, and that as Butler ran past Blackwell toward the stage, Butler pointed his Lugar at Blackwell (Blackwell: 1614-24).

Finally, several eyewitnesses identified Butler and Johnson as they fled from the scene of the murder. After

firing repeatedly at Malcolm, Butler, observed by De Pina and chased by Blackwell and by RONALD TIMBERLAKE who knocked him down with a "body block," turned from the stage and ran to the ballroom's rear exit (De Pina: 816-23; Blackwell: 1624-5; Timberlake: 1310-17). And, as Blackwell chased Butler, he "ran into" Johnson who turned away from Blackwell and ran into the ladies' lounge (Blackwell: 1625-8).

9. On March 10, 1966, the jury found Butler, Johnson and Hagan guilty of Murder in the First Degree.

10. On April 14, 1966, Justice Marks sentenced each of them to life imprisonment.

11. The transcripts of the trial and sentence proceedings are incorporated by reference herein and made a part of this affidavit. They will be provided to the Court immediately upon request.

12. On May 22, 1968, the Apellate Division, First Department, concluding that Butler's, Johnson's and Hagan's guilt "was overwhelmingly established", unanimously affirmed their judgments of conviction. 29 A.D. 2d 931 (1st Dept., 1968).

13. On April 16, 1969, the New York State Court of Appeals, characterizing the proof as "abundant", unanimously affirmed the judgments. 24 N.Y.2d 395 (1969).

14. On October 27, 1969, the United States Supreme Court denied certiorari. 396 U.S. 886 (1969).

15. On or about December 5, 1977, by their attorney, William M. Kunstler, Butler and Johnson moved, pursuant to New York State Criminal Procedure Law §440.10(1)(g), to vacate their judgments of conviction on the ground of "newly discovered evidence."* Their motion was predicated on the affidavit

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*CPL §440.10(1)(g) provides that:

> 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:
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> (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; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

of Thomas Hagan, dated November 30, 1977.* In his affidavit, Hagan set forth some of the details of the origin, planning and execution of the murder. He asserted that Butler and Johnson had nothing to do with the murder, and he named as his accomplices "Brothers Lee, Ben, Willie X and Willbour".

16. The People responded on or about February 9, 1978. We compared Hagan's trial testimony with his affidavit and pointed out that his affidavit was very little more than a repetition of his trial testimony. We further contended that even if Hagan's identification of his accomplices were deemed to be more than a repetition of his trial testimony, the information in his affidavit was not "of such character as to create a probability that had such evidence been recevied at the trial the verdict would have been more favorable" to Butler or Johnson. We based our argument primarily on the overwhelming evidence of Butler's and Johnson's guilt, which we set forth. Furthermore, Hagan had presented himself to the jury as a "martyr," i.e., someone who was willing to take the responsibility

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*During the course of the motion, Butler and Johnson advanced several additional grounds upon which they contended their judgments should be vacated. However, since Butler and Johnson now assert only the "Hagan" aspect in support of their instant petition, only that aspect of the motion to vacate will be recapitulated here.

so that the men whose innocence he professed would not be convicted, but who was not concerned with bringing to justice those whom he asserted had acted with him. Thus, we contended, Hagan's identification and consequent sacrifice of his brethren would not have fit the image he sought to convey to the jury, and would not have rendered his testimony any more believable than was the testimony the jury heard and rejected. The People's response, dated February 9, 1978, to the motion to vacate the judgments is attached hereto as Exhibit "A" and incorporated herein. In chronological order, it belongs after page 56 of petitioners' appendix to the instant petition.

17. On February 15, 1978, at the oral argument on the motion to vacate the judgments, the Honorable Harold Rothwax termed Hagan's affidavit "frivolous." He stated that it was not significantly different than Hagan's trial testimony, and he adjourned the matter to give Mr. Kunstler time to submit a further affidavit from Hagan.

18. On February 25, 1978, Hagan prepared a supplemental affidavit. He again set forth the manner in which he said the murder was planned and carried out, and he provided a few additional details. He also gave the last names of "Ben"

and "Lee," and the streets on which they and "William X" were living in 1965.

19. In April, 1978, the People responded to Hagan's supplemental affidavit. In essence, we argued that Hagan's supplemental affidavit no more satisfied the requirements of CPL §440.10(1)(g) than had his original affidavit. The People's supplementary response is attached hereto as "Exhibit "B," and incorporated herein. In chronological order, it belongs after page 88 of petitioner's appendix to the instant petition.

20. Beginning with an affidavit dated on or about April 18, 1978, and continuing with affidavits dated April 29 and May 12, 1978, Butler and Johnson submitted numerous Federal Bureau of Investigation documents, in their redacted form, which, they claimed, supported Hagan's identification of his accomplices as set forth in his November 30, 1977 and February 25, 1978 affidavits.

21. In response to this aspect of Butler's and Johnson's motion, the District Attorney's Office case file was examined. It contained no mention or indication of, or reference to, any of the persons identified by Hagan as his accomplices. Additionally, most of the FBI documents submitted by

Butler and Johnson were obtained from the FBI in their unredacted form and were provided to Justice Rothwax. Nothing in these FBI documents supported Hagan's allegations regarding the identity of his accomplices; specifically, there was no mention or indication of, or reference to, any of the persons Hagan alleged were his accomplices. Those FBI documents not on file in the FBI's New York office were not provided to Justice Rothwax.

As we reported to the court, these documents, according to Steven Edwards, the FBI agent who coordinated the search for the documents, were on file in the FBI's headquarters in Washington, D.C., and given the volume of papers on file there, it would take a considerable period of time to obtain them. In any event, according to Agent Edwards, in all likelihood nothing in these documents would have corroborated the identity of the persons Hagan claimed were his accomplices. This was so because many of the documents were internal FBI memoranda which merely summarized the New York City Police Department's investigation into the murder, and which contained no original information developed by the FBI; others contained information developed by the FBI which paralleled information obtained by the New York City Police

Department; and others referred to matters not relevant to the motion to vacate the judgments. Nevertheless, as we informed the court, if the court wished to examine these documents, we would attempt to obtain them as quickly as possible. The People's response, dated July 14, 1978, is attached as "Exhibit "C", and incorporated herein. In chronological order, it belongs after page 155 of petitioner's appendix to the instant petition. (The unredacted FBI documents are not being submitted herewith, but will be provided to the Court upon request).

21. In an affidavit sworn to on or about May 14, 1978, Benjamin Goodman (now apparently known as Benjamin Karim) stated that Butler and Johnson, both of whom he knew well for several years, were not in the Audubon Ballroom when Malcolm X was murdered. Goodman was the man who first spoke to the audience and then introduced Malcolm. In his affidavit, Goodman claimed that "one of [his] functions was to provide security for Malcolm's person," that he therefore "did observe the faces of all the [four to five hundred] people in the crowd," and that, because of the animosity between the Nation of Islam to which Butler and Johnson belonged and the Organization of Afro-American Unity which Malcolm founded and to which Goodman

belonged, had Butler or Johnson been in the audience, Goodman "would have been sure to notice [them]."

22. In response, the People pointed out that Goodman's affidavit was in direct contradiction to the testimony he had given to the Grand Jury on April 5, 1965. There, Goodman specifically testified that he was not looking for any particular person; that his function was merely to introduce Malcolm X and "not to see who was there"; and that he did not know, one way or the other, if Butler or Johnson were present in the ballroom. Goodman's Grand Jury testimony was annexed to the People's July 14, 1978 response, which is Exhibit "C" of the response to the instant petition.

23. On September 6, 1978, further oral argument was had on the motion to vacate the judgments. At that time, Mr. Kunstler informed Justice Rothwax that he had located one of the persons identified by Hagan as his accomplice, and that he was making progress in his attempt to obtain a statement from this person. He requested additional time to continue to talk to this person, as well as to attempt to locate two of the other persons identified by Hagan. Over the People's objection, the court adjourned the matter t October 12, 1978.

24. However, in an affidavit dated September 12, 1978, Mr. Kunstler admitted to the court that the person who had been interviewed "first denied any participation in the murder and then stated that he was not going to jeopardize himself for anyone..." (See, petitioners' appendix to their instant petition at pp. 166-7). Mr. Kunstler indicated in his affidavit that no further efforts had been made to talk to this person, and that nothing had been done to locate or contact the other two men to whom Mr. Kunstler had referred on September 6, 1978. Id. at 166-7.

25. Indeed, in a telephone conversation with me on September 18, 1978, Mr. Kunstler admitted to me that he had not spoken to the one person since before the last court appearance on September 6, 1978, and that he did not intend to speak to this person or to attempt to locate or speak with the two other persons to whom he had referred on September 6, 1978.

26. Instead, in his September 12, 1978 affidavit, Mr. Kunstler asked the court to order the District Attorney's Office to interrogate these men because, as Mr. Kunstler stated to me in our September 18, 1978 telephone conversation, we are "better at getting confessions" than he is and he felt "uncomfortable" asking someone to confess to a crime.

27. The People's summary of the events described in ¶¶ 23-26 above, and our response to Mr. Kunstler's September 12, 1978 affidavit, were contained in an October 6, 1978 letter from us to Justice Rothwax. That letter is attached as Exhibit "D", and incorported herein. In chronological order, it belongs after page 168 of petitioner's appendix to the instant petition.

28. On October 29, 1978, in a letter to the court, Butler and Johnson responded to the People's October 6 letter. Mr. Kunstler's October 29, 1978 letter is attached as Exhibit "E," and incorpoated herein.

29. On November 1, 1978, Justice Rothwax denied the motion to vacate the judgments.

30. On or about November 31, 1978, Butler and Johnson applied for leave to appeal to the Appellate Division.

31. The People opposed the application in a letter dated December 6, 1978. A copy of that letter is attached hereto as Exhibit "F," and incorporated herein. In chronological order, it belongs after page 180 of petitioner's appendix to the instant petition.

32. On December 19, 1978, the Honorable Arnold L. Fein, a Justice of the Appellate Division, First Department, denied Butler and Johnson leave to appeal to that court.

33. Butler and Johnson subsequently commenced the instant proceeding for a writ of habeas corpus.

WHEREFORE, based on the foregoing, and on the accompanying memorandum of law which is attached hereto and made a part hereof, it is respectfully requested that the petition for a writ of habeas corpus be denied.

ALLEN ALPERT

Sworn to before me this
day of June, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ
(Norman 3X Butler)

And

KHALIL ISLAM
(Thomas 15X Johnson),

Petitioners,

-against-

SUPERINTENDENTS OF OSSINING and
CLINTON CORRECTIONAL FACILITIES,

Respondents.

80 Civ. 1346
"TPG"

MEMORANDUM OF LAW IN
OPPOSITION TO PETITION
FOR WRIT OF HABEAS CORPUS

Petitioners Muhammad Abdul Aziz (Norman 3X Butler) and Khalil Islam (Thomas 15X Johnson), presently incarcerated in New York State in consequence of their conviction of the February 21, 1965 murder of Malcolm X, seek a writ of habeas corpus from the United States District Court for the Southern District of New York.

This Court, however, has no power to grant a writ of habeas corpus unless the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. §2241(c)(3). Further, this Court may not even entertain an application for the writ

from a state prisoner unless the petitioner grounds his request for relief on the contention that he "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. §2254(a). The instant petition merely alleges in conclusory fashion that, "Petitioners are two black men who are presently illegally, unlawfully and unconstitutionally incarcerated in [two] New York State penitentiaries..." Petition at ¶1. There is no allegation that their custody is violative of any of their federal constitutional or statutory rights; indeed, neither the federal constitution in general or any of its specific provisions, nor federal statutory or case law, is mentioned, indicated, or referred to in any manner in the instant petition. This Court is therefore without power to grant, or even to entertain the application for, the requested writ of habeas corpus, and the application must be dismissed.

Beyond this, it is not at all clear exactly what petitioners claim is the infirmity which invalidates their present custody. The petition is nothing more than a one-sided re-statement of the history of the proceedings in the New York State trial-level court regarding petitioners' motion to vacate their judgments of conviction pursuant to New York State Criminal Procedure Law §440.10

(1)(g). The petition consists solely of petitioners' affidavits. There is no memorandum of law in support of the petition, and the affidavits are unencumbered by any legal argument.

To the limited extent that a claim may be gleaned from the petition, however, it appears to be that on the basis of the information contained in Hagan's second affidavit, the District Attorney's Office improperly refused to investigate Hagan's allegations when it declined to attempt to interrogate the one "accomplice" to whom petitioners' representative had talked and to attempt to locate and talk to Hagan's other "accomplices," and that the state court improperly refused to order the District Attorney's Office to do so. Petition at ¶11. Assuming this to be the gist of petitioners' current complaint, and that they are asserting it here as a matter of federal constitutional law (which, as shown above, they have not done), petitioners are not entitled to the relief they seek.

In the state courts, petitioners never asserted that, as a matter of federal constitutional law, the District Attorney's Office should interrogate Hagan's alleged accomplices or conduct any other investigation of Hagan's accomplices, or that the refusal of the state court to order this investigation violated any of their

rights as a matter of federal constitutional law. Rather, tracking the words of CPL §440.10(1)(g), they urged the court that "had Mr. Hagan testified at the original trial as he has in his second affidavit, there might well have been different verdicts insofar as [Butler and Johnson] were concerned." Exhibit E at p. 2. Further, specifically citing the statute, they urged that the allegations already presented did, and the testimony they expected at a hearing would, "meet the statutory standard for the granting of a new trial under §440.10, Criminal Procedure Law." Id. Finally, they asked that, "in the interest of justice," the court direct the District Attorney's Office to conduct the investigation they had requested. Id. Similarly, in their application to the Appellate Division for leave to appeal from the denial of their §440.10 motion, petitioners did not assert that the denial of the motion or the refusal of the court to order the requested investigation violated their federal constitutional rights. Instead, they merely asserted, again in the words of §440.10(1)(g), that the information which was presented during the course of the motion "in the event of a new trial for these defendants, might, and, indeed, probably would, result in a different

verdict," and that, "it is felt that simple and elemental justice requires at least the granting of an evidentiary hearing."* Petitioners' Appendix at pp. 179-80, ¶7. Having failed in the state courts to assert that the refusal of the People to conduct the investigation they sought and of the state court to order this investigation were violative of their federal constitutional rights, petitioners may not now raise this claim in the instant application for habeas corpus relief. Johnson v. Metz, 609 F.2d 1052 (2nd Cir. 1979).

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*The only reference to the federal constitution in the state court proceedings was in Mr. Kunstler's December 5, 1977 affidavit. That affidavit was submitted together with Hagan's first Affidavit (Hagan's second affidavit would not be submitted for another three months) and urged only that Hagan's affidavit justified a hearing pursuant to CPL §440.10(1)(g), not that an investigation of his allegations should be conducted. Thus, Mr. Kunstler asserted that Hagan's first affidavit constituted newly discovered evidence "within the meaning of §440.10(g), Criminal Procedure Law", and that it "entitled [Butler and Johnson], as a matter of law, to an evidentiary hearing at which the said new evidence can be presented to this Court for its consideration thereof with reference to the granting or denying of the relief, or any of it, sought herein". Petitioners' appendix at p.14. Contending that Hagan was prepared to testify at this hearing, Mr. Kunstler claimed that, "Nothing short of such a hearing would comport with the standards of due process of law and the equal protection of the law mandated by the Fifth and Fourteenth Amendments to the Constitution of the United States. . ." Id. at pp. 14-15. Restricted as it was to Hagan's first affidavit and to a call for an evidentiary hearing based on that affidavit, the invocation of the references to the federal constitution has no applicability to the instant claim which, if we have divined correctly, is concerned with the allegedly wrongful refusal to investigate the allegations in Hagan's second affidavit.

Even if the instant petition is read more broadly as a claim that Hagan's affidavits constitute newly discovered evidence of petitioners' innocence - the instant petition must still be dismissed, for a habeas corpus proceeding is simply not available to inquire into this type of claim. Federal courts have jurisdiction over habeas corpus petitions only if the petition raises a question of "constitutional significance." Schaefer v. Leone, 443 F.2d 182, 184 (2nd Cir.1971), cert. denied 404 U.S. 939 (1971). The writ will issue if the conviction upon which the petitioner is in custody was obtained in a fundamentally unfair manner which deprived petitioner of due process of law in violation of the Fourteenth Amendment. Fay v. Noia, 372 U.S. 391 (1963). Ordinarily, though, "the guilt or innocence of the accused, as an independent consideration, is not relevant [to a habeas corpus proceeding]." J. Cook, Constitutional Rights of the Accused: Post-Trial Rights (1976), §86, pp. 205-6. It is only when there has been a "conviction on charges unsupported by any evidence [that there] is a denial of due process" to which habeas corpus relief is appropriate. Boilermakers v. Hardeman, 401 U.S. 233, 246 (1971). "Absent a complete lack of evidence for the

conviction, the question of whether there was sufficient proof for the conclusion reached by the trier of fact is not cognizable on federal habeas review... [When] it cannot be said that there was a complete lack of evidence for Petitioner's conviction [there is no] issue of constitutional dimension on which federal habeas corpus relief may be granted." Stephens v. LeFevre, 467 F. Supp. 1026, 1030 (S.D.N.Y., 1979), citing, among others, United States ex rel. Terry v Henderson, 462 F2d 1125 (2nd Cir., 1972). Petitioners, of course, have not alleged that their convictions were unsupported by any evidence, and thus may not avail themselves of federal habeas corpus relief. (Indeed, given the eyewitness testimony against them, and in light of the characterization of the evidence by the New York Appellate courts as "overwhelming" and "abundant," such a contention would be patently absurd).

Instead, given its most generous construction, their petition contends that Hagan's affidavits constitute newly discovered evidence of their innocence. Assuming for the moment the truth of Hagan's allegations and that the information in them is newly discovered, petitioners are still not entitled to habeas corpus relief. "... [N]ewly discovered evidence only warrants habeas corpus relief where it bears on 'the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state

petitioner is not a ground for relief on federal habeas corpus.'" Mapp v. Clement 451 F. Supp. 505, 511 (S.D.N.Y., 1978), aff'd 591 F.2d 1330 (2nd Cir. 1979), cert. denied 99 S. Ct. 1428 (1979) (quoting Townsend v. Sain, 372 U.S 293, 317 (1963)). Thus, even on the basis of an expansive interpretation of their petition - that Hagan's affidavits provide new evidence of their innocence - petitioners are not entitled to habeas corpus relief, for there is no contention that their convictions were obtained in an unconstitutional manner.

Although not constitutionally required to do so, New York, by legislative grace, enacted a mechanism whereby persons convicted of crimes could attempt to have their convictions reversed by presenting to the State courts newly discovered evidence of their innocence. CPL §440.10(1)(g). Petitioners, who availed themselves of this opportunity, apparently now contend that they were denied due process of law by the manner in which their §440.10 motion was disposed of.* [First sentence from next page goes here].

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*In interpreting the petition as alleging a denial of due process, where in fact no such allegation was set forth, we are, of course, affording petitioners the benefit of the doubt. If the petition is read to allege only that the state courts had wrongly decided the motion, the application for the writ of habeas corpus would clearly be inappropriate, for the "the proper role of historic federal habeas corpus jurisdiction [is] not to serve as the basis for merely an additional appeal." Schaefer v Leone, supra, 443 F.2d at 185.

This claim is wholly meritless. From the beginning of the motion in December, 1977 to its conclusion eleven months later, Justice Rothwax repeatedly indulged petitioners in their efforts to obtain evidence that would meet the requirements of the statute. For example, at the outset, the court could have denied the motion after receiving Hagan's first affidavit, an affidavit which the court concluded did not significantly differ from Hagan's trial testimony, and which the court termed "frivolous." Instead, however, the court adjourned the motion without date, thus affording petitioners whatever time they felt they needed to produce additional support for their motion. Similarly, months later, when Mr. Kunstler reported that he needed additional time to talk to the persons Hagan said were his accomplices, the court gave him an additional five weeks. There is, moreover, nothing to indicate that petitioners would not have been afforded even more time if they had requested it. In fact, the proceedings drew to a close not because of the impatience of the court to decide the matter (an inclination which would, in any event, have been fully warranted), but because petitioners abandoned their attempts to obtain the information for which they had requested that the motion be adjourned. Although Mr. Kunstler had requested additional time to talk further with one of Hagan's alleged accomplices (who

had already denied to petitioners' representative any involvement in the murder of Malcolm X) and to attempt to locate and talk to the other alleged accomplices, he admitted that he had done nothing further since he had obtained the requested adjournment to contact any of these people, and that he intended to take no further action with respect to any of them. Mr.Kunstler explained that he felt "uncomfortable" asking someone to confess to a crime. Petitioners are certainly hard-pressed to make out a claim that the manner in which their motion was disposed of denied them due process of law when they themselves intentionally refused to take the steps to bring before the court* what they believed was evidence relevant to their motion.

Moreover, the abandonment by petitioners of the attempt to obtain statements from Hagan's alleged accomplices meant that Hagan's affidavit, which was, as Justice Rothwax observed in his opinion denying the motion, a mere "recapitulation, although somewhat more

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*Indeed, although their petition alleges that, following the denial of the §440.10(1)(g) motion, they received even more detailed information regarding the descriptions and backgrounds of Hagan's alleged accomplices, petitioners have apparently done nothing to locate or obtain statements from them. In this posture, their attempt to obtain habeas corpus relief on the ground that there exists new evidence of their innocence is singularly inappropriate.

specific, of his testimony at the original trial" - was, as the court further noted, "uncorroborated by the testimony of any other witness either at present or at the time of the original trial." Recognizing the weakness of their position, based as it was solely on Hagan's affidavit, petitioners attempted to have the People gather evidence corroborative of Hagan's allegations. (Mr. Kunstler insisted, for example, that we are "better at getting confessions" than he is). But, as the court correctly noted in its opinion, it was petitioners' burden, not the People's, to bring forth evidence in support of their motion. The insistence of the court that petitioners satisfy this burden in order to be entitled to the relief they sought under the statute, and its refusal to shift this burden to the People, in no way deprived petitioners of due process of law.

CONCLUSION

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

Respectfully submitted,

ROBERT M. MORGENTHAU
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June, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ
(Norman 3X Butler)

and

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FOR WRIT OF HABEAS CORPUS

Petioners Muhammad Abdul Aziz (Norman 3X Butler) and Khalil Islam (Thomas 15X Johnson), presently incarcerated in New York State in consequence of their conviction of the February 21, 1965 murder of Malcolm X, seek a writ of habeas corpus from the United States District Court for the Southern District of New York.

In order to be entitled to federal habeas corpus relief, a state prisoner must ground his request for relief on the contention that he "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. §§2241(c)(3) and 2254(a). The instant petition, however, merely alleges in conclusory fashion that, "Petitioners are two black men who are presently illegally, unlawfully and unconstitutionally incarcerated in [two] New York State penitentiaries..." Petition at ¶1. There is no allegation that their custody is violative of any of their federal constitutional or statutory rights; indeed, neither the federal constitution in general or any of its specific provisions, nor federal statutory or case law, is mentioned, indicated, or referred to in any manner in the instant petition. While in the case of a pro se petitioner this failure might be

overlooked as the forgivable neglect of an unschooled and inexperienced litigant unfamiliar with even the most rudimentary requirements of federal habeas corpus practice, such is certainly not the situation here. The instant petitioners are not proceeding pro se; rather, they are represented by experienced, able counsel who is undoubtedly fully conversant with the requirement that an application for a writ of habeas corpus must be grounded on a claim that their present custody is violative of petitioners' federal constitutional rights. In this circumstance, the failure to allege a federal constitutional violation is fatal to their application, and the petition for a writ of habeas corpus should therefore be dismissed.

Beyond this, it is not at all clear exactly what petitioners claim is the infirmity which invalidates their present custody. The petition is nothing more than a one-sided re-statement of the history of the proceedings in the New York State trial-level court regarding petitioners' motion to vacate their judgments of conviction pursuant to New York State Criminal Procedure Law §440.10 (1)(g). The petition consists solely of petitioners' affidavits. There is no memorandum of law in support of the petition, and the affidavits are unencumbered by any legal argument. Neither this Court nor respondents should be compelled to guess as to what petitioners' claim is. Thus, even were petitioners' failure to allege a violation of the federal constitution excusable, the petition should be dismissed because of their failure to allege in what manner their custody is offensive to the federal constitution.

To the limited extent that a claim may be gleaned from the petition, however, it appears to be one or both of the following:

1) that Hagan's affidavits constitute newly discovered evidence indicative of petitioners' innocence, and that petitioners' custody is therefore unconstitutional;

2) that on the basis of the information contained in Hagan's second affidavit, the refusal of the District Attorney's Office to investigate Hagan's allegations (for example, when it declined to attempt to interrogate the one "accomplice" to whom petitioners' representative had talked and to attempt to locate and talk to Hagan's other "accomplices"), and the refusal of the state court to order the District Attorney's Office to investigate Hagan's allegations, deprived petitioners of due process of law. Petition at ¶ 11.

Assuming this to be the gist of petitioners' current complaint, and that they are asserting it here as a matter of federal constitutional law (which, as shown above, they have not done), petitioners are not entitled to the relief they seek.

If the instant petition is read as a claim that Hagan's affidavits constitute newly discovered evidence of petitioners' innocence, the petition must be dismissed because a habeas corpus proceeding is simply not available to inquire into this type of claim. Federal courts have jurisdiction over habeas corpus petitions only if the petition raises a question of "constitutional significance." Schaefer v. Leone, 443 F.2d 182, 184 (2nd Cir.1971), cert. denied 404 U.S. 939 (1971). The writ will issue if the conviction upon which the petitioner is in custody was obtained in a fundamentally unfair manner which deprived petitioner of due process of law in violation of the Fourteenth Amendment. Fay v. Noia, 372 U.S. 391 (1963). But, "... newly discovered evidence only warrants habeas corpus relief where it bears on 'the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state petitioner is not a ground for relief on federal habeas corpus.'" Mapp v. Clement 451 F. Supp. 505, 511 (S.D.N.Y., 1978), aff'd 591 F.2d 1330 (2nd Cir. 1979), cert. denied 99 S. Ct. 1428 (1979) (quoting Townsend v. Sain, 372 U.S 293, 317 (1963)). Thus, even on the basis of an expansive interpretation of their petition - that Hagan's affidavits provide new evidence of their innocence - petitioners are not entitled to habeas corpus relief, for there is no contention that this "newly discovered evidence" indicates that petitioners' convictions were obtained in an unconstitutional manner.

Even if federal habeas corpus relief were available when new evidence is discovered which is relevent merely to the question of the petitioner's guilt, the instant petitioners are not entitled to this relief. After carefully reviewing the affidavits submitted by petitioners and after comparing them with Hagan's testimony at the trial, Justice Rothwax concluded that, "These affidavits, complete on their face, conclusively demonstrate that the offer of proof they contain is neither new nor so reliable as to create a probability of a more favorable verdict." The state courts' determination that Hagan's affidavits were merely a "recapitulation" of his trial testimony and that, in any event, they were not sufficiently "reliable" to have affected the verdict should be given presumptive weight by this Court. Petitioners have offered nothing to warrant this Court's disregarding the state court's determination.

If the petition is read as a claim that the refusal to investigate the allegations in Hagan's second affidavit denied petitioners due process of law, the petition must similarly be dismissed.

In the state courts, petitioners never asserted that, as a matter of federal constitutional law, the District Attorney's Office should interrogate Hagan's alleged accomplices or conduct any other investigation of Hagan's accomplices, or that the refusal of the state court to order this investigation violated any of their rights as a matter of federal constitutional law. Rather, tracking the words of CPL §440.10(1)(g), they urged the court that "had Mr. Hagan testified at the original trial as he has in his second affidavit, there might well have been different verdicts insofar as [Butler and Johnson] were concerned." Exhibit E at p. 2. Further, specifically citing the statute, they urged that the allegations already presented did, and the testimony they expected at a hearing would, "meet the statutory standard for the granting of a new trial under §440.10, Criminal Procedure Law." Id. Finally, they asked that "in the interest of justice," the court direct the District Attorney's Office to conduct the investigation they had requested. Id. Similarly, in their application to the Appellate Division for leave to appeal from the denial of their §440.10 motion, petitioners did not assert that the denial of the motion or the refusal of the court to order the requested investigation violated their federal constitutional rights. Instead, they merely asserted, again in the words of §440.10(1)(g), that the information which was presented during the course of the motion "in the event of a new trial for these defendants, might, and, indeed, probably would, result in a different

verdict," and that, "it is felt that simple and elemental justice requires at least the granting of an evidentiary hearing."* Petitioners' Appendix at pp. 179-80, ¶7. Having failed in the state courts to assert that the refusal of the People to conduct the investigation they sought and of the state court to order this investigation were violative of their federal constitutional rights, petitioners may not now raise this claim in the instant application for habeas corpus relief. Johnson v. Metz, 609 F.2d 1052 (2nd Cir. 1979).

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*The only reference to the federal constitution in the state court proceedings was in Mr. Kunstler's December 5, 1977 affidavit. That affidavit was submitted together with Hagan's first affidavit (Hagan's second affidavit would not be submitted for another three months) and urged only that Hagan's affidavit justified a hearing pursuant to CPL §440.10(1)(g), not that an investigation of his allegations should be conducted. Thus, Mr. Kunstler asserted that Hagan's first affidavit constituted newly discovered evidence "within the meaning of §440.10(g), Criminal Procedure Law", and that it "entitled [Butler and Johnson], as a matter of law, to an evidentiary hearing at which the said new evidence can be presented to this Court for its consideration thereof with reference to the granting or denying of the relief, or any of it, sought herein". Petitioners' appendix at p.14. Contending that Hagan was prepared to testify at this hearing, Mr. Kunstler claimed that, "Nothing short of such a hearing would comport with the standards of due process of law and the equal protection of the law mandated by the Fifth and Fourteenth Amendments to the Constitution of the United States. . ." Id. at pp. 14-15. Restricted as it was to Hagan's first affidavit and to a call for an evidentiary hearing based on that affidavit, the invocation of the references to the federal constitution has no applicability to the instant claim which, if we have divined correctly, is concerned with the allegedly wrongful refusal to investigate the allegations in Hagan's second affidavit.

In any event, petitioners' claim is wholly meritless. Although not constitutionally required to do so, (see, Mapp v. Clement, supra) New York, by legislative grace, enacted a mechanism whereby persons convicted of crimes could attempt to have their convictions reversed by presenting to the state courts newly discovered evidence of their innocence. But that mechanism, CPL § 440.10 (1)(g), requires the convicted defendant to come forward with sufficient evidence to warrant the vacatur of his judgment of conviction. The burden is solely the defendant's. Petitioners point to no authority, and, indeed there is none, which calls upon the District Attorney to have conducted an investigation in corroboration of Hagan's allegations.

Furthermore, an objective review of the proceedings before Justice Rothwax makes it eminently clear that the manner in which the motion was disposed of did not deny petitioners due process of law.

This claim is wholly meritless. From the beginning of the motion in December, 1977 to its conclusion eleven months later, Justice Rothwax repeatedly indulged petitioners in their efforts to obtain evidence that would meet the requirements of the statute. For example, at the outset, the court could have denied the motion after receiving Hagan's first affidavit, an affidavit which the court concluded did not significantly differ from Hagan's trial testimony, and which the court termed "frivolous." Instead, however, the court adjourned the motion without date, thus affording petitioners whatever time they felt they needed to produce additional support for their motion. Similarly, months later, when Mr. Kunstler reported that he needed additional time to talk to the persons Hagan said were his accomplices, the court gave him an additional five weeks. There is, moreover, nothing to indicate that petitioners would not have been afforded even more time if they had requested it. In fact, the proceedings drew to a close not because of the impatience of the court to decide the matter (an inclination which would, in any event, have been fully warranted), but because petitioners abandoned their attempts to obtain the information for which they had requested that the motion be adjourned. Although Mr. Kunstler had requested additional time to talk further with one of Hagan's alleged accomplices (who

had already denied to petitioners' representative any involvement in the murder of Malcolm X) and to attempt to locate and talk to the other alleged accomplices, he admitted that he had done nothing further since he had obtained the requested adjournment to contact any of these people, and that he intended to take no further action with respect to any of them. Mr.Kunstler explained that he felt "uncomfortable" asking someone to confess to a crime. Petitioners are certainly hard-pressed to make out a claim that the manner in which their motion was disposed of denied them due process of law when they themselves intentionally refused to take the steps to bring before the court what they believed was evidence relevant to their motion.*

Moreover, the abandonment by petitioners of the attempt to obtain statements from Hagan's alleged accomplices meant that Hagan's affidavit was, as Justice Rothwax observed in his opinion denying the motion, a mere "recapitulation, although somewhat more

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*Indeed, although their petition alleges that, following the denial of the §440.10(1)(g) motion, they received even more detailed information regarding the descriptions and backgrounds of Hagan's alleged accomplices, petitioners have apparently done nothing to locate or obtain statements from them. In this posture, their attempt to obtain habeas corpus relief on the ground that there exists new evidence of their innocence is singularly inappropriate.

from this Court

specific, of his testimony at the original trial") as the court further noted, "uncorroborated by the testimony of any other witness either at present or at the time of the original trial." Recognizing the weakness of their position, based as it was solely on Hagan's affidavit, petitioners attempted to have the People gather evidence corroborative of Hagan's allegations. (Mr. Kunstler insisted, for example, that we are "better at getting confessions" than he is). But, as the court correctly noted in its opinion, it was petitioners' burden, not the People's, to bring forth evidence in support of their motion. The insistence of the court that petitioners satisfy this burden in order to be entitled to the relief they sought under the statute, and its refusal to shift this burden to the People, in no way deprived petitioners of due process of law.

* * *

In sum, the application for a writ of habeas corpus is totally without merit. There is no claim of a denial of petitioners' federal constitutional rights, nor do petitioners assert the reasons that their custody is supposedly constitutionally invalid. A claim merely that newly discovered evidence indicates that petitioners are innocent does not, by itself, raise a constitutional issue cognizable in a federal habeas corpus proceeding. In any event, Hagan's affidavits do not constitute "new" evidence nor are they sufficiently reliable to render a different verdict probable. The ~~office of the District Attorney to conduct the investigation requested by petitioners and the refusal of the State~~

petitioners were not entitled to have the District Attorney's office conduct an investigation in corroboration of Hagan's allegations, for the burden to allege sufficient new evidence was petitioners'. Moreover, the manner in which the state court denied the motion to vacate the judgments did not deny petitioners due process of law.

CONCLUSION

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

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
155 Leonard Street
New York, New York 10013
(212) 553-9000

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys

Of Counsel

June, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

MUHAMMAD ABDUL AZIZ (Norman 3X Butler) and KHALIL ISLAM (Thomas 15X Johnson),

Petitioners,

-v-

SUPERINTENDENTS OF OSSINING and CLINTON CORRECTIONAL FACILITIES,

Respondents.

- - - - - - - - - - - - - - - - - - - -x

REPLY AFFIRMATION

80 Civ. 1345/1346
(TPG)

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

WILLIAM M. KUNSTLER, an attorney duly licensed as such in the State of New York, under the pains and penalties of perjury, affirms as follows:

1. I am the attorneys for petitioners herein and I am submitting this affirmation in reply to the affidavit in opposition to the Petition for Writ of Habeas Corpus herein.

2. In essence, Mr. Alpert merely repeats arguments advanced by him in the state courts and I do not believe that any response other than that which is already submitted to this Court would do anything more than burden an already lengthy record.

3. However, I would like to point out that he misses the essential point of the petition. Mujahid Abdul Halim (Thomas Hagan) has, after a great number of conversations with the undersigned, furnished complete descriptions of the four men who participated with him in the murder of Malcolm X on February 21, 1965, as well as their names. Petitioners lack both the resources and the means

to investigate the matter any further and, without the subpoena power, are unable to proceed further with the material presently known to them and before this Court.

4. It would seem that when petitioners serving long terms of imprisonment succeed in obtaining pertinent information from an admitted participant in the crimes of which they were convicted/who has finally come forward and given as much detail as he can about the planning and execution of the crimes in question, including names, addresses, physical descriptions and other identifying factors, the burden should pass to the state to investigate fully this information so that two innocent men do not languish in prison for want of official stmulus. We all understand that the crimes here involved took place some fifteen years ago but to allow such pertinent and relevant information to go uninvestigated by the agency empowered and directed by law to do so is to avoid the fundamental due process and equal protection arguments here advanced.

5. It is not enough to say that the FBI files would be unavailing. There are, upon information and belief, almost 2,000,000 pages on the Nation of Islam and/or Malcolm X which have not yet been released under the Freedom of Information Act in the hands of the Bureau. Even a rudimentary investigation by the FBI into Halim's allegations would undoubtedly reveal a great deal about the truth or falsity of his statements. This case should not --and cannot-- be decided upon affidayits alone. It presents a challenge to the entire adminitsration of justice and to leave it in its present unresolved status is to avoid the difficult and hope that it will

just go away and be forgotten.

6. If what Halim says is true, it is clear that a tragic miscarriage of justice has taken place. He has no reason to fabricate at this stage in his life and is taking a great chance with his own life in making the statements he has done in writing and under oath. What he says can in no way be of benefit to him and, as indicated above, can cause him inestimable harm. Should this Court grant an evidentiary hearing, Halim is prepared to testify and be subjected to cross-examination. In addition, subpoenas to the persons named by him as his accomplices will, in at least one case, and possibly in others, bring before this Court a person or persons accused by him as being his accomplices. Compulsory process to the FBI and other law enforcement agencies will produce material that may well buttress Halim's allegations; there is enough before the Court now to see that those allegations have some support in official documents presently available to counsel.

7. In other words, there must be a forum in which petitioners can air the grave doubts which have been cast upon their convictions. They certainly have presented enough material to justify such a hearing. In the interest of justice, they pray that this Court, which has not shirked in the past from difficult and hard decisions in much the same area, will grant them, at the very least, an evidentiary hearing so that they can prove that they are both innocent of the crimes for which they have been sentenced to prison for life.

William M. Kunstler

WILLIAM M. KUNSTLER

Dated: New York, N.Y.
July 23, 1980

Appendix "2"

FD 6 (Rev. 5-22-64)

FBI

Date: 2/27/65

Transmit the following in PLAIN
(Type in plaintext or code)

Via TELETYPE URGENT
(Priority)

TO: DIRECTOR, FBI (100-399321)

FROM: SAC, NEW YORK (105-8999)

MALCOLM K. LITTLE, ALSO KNOWN AS, IS DASH MMI

RE NEW YORK TELETYPE TO BUREAU FEBRUARY TWENTY SIX LAST CAPTIONED AS ABOVE, WHICH REPORTED THAT NEW YORK CITY POLICE DEPARTMENT HAS ADVISED THAT WITNESS RONALD TIMBERLAKE HAS NOW IDENTIFIED BOTH TALMADGE HAYER AND NORMAN BUTLER AS ASSAILANTS OF MALCOLM X AT THE TIME OF HIS KILLING. AS BUREAU HAS BEEN PREVIOUSLY ADVISED, RONALD TIMBERLAKE WAS FIRST CONTACTED BY NEW YORK OFFICE AGENTS, AT HIS REQUEST, WHEN HE TURNED OVER FORTY FIVE CALIBER AUTOMATIC HE HAD RECOVERED AT SCENE OF KILLING. TIMBERLAKE WAS AT FIRST RELUCTANT TO SERVE AS WITNESS BUT IS NOW COOPERATING FULLY WITH POLICE.

ON FEBRUARY TWENTY SIX, CHIEF OF DETECTIVES PHILLIP WALSH, INSPECTOR THOMAS C. RENAGHAN, AND DEPUTY INSPECTOR ARTHUR GRUBERT (NA), NEW YORK CITY POLICE DEPARTMENT, ALL EXPRESSED THEIR DEEP APPRECIATION TO NEW YORK OFFICE AGENTS FOR THE EXCELLENT COOPERATION IN TURNING OVER WITNESS TIMBERLAKE AND THE

1-New York
1-Supervisor #43

RJR:cds
(2)

SA's name

INDEXED
FILED

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

11

FD-16 (Rev. 5-22-64)

FBI

Date:

Transmit the following in _____
(Type in plaintext or code)

Via _____ _____
(Priority)

NY 105-8999

PAGE TWO

GUN HE RECOVERED. ONE POLICE OFFICER SAID THAT AS OF FEBRUARY TWENTY SIX TIMBERLAKE WAS THE MOST IMPORTANT WITNESS THEY HAD.

FOR BUREAU'S INFORMATION.

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

12

FBI WASH DC 2-40 AM 2-26-65 HFL

9-30 PM URGENT 2-25-65 NWL

TO DIRECTOR CHICAGO NEWARK AND NEW YORK

NEW YORK VIA ----3---- WASHINGTON - ENCODED

FROM PHILADELPHIA 252025

MALCOLM K. LITTLE, AKA, IS-MMI.

RE PHILADELPHIA CALL TO NEW YORK TODAY.

ON FEBRUARY TWENTYFIVE, NINETEEN SIXTYFIVE, GEORGE MITCHELL /PROTECT IDENTITY/, FIVE ONE THREE FOUR HAZEL AVENUE, PHILADELPHIA, WHO IS IN POSITION TO FURNISH RELIABLE INFORMATION, BUT WITH WHOM INSUFFICIENT CONTACT HAS BEEN HAD FOR EVALUATION, ADVISED AS FOLLOWS.... HE RECOGNIZED NEWSPAPER PHOTO OF TALMADGE HAYER, AKA THOMAS HAGAN, AS PERSON HE KNEW AS NOI AND FOI MEMBER IN NINETEEN SIXTYTHREE AND NINETEEN SIXTYFOUR. CANNOT RECALL X NUMBER, BUT BELIEVES FIRST NAME WAS TALMADGE OR THOMAS. ATTENDED NOI MEETINGS WITH HAYER IN NEWARK AND PATERSON, N.J. ALWAYS ASSUMED HAYER MEMBER MM NUMBER TWENTYFIVE, NEWARK, HOWEVER, NOW FEELS MAY HAVE BEEN MEMBER OF TEMPLE IN PATERSON. AT MEETINGS, BOTH NEWARK AND PATERSON, HAYER WAS SUXXX SECURITY GUARD AND SEARCHED MITCHELL MOST THOROUGHLY ON SEVERAL OCCASIONS. MITCHELL ALSO OBSERVED HAYER AT MEETING AT ARENA, FOUR FIVE THREE SEVEN MARKET STREET, PHILADELPHIA, ON SEPTEMBER TWENTYNINE, NINETEEN SIXTYTHREE

END PAGE ONE

105-8979

SEARCHED ____ INDEXED ____

SERIALIZED ____ FILED ____

FBI — NEW YORK

TL DIRECTOR CHICAGO NEWARK AND NEW YO

PAGE TWO VIA ----3---- WASHINGTON - ENCODED

AT WHICH ELIJAH MUHAMMAD WAS PRINCIPAL SPEAKER. HAYER WAS ON SEARCH DETAIL INSIDE ARENA ON NORTH CORRIDOR.

MALCOLM LAST SAW HAYER IN CHICAGO FEBRUARY NINETEEN SIXTY FOUR AT SAVIOR-S DAY CONVENTION. HAYER SAT ON EITHER FIRST OR SECOND ROW WHEN ELIJAH MUHAMMAD SPOKE AS A GUARD FOR MUHAMMAD IN EVENT OF TROUBLE. FEBRUARY TWENTYFIVE, NINETEEN SIXTYFIVE, GEORGE MITCHE-

-MITCHELL DESCRIBED HAYER AS HANDSOME AND WITH PHYSICAL ABILITY TO TAKE CARE OF HIMSELF.

CHICAGO AND NEWARK CONTACT SOURCES IN ATTEMPT TO VERIFY AND ENLARGE UPON ABOVE.

NEW YORK SEND PHILADELPHIA PHOTOGRAPHS OF HAYER FOR DISPLAY TO MITCHELL AND OTHER SOURCES.

END

NY 55 JAA

FBI NEW YORK

Photos sent to Phil. 3/2/65 JJ

FD-36 (Rev. 10-29-63)

FBI

Date: 2/22/65

Transmit the following in PLAIN
(Type in plain text or code)

Via TELETYPE URGENT
(Priority)

TO: DIRECTOR, FBI (100-399321)
SAC, CHICAGO
SAC, PHILADELPHIA

FROM: SAC, NEW YORK (105-8999)

SUBJECT: MALCOLM K. LITTLE aka
IS-MMI

RE NEW YORK TELEPHONE CALLS TO AND FROM THE BUREAU AND TO CHICAGO, FEBRUARY TWENTY ONE AND TWENTY TWO, NINETEEN SIXTY FIVE.

NY [redacted] Informant symbol #, RELIABLE, ADVISED THREE TEN P.M., FEBRUARY TWENTY ONE, NINETEEN SIXTY FIVE, THAT MALCOLM X WAS JUST SHOT AT THE AUDUBON BALLROOM, NEW YORK CITY, WHILE ADDRESSING AN ORGANIZATION OF AFRO DASH AMERICAN UNITY RALLY. AT THE TIME MALCOLM WAS SHOT AN EXCHANGE OF GUNFIRE FROM THE SPEAKERS PLATFORM WAS OBSERVED. REUBEN X FIRED SEVERAL SHOTS AT THE ASSASINS.

1 - Washington Field (AM) (RM)(INFO)
1 - Boston (AM) (RM) (INFO)
1 - Cleveland (AM) (RM) (INFO)
1 - Los Angeles (AM) (RM) (INFO)
1 - Newark (AM) (RM) (INFO)
1 - San Francisco (AM) (RM)(INFO)

JCS:rfh
(7)

SEARCHED ..... INDEXED .....
SERIALIZED ..... FILED .....
FBI - NEW YORK
[redacted]
SA's name

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

WA 5-PM

14

FD-36 (Rev. 5-22-64)

FBI

Date:

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Via _____ _____
(Priority)

NY 105-8999

PAGE TWO

NYCPD CAPTURED ONE PERSON OUTSIDE OF AUDUBON BALLROOM WHO WAS LATER IDENTIFIED AS THOMAS HAGAN, NEGRO MALE, AGE TWENTY TWO. HAGAN HAD IN HIS POSSESSION AT THIS TIME A FORTY FIVE AUTOMATIC CLIP CONTAINING FOUR ROUNDS OF AMMUNITION. HAGAN WAS SHOT IN THE LEFT THIGH AND WAS ADMITTED TO JEWISH MEMORIAL HOSPITAL FOR TREATMENT, AND AT FIVE THIRTY P.M., FEBRUARY TWENTY ONE, NINETEEN SIXTY FIVE WAS TRANSFERRED TO BELLEVUE HOSPITAL, NYC. NYCPD ADVISED THAT A SAWED OFF, DOUBLE BARREL SHOTGUN WAS FOUND ON THE STAGE OF THE BALLROOM WRAPPED IN A GREEN SUIT COAT, CONTAINING A KEY FOR YALE LOCK, PACK OF CAMEL CIGARETTES, EMPTY GLASS CASE BEARING OPTOMETRIST'S NAME, M.M. PINE, MAIN STREET, FLUSHING. SHOTGUN CONTAINED TWO DISCHARGED REMINGTON EXPRESS SHELLS, SINGLE O BUCKSHOT SHELLS AND INDICATIONS THAT GUN WAS RECENTLY USED. ALSO LOCATED IN THE HALL WERE THREE FORTY FIVE CALIBER SHELLS AND SLUGS, SIX NINE MILEMETER SHELLS AND TWO SLUGS AND THREE THIRTY TWO CALIBER SLUGS AND TEN PIECES OF LEAD, PRESUMABLY FIRED FROM A SHOTGUN.

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Special Agent in Charge

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FBI

Date:

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Via _____ _____
(Priority)

NY 105-8999

PAGE THREE

ANOTHER SOURCE, WHO IS IN A POSITION TO FURNISH RELIABLE INFORMATION, ADVISED THAT MALCOLM WAS PRESENTED TO THE AUDIENCE AT APPROXIMATELY THREE TWO P.M. AND HAD MOVED TO A POSITION BEHIND THE PODIUM. AS HE ROSE FROM BEHIND THE PODIUM AND WALKED TO THE SPEAKER'S POSITION TO GREET THE AUDIENCE SOMEONE FROM THE LEFT SIDE OF THE HALL, APPROXIMATELY FOUR ROWS FROM THE FRONT, DESCRIBED AS A NEGRO MALE, YELLED QUOTE GET YOUR HANDS OUT OF MY POCKET UNQUOTE. AS THIS WAS DONE, MALCOLM X'S BODY GUARDS MOVED IN THE DIRECTION OF THIS INDIVIDUAL AND ATTEMPTED TO SUBDUE HIM, WHEREUPON MALCOLM X SAID QUOTE HOLD IT UNQUOTE. AT THIS TIME SOURCE WAS WALKING TOWARD THIS MAN IN FRONT OF THE AUDIENCE AND FROZE AS A RESULT OF MALCOLM'S COMMAND TO QUOTE HOLD IT UNQUOTE. WITHOUT HESITATION, TWO MEN, OCCUPYING THE FRONT SEATS, LEFT SIDE OF MIDDLE AISLE, APPROXIMATELY EIGHTEEN FEET FROM MALCOLM X, GOT INTO A CROUCHED POSITION AND FIRED SEVERAL SHOTS IN THE DIRECTION OF MALCOLM X. THESE MEN

WILL BE INTERVIEWED

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Special Agent in Charge

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FD-36 (Rev. 5-22-64)

FBI

Date:

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Via _____ _____
(Priority)

NY 105-8999
PAGE FOUR

WERE DRESSED IN DARK CLOTHES, STILL IN A CROUCHED POSITION THE GUNMEN HASTILY MOVED TOWARD THE EXIT AND SEEMED TO BE STILL FIRING. SOURCE ADVISED THAT ~~RUBEN~~ REUBEN FRANCIS, MEMBER OF MALCOLM'S GROUP, HAD SHOT ONE OF THE QUOTE DECOYS UNQUOTE AND THAT ONE OF THE GUNMEN WAS CAUGHT BY SEVERAL OF THE MMI MEMBERS.

TRUSTED MEMBERS OF THE MMI MET AT THE HOTEL THERESA AT WHICH TIME JAMES SIXTY SEVEN X, WARDEN, EXECUTIVE SECRETARY OF THE MMI, STATED THAT HE HAD NEVER HEADED AN ORGANIZATION BUT WOULD DO ALL HE COULD TO PRESERVE THE IDEA AND KEEP THE PROGRAM ALIVE. HE ALSO STATED THAT A LESSON HAD BEEN LEARNED BY THE GROUP IN THAT NOW THEY MUST TIGHTEN UP THE SECURITY OF BOTH MEMBERS AND LEADERS AND STATED QUOTE WE ARE AT WAR UNQUOTE.

NYCPD ADVISED THAT IN ADDITION TO MALCOLM AND HAGAN, THE SUSPECT, BEING SHOT, TWO PEOPLE IN THE AUDIENCE WERE STRUCK BY FLYING BULLETS. ONE WILLIE HARRIS, A MEMBER OF MALCOLM'S ORGANIZATION, WAS SHOT IN THE RIGHT SIDE AND WILLIE PARKER WAS WOUNDED IN THE LEFT FOOT. BOTH WERE TAKEN TO

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Special Agent in Charge

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FD-36 (Rev. 5-22-64)

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Via _____ _____
(Priority)

NY 105-8999

PAGE FIVE

COLUMBIA PRESBYTERIAN HOSPITAL AND THEIR CONDITIONS ARE CONSIDERED GOOD. POLICE CONSIDER BOTH PARKER AND HARRIS TO BE MERELY ONLOOKERS AND NOT TO HAVE BEEN INVOLVED IN THE SHOOTING. AUTOPSY ON MALCOLM X REFLECTED THAT HE HAD TEN BULLET WOUNDS IN HIS CHEST, THIGH AND ANKLE, PLUS FOUR BULLET GREASES IN THE CHEST AND THIGH. THIS AUTOPSY LOCATED ONE NINE MILEMETER SLUG, ONE FORTY FIVE CALIBER SLUG AND SEVERAL SHOTGUN PELLETS IN HIS BODY. THE POLICE HAVE CHARGED HAGAN WITH HOMICIDE ON MALCOLM X AND HAVE CHARGED ~~RUBEN~~ REUBEN X FRANCIS WITH FELONIOUS ASSAULT AND POSSESION OF A DEADLY WEAPON. THE POLICE SAY THAT IN VIEW OF THE NATURE OF HAGAN'S INJURY HE MAY BE HOSPITALIZED FOR UP TO SIX WEEKS. THE NYCPD HAVE A WITNESS WHO HAS IDENTIFIED FRANCIS AS FIRING BACK AT ASSAILANTS OF MALCOLM X. FRANCIS IS PRESUMED TO HAVE FIRED THE SHOT WHICH STRUCK HAGAN. POLICE ALSO SUSPECT FRANCIS SHOT THE THIRTY TWO CALIBER REVOLVER USED IN THESE SHOOTINGS, THOUGH THE GUN HAS NOT BEEN LOCATED. THE POLICE NOW ESTIMATE THAT THE NUMBER OF MALCOLM'S ASSAILANTS NUMBER FROM TWO TO FOUR, INCLUDING

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

FD-36 (Rev. 5-22-64)

FBI

Date:

Transmit the following in _____ (Type in plaintext or code)

Via _____ (Priority)

NY 105-8999

PAGE SIX

THE CAPTURED HAGAN. FBI IDENTIFICATION DIVISION IDENTIFIED FINGERPRINTS OF HAGAN AS IDENTICAL TO TALMADGE HAYER, ALSO KNOWN AS THOMAS HAYER, FBI NUMBER ONE FOUR TWO FOUR NINE SIX F, NEGRO MALE, BORN MARCH SIXTEEN, NINETEEN FORTY TWO AT HACKENSACK, NEW JERSEY, RESIDES THREE FOUR SEVEN MARSHALL STREET, PATTERSON, NEW JERSEY, ARRESTED ELEVEN SEVEN SIXTY THREE FOR RECEIPT OF STOLEN GOODS BY PASSAIC COUNTY BUREAU OF IDENTIFICATION, PATTERSON, NEW JERSEY, ARREST NUMBER THREE TWO NINE SIX ONE, NO DISPOSITION SHOWN. NYO AND NEWARK INDICES NEGATIVE ON HAYER. DESCRIPTION OF ONLY ONE OTHER ASSAILANT HAS BEEN DETERMINED. HE IS A NEGRO MALE, AGE TWENTY EIGHT, SIX FEET TWO INCHES, TWO HUNDRED POUNDS, HEAVY BUILD, DARK COMPLEXION, WEARING GRAY COAT AND BELIEVED TO BE ASSAILANT WHO USED SHOTGUN. HAGAN HAS REFUSED TO FURNISH ANY INFORMATION OTHER THAN HIS NAME AND AGE, WHICH IS TWENTY TWO YEARS. NYO INDICES ON HAGAN NEGATIVE.

RONALD TIMBERLAKE, SELF-ADMITTED OAAU MEMBER, RESIDING ONE SEVEN SIX FOUR BEDFORD AVENUE, BROOKLYN, NY,

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(Priority)

NY 105-8999

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TELEPHONICALLY CONTACTED NYO AND ADVISED HE HAS ONE OF THE GUNS USED TO KILL MALCOLM X. CONTACTED BY BUREAU AGENTS, TIMBERLAKE TURNED OVER TO THEM A UNITED STATES ARMY COLT FORTY FIVE, MODEL ONE NINE ONE ONE, SERIAL NUMBER THREE THREE FIVE ZERO FIVE FIVE, WITH CLIP CONTAINING THREE ROUNDS OF AMMUNITION. DURING INTERVIEW, TIMBERLAKE STATED HE WITNESSED THE SHOOTING FROM THE REAR OF THE AUDUBON BALLROOM AND BELIEVED FOUR TO FIVE NEGRO MALES PARTICIPATED IN THE SHOOTING. TIMBERLAKE STATED THAT TWO MEN PASSED HIM WHEN LEAVING THE BALLROOM. TWO OTHERS WERE RUNNING OUT OF THE BALLROOM, ONE TURNED TO RETURN THE FIRE AT MALCOLM'S MEN. AS THIS MAN TURNED TO RUN OUT THE DOOR, HE, TIMBERLAKE, THREW A BODY BLOCK AT HIM, AND THIS PERSON FELL ON THE STEPS, DROPPING THE GUN. THE LAST MAN RUNNING OUT OF THE BUILDING JUMPED OVER THE PERSON HE STRUCK AND WAS APPARENTLY ARRESTED WHEN HE LEFT THE BUILDING. THE PERSON WHO WAS STRUCK DOWN FELL DOWN THE STAIRS, SCRAMBLED TO HIS FEET, AND BEGAN RUNNING OUT OF THE BUILDING. TIMBERLAKE STATED HE PICKED UP THE GUN AND TRIED TO SHOOT HIM BUT

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NY 105-8999

PAGE EIGHT

THE GUN JAMMED. ABOUT THIS TIME, SOME OF MALCOLM'S MEN PUSHED HIM BACK INSIDE THE BUILDING WHERE HE THEN PUT THE GUN IN HIS POCKET AND WAITED UNTIL MALCOLM WAS TAKEN AWAY, AND LEFT THE BALLROOM. TIMBERLAKE DESCRIBED THE MAN WITH THE GUN AS BEING MALE NEGRO, AGE TWENTY, FIVE FEET SEVEN INCHES, MEDIUM BUILD, SHORT BLACK HAIR, BROWN SKIN, WEARING A DARK BROWN, DIRTY SUEDE JACKET. THE LAST MAN LEAVING THE BUILDING WAS DESCRIBED AS MALE, NEGRO, THIRTY YEARS OF AGE, SIX FEET TALL, ONE HUNDRED AND SIXTY POUNDS, SHORT BLACK HAIR, MAY HAVE HAD A SMALL MUSTACHE, WORE DARK TROUSERS, MEDIUM GRAY TOP COAT AND NO HAT.

INSPECTOR THOMAS G. RENEGHAN, DEPUTY INSPECTOR ARTHUR GRUBERT, N.A. AND DETECTIVE LOUIS W. JARLY, ALL OF THE NYCPD, CAME TO THE NYO AND PICKED UP THE FORTY FIVE CALIBER GUN MADE AVAILABLE BY TIMBERLAKE AND WERE ADVISED THAT THE INDIVIDUAL WHO GAVE AGENTS THIS GUN DESIRED HIS IDENTITY BE KEPT CONFIDENTIAL AT THIS TIME, AND THAT THE FBI WOULD ATTEMPT TO PREVAIL UPON THIS SOURCE TO COOPERATE AND IDENTIFY HIMSELF TO THE POLICE. INSPECTOR RENEGHAN

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Special Agent in Charge

FD-36 (Rev. 5-22-64)

FBI

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Via _____ _____
(Priority)

NY 105-8999

PAGE NINE

ADVISED THAT HE DID NOT DESIRE THAT WE ATTEMPT TO APPROACH THIS SOURCE AT THIS TIME AND PREFERRED THAT WE WAIT UNTIL THE FBI IS CONTACTED BY HIM AT A LATER DATE AS AN APPROACH AT THIS TIME MAY BE FRIGHTEN THIS POTENTIAL WITNESS, CAUSING HIM TO LEAVE THE NY AREA. NY WILL NOT RECONTACT THIS SOURCE AT THIS TIME PURSUANT TO INSPECTOR RENEGHAN'S REQUEST.

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FD-36 (Rev. 10-29-63)

FBI

Date:

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NY 105-8999

POLICE INDICATE THEY HAVE THE FOLLOWING WITNESSES TO THIS SHOOTING: FREE LANCE REPORTERS CHARLES MOORE AND ALBERT MC CLELLAN, BOTH OF SIXTY-SIX RIVERSIDE DRIVE, NYC, WILLIE PARKER, TWO THREE NAUGHT FIVE THIRTIETH AVENUE, ASTORIA, DOB JANUARY TWENTY-SIX TWENTY-NINE, MENTIONED PREVIOUSLY, AND EDWARD PARENTHESIS LNU END PAREN, OF ONE NINE NAUGHT DASH NAUGHT THREE ONE HUNDRED ELEVENTH AVENUE, QUEENS, N.Y., A NEGRO MALE, AGE SIXTY-NINE.

JACK SHANAHAN, CITY DESK, ASSOCIATED PRESS, FIFTY ROCKEFELLER PLAZA, NYC, ADVISED FEBRUARY TWENTY-FIRST SIXTY-FIVE THAT ONE OF THEIR SOURCES WHOSE RELIABILITY IS UNKNOWN BY THIS OFFICE, HAD STATED THAT SOME MEN, INCLUDING DONALD WASHINGTON AND OMAR (PH) (BELIEVED TO BE OMAR AHMED) (KNOWN OAAU MEMBERS IN NYC), WERE GOING TO CHICAGO EITHER BY PLANE OR CAR FOR THE PURPOSE OF KILLING ELIJAH MUHAMMAD, NOI NATIONAL LEADER. AP SOURCE ALSO ADVISED THAT PLANS HAVE BEEN MADE TO KILL JAMES SIXTY-SEVEN X WARDEN AND MARTIN LUTHER KING. AP SOURCE INDICATED THAT KING WAS TO HAVE BEEN KILLED WHEN THE STATUE OF LIBERTY WAS SUPPOSED TO HAVE BEEN DESTROYED. HE ALSO STATED THAT MALCOLM X WAS NOT DUE TO BE ASSASSINATED UNTIL TWO WEEKS

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Via _____ _____ (Priority)

NY 105-8999

FROM TODAY (FEBRUARY TWENTY-ONE SIXTY-FIVE) BUT THAT THE SCHEDULE HAD BEEN MOVED AHEAD.

IT IS TO BE NOTED IN REFERENCE TO DONALD WASHINGTON THAT NY FOUR SIX NAUGHT FIVE R ADVISED FEBRUARY TWENTY-ONE SIXTY-FIVE THAT DONALD WASHINGTON IS DESCRIBED AS NEGRO, MALE, AMERICAN, LATE TWENTIES, FIVE FOOT NINE INCHES, ONE SEVENTY FIVE POUNDS, MEDIUM BUILD, BROWN EYES, BLACK HAIR, SMALL MUSTACHE, SMALL BEARD, VERY PRONOUNCED HOOK NOSE, COFFEE BEAN COMPLEXION, VERY NERVOUS, EXCITABLE MANNER. WEARS PAKISTINIAN TYPE GINNAHA CAP. OMAR AHMED WAS DESCRIBED BY NY FOUR SIX NAUGHT FIVE R AS FOLLOWS: NEGRO, MALE, AMERICAN, THIRTY-ONE YEARS OF AGE, SIX FEET TWO OR THREE INCHES TALL, ONE SEVENTY-FIVE TO ONE EIGHTY POUNDS, WELL-KNIT BUILD, SHAVED HEAD, THIN MUSTACHE, VERY DARK COMPLEXION, DARK EYES, FALSE TEETH IN FRONT OF MOUTH, WEARS GINNAHA TYPE CAP AND A BLACK COAT.

NY Informant symbol # [redacted] ADVISED HE OVERHEARD MARK CRAWFORD, REPORTER "LIFE" MAGAZINE, IN CONVERSATION WITH A GEORGE (LNU), WASHINGTON, D. C., APPROXIMATELY ELEVEN THIRTY P.M. FEBRUARY TWENTY-ONE SIXTY-FIVE DURING WHICH CONVERSATION

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Special Agent in Charge

FD-36 (Rev. 12-13-56)

FBI

Date:

Transmit the following in _____
(Type in plain text or code)

Via _____ _____
(Priority or Method of Mailing)

CRAWFORD STATED THAT THE KILLERS OF MALCOLM X WERE POSSIBLY IMPORTED TO NYC. NY [redacted] BELIEVED THE FOLLOWING STATEMENTS BY CRAWFORD TO BE ACCURATE, THAT CRAWFORD ADVISED GEORGE TO CHECK OUT WASHINGTON AND CIA BECAUSE THEY WANTED MALCOLM OUT OF THE WAY BECAUSE HE SNAFUED AFRICAN RELATIONS FOR THE U. S. INFORMANT ALSO OVERHEARD CRAWFORD CALL DICK DURHAM IN CHICAGO AT TELEPHONE AB FOUR EIGHT SIX TWO THREE DURING WHICH CONVERSATION CRAWFORD ADVISED DURHAM THAT TWO OF MALCOLM'S MEN WERE THEN IN CHICAGO HAVING FLOWN THERE TO HIT EITHER ELIJAH OR THE UNIVERSITY (PRESUMABLY UNIVERSITY OF ISLAM). HE ALSO ADVISED DURHAM TO STAY OUT OF THE WAY WHEN BULLETS START FLYING.

THE NYCPD ADVISED FEBRUARY TWENTY-ONE SIXTY-FIVE AT ELEVEN P. M. THAT THE PHILADELPHIA POLICE HAD CONTACTED THEM TO ADVISE THAT THEY HAD PICKED UP ONE LLOYD WRIGHT (BELIEVED TO BE AN MMI MEMBER IN PHILADELPHIA) WHO CAME TO ST. LUKE'S HOSPITAL IN PHILADELPHIA WITH A BROKEN ARM AND ADMITTED BEING AT THE AUDUBON BALLROOM WHEN THE SHOOTING TOOK PLACE INVOLVING MALCOLM LITTLE. NO FURTHER DETAILS WERE FURNISHED AT THIS TIME IN THIS

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Special Agent in Charge

FD-36 (Rev. 12-13-56)

FBI

Date:

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(Type in plain text or code)

Via _____ _____
(Priority or Method of Mailing)

REGARD BY THE NYCPD. THIS BEING SUBMITTED FOR PHILADELPHIA'S INFORMATION.

BUREAU WILL BE KEPT ADVISED.

AM COPIES BEING FORWARDED TO BOSTON, CLEVELAND, LOS ANGELES, SAN FRANCISCO, NEWARK AND WASHINGTON FIELD OFFICE.

ALL INFORMATION CONTAINED HEREIN PERTAINING TO CHICAGO HAS BEEN PREVIOUSLY FURNISHED TO THEM BY TELEPHONE.

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

FD-36 (Rev. 10-29-63)

FBI

Date: 2/23/65

Transmit the following in _____ (Type in plain text or code)

Via TELETYPE URGENT (Priority)

TO: DIRECTOR, FBI (100-399321)

FROM: SAC, NEW YORK (105-8999)

MALCOLM K. LITTLE, AKA; IS DASH MMI

RENYTELETYPE TO BUREAU DATED FEBRUARY, TWENTY TWO, SIXTY FIVE.

LT. FRANK SULLIVAN, HOMICIDE SQUAD, NEW YORK CITY POLICE DEPARTMENT (NYCPD) STATED HE CONTACTED RONALD TIMBERLAKE EVENING OF FEBRUARY TWENTY TWO, SIXTY FIVE. HE STATED TIMBERLAKE WAS BELLIGERENT AND REFUSED TO GIVE A STATEMENT EVEN AFTER NYCPD OFFERED HIM PROTECTION. TIMBERLAKE SAID HE DIDN'T WANT TO GET INVOLVED IN ANYWAY WITH THE INVESTIGATION OF MALCOLM X'S DEATH. TIMBERLAKE WAS TAKEN TO BELLEVUE HOSPITAL, NYC BY NYCPD WHERE ACCORDING TO LT. SULLIVAN TIMBERLAKE EITHER COULD NOT OR WOULD NOT IDENTIFY TALMADGE HAYER AS ONE OF THE ASSASSINS. LT. SULLIVAN STATED HAYER'S FINGERPRINT WAS FOUND ON THE CLIP OF THE FORTY FIVE CAL. PISTOL TURNED OVER TO THE NYO BY TIMBERLAKE. NYCPD PLANS TO RECONTACT TIMBERLAKE IN ABOUT TWO DAYS.

1 - New York

1 - Supv. #3

JCS:mrm
(2)

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

1965

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FD-36 (Rev. 5-22-64)

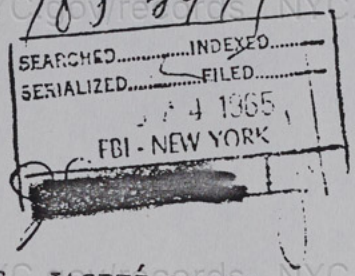
FBI

Date: 2/23/65

Transmit the following in PLAIN TEXT
(Type in plaintext or code)

Via TELETYPE URGENT
(Priority)

105-8999-125



TO : DIRECTOR, FBI (100-399321)

FROM : SAC, NEW YORK (105-8999)(43)

SUBJECT: MALCOLM K. LITTLE, AKA.
IS - MMI

ON TWO TWENTY THREE, SIXTY FIVE, JASPER DAVIS ADVISED NYO THAT HE ATTENDED OAAU RALLY AT AUDUBON BALLROOM, NYC, TWO TWENTY ONE, SIXTY FIVE, WHEN MALCOLM X WAS KILLED. ACCORDING TO DAVIS HE WAS SITTING IN THE SEVENTH OR EIGHTH ROW FROM THE FRONT ON THE RIGHT SIDE WHEN FACING THE AUDIENCE. DAVIS SAID MALCOLM X HAD JUST GREETED THE AUDIENCE WHEN A NEGRO MALE SEATED NEXT TO HIM SAID "GET YOUR HANDS OUT OF MY POCKET" THEN STOOD UP AND PUSHED HIS CHAIR BACK. SEVERAL OTHER PERSONS IN THE SAME ROW GOT UP CAUSING SOME CONFUSION WHICH IN TURN CAUSED OTHERS TO LOOK IN THAT DIRECTION. DAVIS SAID THEN HE HEARD A LOUD SHOT RING OUT COMING FROM THE FRONT OF THE HALL NEAR THE STAGE. HE SAID HE GOT A LOOK AT THE BACK OF THE HEAD OF THE PERSON HE BELIEVES FIRED THE FIRST SHOT BUT WOULD NOT BE ABLE TO IDENTIFY HIM. DAVIS SAID EVERYTHING HAPPENED SO FAST AND THE FACT THAT

1 - New York
JCS:msb
(2)

1 - SUP. 43

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Special Agent in Charge

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FD-36 (Rev. 5-22-64)

FBI

Date:

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Via TELETYPE _____
(Priority)

NY 105-8999
PAGE TWO

HE "HIT" THE FLOOR TO SAVE HIMSELF FROM BEING SHOT, PREVENTED HIM FROM BEING ABLE TO IDENTIFY ANY OF THE GUNMEN. DAVIS DESCRIBED THE MAN WHO SAID "GET YOUR HANDS OUT OF MY POCKET" AS MALE, NEGRO, ABOUT THIRTY FIVE TO FORTY YEARS, FIVE FEET NINE INCHES, MEDIUM BUILD, BROWN SKIN, WHO WORE A RATHER DARK GRAY OR PLAIN GRAY JACKET. DAVIS SAID AFTER THE SHOOTING HE WENT UP TO SEE MALCOLM X AND SAID HE WAS ALL BLOODY AND NO SIGN OF LIFE. DAVIS SAID HE WAS INTERVIEWED BY THE NYCPD AND FURNISHED THE SAME INFO TO THEM ON TWO TWENTY ONE, SIXTYFIVE.

A FORMER PSI, NYO informant's name [redacted] (INSUFFICIENT CONTACT TO DETERMINE RELIABILITY) AND NY Informant's symbol # [redacted] (RELIABLE) ADVISED TWO TWENTY THREE, SIXTY FIVE, THAT ALL MEETINGS OF THE MMI AND OAAU HAVE BEEN CANCELLED UNTIL AFTER MALCOLM X'S FUNERAL ON SATURDAY, TWO TWENTY SEVEN, SIXTY FIVE. THE ONLY SCHEDULED AFFAIR IS A MEMORIAL BENEFIT TO RAISE MONEY FOR MALCOLM X'S WIDOW AND FAMILY, SCHEDULED FOR EIGHT P.M., TWO

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Special Agent in Charge

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FD-36 (Rev. 5-22-64)

FBI

Date:

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Via TELETYPE _____ (Priority)

NY 105-8999
PAGE THREE

TWENTY THREE, SIXTY FIVE, IN THE SKYLINE ROOM OF THE HOTEL THERESA, NYC, BY THE OAAU.

ON TWO TWENTY THREE, SIXTY FIVE, CSNY [redacted] Informant's symbol # [redacted] (RELIABLE) ADVISED THAT THE HOTEL THERESA HAS CANCELLED THE RESERVATION OF THE OAAU FOR THE SKYLINE ROOM ON TWO TWENTY THREE, SIXTY FIVE, AND BENEFIT WILL DEFINITELY NOT BE HELD THERE. CANCELLATION BY HOTEL WAS ON SUGGESTION OF NYC PD CAPTAIN SEALEY (NA), TWENTY EIGHTH PRECINCT, TO AVOID FURTHER TROUBLE.

BSS, NYCPD, ADVISED OF SCHEDULED BENEFIT AND THE CANCELLATION OF THE HOTEL RESERVATION.

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

35

FD-36 (Rev. 5-22-64)

FBI

Date: 3/30/65

Transmit the following in CODE
(Type in plaintext or code)

Via TELETYPE URGENT
(Priority)

TO: DIRECTOR, FBI (100-399321)

FROM: SAC, NEW YORK (105-8999)

SUBJECT: MALCOLM K. LITTLE aka
IS - MMI

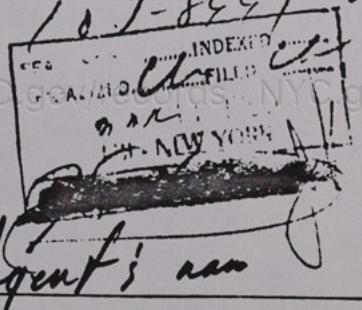
RE NEW YORK TEL THREE TWENTY NINE SIXTY FIVE.

SGT. GEORGE PORETTE, TWENTY FOURTH PRECINCT, NYCPD, ADVISED THREE THIRTY SIXTY FIVE THAT ROBERT THIRTY FIVE X SMITH, BUFILE ONE HUNDRED-FOUR FOUR THREE THREE ONE FOUR, FAILED TO APPEAR IN COURT, NEW YORK THREE TWENTY NINE SIXTY FIVE ON CHARGES OF POSSESSION OF A GUN. ROBERT [illegible] FORFEITED ONE THOUSAND DOLLARS BAIL. SMITH WAS ONE OF MALCOM X'S BODYGUARDS ON TWO,TWENTY ONE SIXTY FIVE WHEN MALCOLM X WAS KILLED. SMITH WAS SEEN WITH LARGE AMOUNT OF MONEY DAY AFTER MALCOLM X'S DEATH. POLICE DEPARTMENT HAS WARRANT FOR SMITH'S ARREST FOR FAILING TO APPEAR IN COURT.

105-8999-6209

1-New York 100-[illegible] (LANGSTON SAVAGE)
1-New York 100-153269 (ROBERT SMITH)
1-New York

JCS:pmg
(4)
1-Supervisor # 43



Agent's name

Approved: _____ Sent 752 PM Per _____
Special Agent in Charge

40

-64)

FBI

Date:

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(Type in plaintext or code)

Via _____ _____
(Priority)

NY 105-8999

PAGE TWO

ALSO WANTED BY POLICE DEPARTMENT FOR QUESTIONING IN DEATH OF MALCOLM X. LANGSTON SAVAGE KNOWN MEMBER MMI SUBPOENAED TO APPEAR BEFORE GRAND JURY THIS DATE. ACCORDING TO SGT. PORETTE, SAVAGE MAY BE HELD IN CONTEMPT FOR REFUSING TO ANSWER QUESTIONS BEFORE GRAND JURY. CURRENT INVESTIGATION BEING CONDUCTED BY NYO ON SAVAGE FOR CONSIDERATION ON THE SECURITY INDEX.

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

(Rev. 10-29-63)

FBI

Date: 4/2/65

Transmit the following in _____ (Type in plain text or code)

Via Airtel _____ (Priority)

To: SACs, New York (105-8999) 225
Philadelphia (100-39918)

From: Director, FBI (100-399321)

MALCOLM K. LITTLE
INTERNAL SECURITY - MMI

ReNYairtels 4/1/65 and 3/8/65, both captioned as above.

NYairtel of 3/8/65 contained information that NY symbol # was among informants who had viewed a photograph of Edward Oliver and had been unable to identify Oliver as being in attendance at the meeting at which Little was killed. Reairtel of 4/1/65 reported that NY [redacted] had stated after reviewing a photograph of Oliver that a person resembling Oliver had been observed at the above-mentioned meeting. The informant could not make a positive identification.

Prior to granting authority for the New York Office to furnish the tentative identification of Oliver as having been present at the meeting held 2/21/65, at which Little was killed, to the New York City Police Department; New York should advise by return airtel whether Oliver's photograph had been reviewed by all informants in attendance at the meeting.

In addition, Philadelphia should advise by return airtel whether [redacted] or his wife were able to identify Oliver as attending the meeting.
symbol #

- 105-8999-6256

#42 [redacted]

Agent's name

Sent Via _____ M Per _____

43

FBI

Date: 4/1/65

Transmit the following in _____

Via _____

TO: DIRECTOR, FBI (100-399321)

FROM: SAC, NEW YORK (105-8999)

SUBJECT: MALCOLM K. LITTLE aka
IS - MMI

ReNKteletype, 3/5/65, captioned "NORMAN HOWARD MORTIMORE, aka; SM - NOI".

On 3/8/65, Informant symbol # [redacted], reliable, viewed numerous photographs, including the photographs of TALMAGE HAYER, THOMAS JOHNSON, NORMAN HOWARD MORTIMORE and EDWARD OLIVER. HAYER and JOHNSON have been indicted for the homicide of MALCOLM X on 2/21/65, at New York City. MORTIMORE is a suspect of the NYCPD in the homicide of MALCOLM X. OLIVER is considered one of the Nation of Islam (NOI) "strong armed men" from Newark.

6 - Bureau (RM)
(1 - 100-) (TALMAGE HAYER)
(1 - 100-) (THOMAS JOHNSON)
(1 - 100-) (NORMAN HOWARD MORTIMORE)
3 - Newark (RM)
(1 - 100-) (TALMAGE HAYER)
(1 - 100-) (NORMAN HOWARD MORTIMORE)
(1 - 100-) (EDWARD OLIVER)
2 - Philadelphia (Encs. 2) (RM)
(1 - 100-39918) (MALCOLM K. LITTLE)
5 - New York
(1 - 100-154880) (NORMAN HOWARD MORTIMORE)
(1 - 100-154846) (TALMAGE HAYER)
(1 - 149-689) [redacted]
(1 - [redacted]) By Informant

105-8[illegible]-62

SEARCHED ... INDEXED ...
SERIALIZED ... FILED ...
FBI - NEW YORK

JCS:gfb
(17)

Agent's name [redacted]

Approved: Sent _____ M Per _____
SPECIAL AGENT IN CHARGE

44

The informant, upon reviewing a photograph of HAYER, stated that he observed an individual resembling HAYER in the front section of the Audubon Ballroom on 2/21/65, when MALCOLM X was shot and killed. He said this individual was one of two men who were standing to the right of the rostrum, one of whom was observed shooting a pistol in the direction of MALCOLM X. The informant stated, however, that he could not make a positive identification of the photograph.

Upon reviewing photographs of MORTIMORE and JOHNSON, the informant stated that these photographs resembled two individuals who sat in about the middle of the audience at the Audubon Ballroom on 2/21/65 and who jumped up at about the time MALCOLM X appeared at the rostrum. One of the two individuals (informant could not be certain which) shouted that someone "got into his pocket". This caused a disturbance and drew the attention of the audience and MALCOLM X's bodyguards to themselves. The guards approached them and left MALCOLM X unguarded, at which time some shooting occurred down in front near the rostrum. The informant could not make a positive identification of the photographs.

The informant, upon reviewing a photograph of OLIVER, remarked that he saw a person resembling OLIVER at the Audubon Ballroom when MALCOLM X was shot, but did not believe that this person took an active part in the killing of MALCOLM X. The informant advised he could not make a positive identification of the photograph.

Sergeant GEORGE PORETTE, 24th Precinct, NYCPD, advised on 3/31/65, that at the present time HAYER, JOHNSON and NORMAN 3X BUTLER are the only persons known to them to have had anything to do with the death of MALCOLM X.

Bureau authority is requested to furnish information made available by NY [redacted] to the NYCPD on a confidential basis. If Bureau approves, this information will be furnished to NYCPD through Assistant Chief Inspector JOSEPH L. COYLE, Head of Manhattan North Detectives, NYCPD.

NY 105-8999

Philadelphia Office is requested to exhibit attached photograph of MORTIMORE and OLIVER to [redacted] and his wife to determine if they could identify MORTIMORE and OLIVER as taking part in the assassination of MALCOLM X or were observed in the audience at the Audubon Ballroom on 2/21/65 in New York City.

Philly's Informant symbol #

46

4/9/65

AIRTEL REGISTERED MAIL

TO: DIRECTOR, FBI (100-399321)

FROM: SAC, PHILADELPHIA (100-39918)

MALCOLM K. LITTLE
IS - MMI

RePHairtel to Director, 3/30/65, cc New York; NYairtel to Director, 4/1/65, cc Philadelphia; Buairtel to New York and Philadelphia, 4/2/65.

A photograph of EDWARD OLIVER, furnished by the New York Office, was exhibited to PH [redacted] and his wife. Neither PH [redacted] nor his wife could identify OLIVER. They stated that to their knowledge they had never seen him before.

In reNYairtel it is noted that NY [redacted] advised NORMAN HOWARD MORTIMORE and THOMAS JOHNSON resembled two individuals who sat in the middle of the audience at the Audubon Ballroom, New York City, on 2/21/65 and jumped up at about the time MALCOLM X appeared at the rostrum. One of these individuals shouted that someone "got into his pocket."

In rePHairtel, PH [redacted] advised that before the Grand Jury in New York City, he identified TALMAGE HAYER as the individual who stood up and told the person on his left, "Get your hand out of my pocket."

3 - Bureau (RM)
2 - New York (105-8999)(RM)
2 - Philadelphia
1 - 100-39918
1 - [redacted] Informant f.l.p #

Enc. (7) Mac

105-8999-626

SEARCHED INDEXED
SERIALIZED FILED
APR 1 1965
FBI — NEW YORK

Agent's name

4/10/65 JCM

47

PH 100-39918

PH [redacted] has identified photographs of HAYER, THOMAS JOHNSON and NORMAN BUTLER as being present at the Organization of Afro-American Unity (OAAU) meeting on 2/21/65 at the Audubon Ballroom in New York City, at which MALCOLM LITTLE was murdered. These photographs are the only photographs of suspects that PH [redacted] has identified.

OPTIONAL FORM NO. 10 5010-106
MAY 1962 EDITION
GSA GEN. REG. NO. 27

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, New York (105-8999) DATE: 4/13/65

FROM : Director, FBI (100-399321)

SUBJECT: MALCOLM K. LITTLE
INTERNAL SECURITY - MMI

ReBSlet 3/25/65 captioned "Leon Lionel Phillips, Jr., aka, SM - NOI," a copy of which is attached for the Newark Office which has not previously received copies.

New York should carefully review the information contained in referenced letter as furnished by the late Leon Lionel Phillips. After this review, New York should determine whether Phillips had been interviewed by the New York City Police Department (NYCPD) during his visit there after the murder of Little. An attempt should be made to determine whether the information contained in referenced letter is already in the possession of the NYCPD, particularly the information alleging that the individual who fired the shotgun at Little was supposedly a lieutenant from the Newark Temple of the Nation of Islam (NOI). In the event this information is not already in the possession of the NYCPD, such information should not be furnished to the NYCPD without first receiving Bureau authority.

Newark should review its files for the purpose of identifying the lieutenant in the Newark Temple of the NOI. If Newark has not already done so, a photograph of this lieutenant should be furnished to the New York Office for the purpose of having informants who were present at the time Little was killed view the photograph for possible identification as one of the murderers. This matter should be handled promptly.

Boston should in the future insure that copies of all communications are furnished to every interested office so that it will not be necessary for the Bureau to furnish copies of such communications to additional interested offices.

2 - Newark (Enclosure)
1 - Boston (100-27649)

SEARCHED INDEXED
SERIALIZED FILED
APR 13 1965
FBI—NEW YORK

Agent's name

105-[illegible]-63
49

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106-03

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (100-399321) DATE 4/21/65

FROM : SAC, NEWARK (100-40295) (P)

SUBJECT: MALCOLM K. LITTLE, aka
IS-MMI

Re Bureau letter to New York, 4/13/65.

Referenced Bureau letter concerns information furnished to the Boston Office by LEON LIONEL PHILLIPS, JR. alleging that the individual who fired the shotgun at LITTLE was supposedly a lieutenant from the Newark Temple of the NATION OF ISLAM (NOI).

At the time subject was killed, there were only two lieutenants at MUHAMMAD's MOSQUE (MM) #25, Newark, N.J. They are RICHARD 15X (LNU) and EDWARD 15X (LNU). Newark files on both of these individuals have been opened and assigned and investigation to date has failed to positively identify either. NK 2339-S, who has furnished reliable information in the past, has described these individuals as follows:

RICHARD 15X (LNU)

Sex	Male
Race	Negro
Age	28-30
Height	6'2"
Weight	150-160 pounds
Hair	Black
Eyes	Brown
Build	Slender
Complexion	Dark brown
Characteristics	Large eyes; egg-shaped head
Maritial Status	Single
Occupation	Floor waxer
Employer	Unknown

2 - Bureau (RM)
1 - New York (105-8999) (info) (RM)
4 - Newark
(1 - 100-48001) (RICHARD 15X)
(1 - 100-48026) (EDWARD 15X)
GRB:mafm
(7)

105-8999-6324

Agent's name [redacted]

50

NK 100-40295

EDWARD 15X (LNU)

Sex	Male
Race	Negro
Age	28-31
Height	6'2"
Weight	150-165 pounds
Hair	Black
Eyes	Brown
Build	Slender
Complexion	Medium brown
Characteristics	Large eyes; thin mustache
Marital Status	Single
Occupation	Works in a hospital; place unknown

Investigation is continuing to identify RICHARD 15X and EDWARD 15X and photographs will be furnished to New York Office.

Referenced Bureau letter included a copy of Boston letter dated 3/25/65, captioned "LEON LIONEL PHILLIPS, JR., aka; SM-NOI", but did not include a copy of the letterhead memorandum submitted to Bureau with that letter.

The Bureau is requested to furnish Newark with a copy of this letterhead memorandum.

50

DIRECTOR, FBI (100-3[illegible]321) 6/24/65

SAC, NEW YORK (105-8[illegible]) (P)

MALCOLM K. LITTLE aka
IS - [illegible]

On 6/24/65, Sergeant CHARLES PONETTE, 24th Precinct, NYCPD, 151 West 100th Street, NYC, advised that he just received a communication from Deputy Superintendent EDWARD DEMIS, Boston Police Department, Boston, Massachusetts, which stated that "JAMES W. COOK, JR., DOB 12/27/1933, FBI # 655-210-D was believed to have been involved in the killing of Malcolm X on 2/21/65, at NYC. Communication continued by stating that "Cook is believed to have been wounded when Malcolm X was killed and could not be located in the Boston area and is believed to be in Florida, recuperating from his wounds."

NYO indices contain numerous references in the name JAMES COOK, but is unable to locate pertinent information identifiable with COOK.

Bureau and Boston Office are requested to check their indices on JAMES W. COOK, JR. for pertinent information to determine his whereabouts.

Boston Office is requested to contact Boston Police Department for photo and information that connects COOK with the killing of MALCOLM X.

2-Bureau (RS)
2-Boston (RS)
1-New York

JCS:pam
(5)

105-8999 [illegible]
Searched
Serialized
Indexed
Filed

Chief Clerk
Asst. [illegible]

51

0-9 (Rev. 5-22-64)

FBI

Date: 8-25-65

Transmit the following in _____
(Type in plaintext or code)

Via airtel _____
(Priority)

4E

To: SAC, New York (105-8999)

From: Director, FBI (100-399321)

MALCOLM X LITTLE
INTERNAL SECURITY - MMI

Reurtel 8-23-65 and telephone call to New York Office 8-24-65.

Since information has now been received indicating Rueben M. Francis is in Mexico, you should, utilizing this information, fully explore with appropriate officials of the New York City Police Department the possibility of obtaining a Federal unlawful flight warrant concerning him.

In the event there is a continuing reluctance on the part of the New York City Police Department to request FBI assistance under the Unlawful Flight Statute in this matter, you should furnish the Bureau full details.

This should be promptly handled and the Bureau advised of results.

1 cc 100-146782

1 - New York (100-146782)

105-8999

SEARCHED ..... INDEXED
SERIALIZED ..... FILED
AUG 2 1965
FBI - NEW YORK

Agent's name [redacted]

Sent Via _____ M Per _____ 8/2:/

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

Miami, Florida

OCT 21 1965

105-8554

RE: MALCOLM K. LITTLE;
INTERNAL SECURITY -
MUSLIM MOSQUE, INC.

Deputy Superintendent Edward F. Blake, Boston, Massachusetts, Police Department, advised that Department received the following anonymous communication dated June 13, 1965, which had been addressed to the Suffolk County Superior Court, Probation Department:

"James Cook, Black Moslem, said to be hiding in another state with gunshot wounds due to the fact that he was involved in the killing of Malcolm X. Try questioning his wife. Florida is a likely place.

"He was on probation."

Deputy Blake advised the person referred to in this communication was believed to be James W. Cook, Jr.

The files of the Middlesex County Superior Court, Probation Department, Cambridge, Massachusetts, show that James W. Cook, born December 27, 1933, at Boston, Massachusetts, was on probation there for a "flim-flam" type operation. This file shows that Cook pleaded guilty to a charge

105-8999-

SEARCHED
SERIALIZED
OCT 5
FBI

10/21

Howard LIPINSKI, Petitioner-Appellant,
v.
PEOPLE of the STATE OF NEW YORK, Respondent-Appellee.

No. 826, Docket 76-2154.

United States Court of Appeals, Second Circuit.

Argued March 8, 1977.

Decided March 28, 1977.

State prisoner petitioned for writ of habeas corpus. The United States District Court, Henry F. Werker, J., dismissed the petition and prisoner appealed. The Court of Appeals, Irving R. Kaufman, Chief Judge, held that use of the New York "voucher" rule, which prevented prisoner from impeaching his own witness, did not so impair prisoner's defense that his conviction violated the due process clause.

Affirmed.

1. Constitutional Law ⇐268(2)

Use of the New York "voucher" rule, which prevented prisoner from impeaching his own witness in criminal prosecution, did not so impair prisoner's defense that his conviction violated the due process clause.

2. Criminal Law ⇐338(1)

States have great latitude in determining rules of evidence to govern proceedings in their own courts.

3. Witnesses ⇐380(5)

Prisoner who was not permitted to impeach his own witness in criminal trial could not complain that application of the voucher rule prevented him from circumventing rule of evidence that out-of-court declaration introduced to impeach a witness cannot be used as substantive evidence. CPL N.Y. 60.35, subd. 2.

4. Constitutional Law ⇐266(1)

Where state prisoner was amply warned that he would not be permitted to impeach store detective who arrested him for petty larceny and that he was endangering his case by eliciting testimony that confirmed other detective's story, fact that detective gave damaging testimony did not constitute a denial of due process.

Phylis Skloot Bamberger, New York City (William J. Gallagher, The Legal Aid Society, Federal Defender Services Unit, New York City, of counsel), for petitioner-appellant.

Vincent L. Leibell, III, Asst. Dist. Atty., Westchester County, White Plains, N.Y. (Carl A. Vergari, Dist. Atty., Westchester County, White Plains, N.Y., of counsel), for respondent-appellee.

Before KAUFMAN, Chief Judge, and SMITH and MULLIGAN, Circuit Judges.

IRVING R. KAUFMAN, Chief Judge:

The hoary rule of evidence that prevents a party from impeaching his own witness has plagued scholars for over fifty years. The consensus of modern commentators is forcefully expressed by Professor Morgan: "the general prohibition, if it ever had any basis in reason, has no place in any rational system of investigation in modern society." [1]

[1] Nevertheless, many states continue to adhere to the traditional rule, at least in some form. See 3A *Wigmore on Evidence* §§ 896-906 (Chadbourne ed. 1970). The State of New York provides by statute that a party in a criminal case may impeach his own witness with a prior inconsistent statement only if the prior statement is either sworn or subscribed.[2] We are asked today

1. E. Morgan, Basic Problems of Evidence 70-71 (1962).

1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material is-

2. New York law provides:
Rules of evidence; impeachment of own witness by proof of prior contradictory statement

to hold that the use of the New York "voucher" rule, which prevented Howard Lipinski from impeaching the store detective who arrested him for petty larceny, deprived Lipinski of a fair trial. But despite the questionable basis of the voucher rule, we believe that the trial judge's refusal to permit Lipinski to impeach his own witness did not so impair Lipinski's defense that his ultimate conviction violated the due process clause. Accordingly, we will affirm the denial of Lipinski's petition for habeas corpus.

I.

A brief summary of the facts is indispensable for an understanding of this case. In the evening of March 15, 1974, Howard Lipinski entered the Gimbels Department Store at the Cross County Shopping Center through the Central Park doors. He immediately attracted the attention of two store detectives, Robert Bendetson and Michael Starrish, because he had been involved a short time previously in an altercation with a Gimbels salesgirl. Starrish testified that Lipinski wore a raincoat and carried an ordinary brown shopping bag with the curved handle of a black umbrella protruding. Their suspicions aroused, the detectives decided to follow Lipinski's progression through the store.

Lipinski walked immediately to the staircase leading to the basement, the detectives close behind. As Lipinski descended, Starrish was no more than six inches away and had a clear view of the contents of the shopping bag. He testified that it was empty save for the black umbrella.

The store detectives pretended to shop for phonograph records while they maintained surveillance over Lipinski. Starrish testified that Lipinski proceeded immediately to the tennis racket display in the Sporting Goods Department. There, setting his shopping bag on the floor, Lipinski carefully looked around to satisfy himself that he was not being watched. He then removed two tennis rackets from the wall, glanced about him once again, and placed them into the shopping bag. Lipinski then approached the sales counter and engaged the attention of a clerk.

The salesman, Louis Pistecchia, testified that Lipinski sought to "return" the tennis rackets in the shopping bag for a cash refund. Lipinski presented a sales slip dated the previous day which showed he had purchased two tennis rackets of the same model (Wilson T–3000) as those he had just removed from the wall. Pistecchia asked Lipinski to wait while he went to the manager's office with the sales slip to procure a return voucher. The sales clerk was intercepted by Starrish, who explained that Lipinski had not brought the tennis rackets into the store but had just taken them from the wall display. Pistecchia proceeded with the transaction as directed. Lipinski duly signed the voucher, and the sales clerk secured the manager's approval. Pistecchia then delivered the return voucher, made out for $106.98, to Lipinski and directed him to the credit department for his refund.

After Lipinski had left the sales area, Starrish approached him, identified himself as a store detective, and confronted him with the skein of events the detective had just witnessed. Lipinski remained silent.

sue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

3. When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

C.P.L. § 60.35.

Starrish asked Lipinski to accompany him and Bendetson to the security office. As they reached the top of the stairs leading to the ground floor Lipinski bolted for the door. The two detectives thwarted the escape and, after a slight struggle, handcuffed him.

In the store security office Lipinski was questioned but obdurately refused to answer. He was, accordingly, turned over to the Yonkers police. After Lipinski had left, the detectives found the return voucher, signed by the accused, crumpled behind the chair where he had been sitting.

Bendetson signed an information the following day. Shortly thereafter, Lipinski's father, Arthur, a retired lawyer, interviewed Bendetson concerning the incident. A tape recording reveals Bendetson's story as follows:

[Bendetson] He came in through the Central Park Doors, the Men's Department. We followed him in. He's been in the store before. Well, that's beside the point.

I saw he had a shopping bag. We followed him down. Inside the shopping bag nothing was sticking out. We followed him into the Sporting Goods Department. He went right to the tennis rackets. He took two tennis rackets off the wall and put them inside the shopping bag. I saw this and so did somebody else. He then went over to the cash register and produced a receipt for them. And that was that.

[A. Lipinski] He only took two racquets from the wall, you say?

[Bendetson] He took two tennis racquets off the wall and put them into the shopping bag. There was another tennis racquet too; whether he wanted to buy it or exchange it or what, I don't know. All I did was, see him take two tennis racquets off the wall and put them into the shopping bag; and walk over to the cash register.

* * * * * *

[A. Lipinski] . . . [y]ou followed him because he had a big bag?

[Bendetson] Sure.

[A. Lipinski] were you able to see what he had in that bag?

[Bendetson] No. But I know he didn't have two tennis racquets. It was impossible to have two tennis racquets in there.

[A. Lipinski] How big a bag was it?

[Bendetson] Regular size shopping bag.

[A. Lipinski] Well, a regular size shopping bag is big enough.

Lipinski was tried before Yonkers City Judge Robert W. Cacace and a jury on October 7, 1975. The state relied upon Michael Starrish and Louis Pistecchia to establish the sequence of events. Lipinski, proceeding pro se, called Bendetson to the stand. The detective admitted that he had not read the complaint before signing it and that the document contained several errors. The time of day, Lipinski's address, and the spelling of Lipinski's name were incorrect. In addition, the value of the merchandise was set forth rather than the value of the voucher.

After exploring these mistakes, Lipinski directed his questioning to the conversation between his father, Arthur Lipinski, and Bendetson. At this point, Judge Cacace patiently explained and repeatedly emphasized that Lipinski would not be permitted to impeach his own witness with a prior inconsistent statement, unless the out-of-court declaration was a subscribed writing or a statement under oath. Despite the Judge's warning Lipinski insisted on proceeding to examine Bendetson, who confirmed Starrish's testimony, including the statement that there was an umbrella in Lipinski's shopping bag when he entered the store. This, of course, seems to contradict the tape recording of Bendetson's comments on March 16, which indicates that Bendetson did not see an umbrella in Lipinski's shopping bag.

The jury found Lipinski guilty of attempted petty larceny, and Judge Cacace sentenced him to 30 days imprisonment in the Westchester County Penitentiary, service of which was stayed pending appeal. The Appellate Term of the Supreme Court thereafter affirmed Lipinski's conviction,

though it did suggest that the legislature should "modernize" the law to permit impeachment of one's own witness by prior contradictory statements preserved on tape: taped declarations, the court observed, provide the same level of reliability as a subscribed or sworn statement. The New York Court of Appeals denied leave to appeal.

On July 7, 1976, Judge Werker denied Lipinski's petition for habeas corpus on the ground that the limitation of Lipinski's cross-examination of Bendetson did not raise a constitutional infirmity to the conviction.

II.

[2] A. *The standard to be applied.* The states have traditionally been accorded great latitude in determining rules of evidence to govern proceedings in their own courts. In this sensitive area, characterized by delicate and interrelated judgments of fairness and efficiency, the federal courts have trod lightly to refrain from abrasive disruptions of state procedures and to avoid rigidity in an area of law that should be, above all others, empirical.

The benchmark case is *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Leon Chambers was convicted of murdering a policeman, although another man, McDonald, had confessed to the crime. McDonald was called as a witness by the defendant, but repudiated his confession on the stand. Because of the Mississippi rule that a party vouched for the veracity of his witness, Chambers was not permitted to cross-examine McDonald regarding his repudiation. And, since Mississippi did not recognize declarations against penal interest as an exception to the hearsay rule, Chambers was not permitted to introduce testimony from three witnesses that McDonald had told them that he, not Chambers, had shot the policeman.

The Supreme Court held that the use of the voucher and the hearsay rules in tandem violated Chambers's due process right to a fair trial, since it drastically hampered Chambers's ability to demonstrate to the jury that McDonald, not Chambers, committed the crime. Justice Powell, however, was careful to limit the holding:

> [W]e establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

410 U.S. at 302–03, 93 S.Ct. at 1049. The touchstone established by *Chambers*, accordingly, is simply that of fundamental fairness. This standard is sufficiently flexible to avoid excessive interference with state procedures, *see Maness v. Wainwright*, 512 F.2d 88 (5th Cir. 1975), *cert. granted*, 429 U.S. 893, 97 S.Ct. 253, 50 L.Ed.2d 176 (1977), yet sensitive enough to prevent the grave injustices that may result from the mechanistic application of evidentiary rules.

This court has extended *Chambers* under certain circumstances to situations in which the application of the voucher rule alone is involved. *See Welcome v. Vincent*, 549 F.2d 853 (2d Cir. 1977). But, we too have approached the difficult task of assessing the constitutional validity of particular applications of state evidentiary rules with salutary caution. Judge Oakes wrote for the court in *Welcome*:

> Our holding is narrowly confined to rare situations . . . where another person, present on the witness stand, has previously confessed that he, rather than the defendant on trial, has perpetrated the crime. We hold that to restrict examination of such a witness, so that his prior confession may not be proven, is to deny the defendant a fair trial, at least when the confession, though retracted, has some semblance of reliability . . . . We disavow any attempt to "constitutionalize" the law of evidence pertaining to the use of prior statements of a witness, except to the extent of answering the narrow question left open

in part by the nature of the holding in *Chambers*.

Id. at 858.

B. *The legitimate interests served by the voucher rule.* In considering whether a criminal defendant has been denied due process by the application of the voucher rule, we cannot ignore the questionable basis of the rule itself. The voucher rule appears to be one of those atavisms that no quantity of reasoned criticism seems able to destroy,[3] though the federal courts[4] and many states[5] have now abandoned it. The origin of the rule against impeaching one's own witness is shrouded in the mists of time. Perhaps the rule is nothing more than a relic of the ancient procedure of compurgation by oath;[6] perhaps it is a mere excess generated by the emergent adversary system of the Seventeenth Century.[7] In any event, few rules of the common law appear to better justify Holmes's acid aphorism,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, *Path of the Law*, 10 Harv.L.R. 457, 469 (1897).

The traditional justifications of the rule against impeaching one's own witness are plainly bankrupt. No thoughtful jurist or scholar will today defend the proposition that a party is morally bound by the testimony of his witnesses. And, since it is universally accepted that a party must take his witnesses where he finds them, it is

3. *See Chambers v. Mississippi*, 410 U.S. at 295–98, 93 S.Ct. 1038; *United States v. Freeman*, 302 F.2d 347, 350–52 (2d Cir. 1962), *cert. denied*, 375 U.S. 958, 84 S.Ct. 448, 11 L.Ed.2d 316 (1963); *Johnson v. Baltimore & O. R. Co.*, 208 F.2d 633 (3d Cir.), *cert. denied*, 347 U.S. 943, 74 S.Ct. 639, 98 L.Ed. 1091 (1954); 3A *Wigmore on Evidence* §§ 896–906 (Chadbourne ed. 1970); *McCormick on Evidence* § 38 (2d ed. 1972); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 Cornell L.Q. 239, 249–51 (1967); Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U.Chi.L.Rev. 69 (1936).

4. F.R.Ev. 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him."

5. *See, e. g., State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971); Note, *Impeaching One's Own Witness in Nebraska*, 51 Neb.L.Rev. 352 (1971).

6. In the early medieval period,

> proof was not an attempt to convince the judges; it was an appeal to the supernatural, and very commonly a unilateral act. The common modes of proof are oaths and ordeals. It is adjudged, for example, in an action for debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators, or oath-helpers. The defendant must then solemnly swear that he owes nothing, and his oath-helpers must swear that his oath is clean and unperjured. If they safely get through this ceremony, punctually repeating the right formula, there is an end of the case; the plaintiff, if he is hardy enough to go on, can only do so by bringing a new charge, a criminal charge of perjury against them. They have not come there to convince the court, they have not come there to be examined and cross-examined like modern witnesses, they have come there to bring upon themselves the wrath of God if what they say be not true.

F. Maitland, *The Forms of Action at Common Law* 15 (1962). A party's oath-helpers were ordinarily his relatives and did in fact stand as guarantors, if not of his veracity, at least of the justice of his position. See 1 M. Bloch, *Feudal Society* 124–25 (1961). If the poet of *The Song of Roland* may be credited, a party's guarantors risked even more than their souls: the thirty kinsmen who vouched for Ganelon, Roland's betrayer, were promptly hanged after his champion was slain in a judicial duel. See *The Song of Roland* (J. Bedier ed.). "The Trial of Ganelon".

Compurgation by oath was viewed as unsatisfactory even in the time of the Year Books. With the centralization of justice in the royal courts, oath-helpers no longer faced the discipline of having to live with their opponents—and the parish priest—in a small community. They were increasingly hired off the streets, and eventually from the ranks of court ushers. *See* S.F.C. Milsom, *Historical Foundations of the Common Law* 51 (1969). It is somewhat bewildering to consider today a rule whose historical predecessor seems to have been discredited for almost 600 years.

7. *See* Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U.Chi.L.Rev. 60, 70–72 (1936).

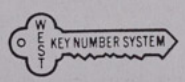
completely unrealistic to imagine him as the guarantor of his witness's veracity in every respect. Indeed, the policy of the State of New York, which permits impeachment by a prior inconsistent statement provided the declaration is written and subscribed, or sworn to, is, in fact, inconsistent with the general principle of "voucher".

The true basis of the New York statute appears to be a fear that, if a party were permitted to impeach his own witness freely with prior inconsistent statements, the New York rule excluding such statements as hearsay would be undermined.[8] This principle appears to establish some minimal rational basis for the rule. But we must note that here, as in *Chambers*, the hearsay danger in permitting a witness to be questioned on the stand *regarding his own prior statement* is minimal. Moreover, in many cases it seems most arbitrary to make the ability to impeach a witness on the basis of a prior inconsistent statement depend on the mere accident of who called the witness to testify.[9] It is clear, therefore, that the rule against impeaching one's own witness may, under some circumstances, be of so little weight that a serious impairment of the right to present a defense cannot be justified.

C. *Lipinski's interest in a fair trial.* We cannot conclude, however, that the application of the New York voucher rule in this case seriously impaired Lipinski's ability to present an effective defense. Lipinski was not placed in the dilemma so often engendered by the rule, where helpful testimony can be secured only by foregoing the very threat of cross-examination that alone guarantees the veracity of a hostile witness. Even if Bendetson had testified in accordance with his taped conversation, Lipinski would have established only that Starrish alone had seen the umbrella in Lipinski's shopping bag. But the state was quite prepared to rely exclusively on Starrish's testimony. It is hardly unfair to discourage Lipinski from calling Bendetson for the sole purpose of showing that Bendetson could add nothing to what Starrish had said.

[3] This conclusion is strengthened by the consideration that, under an aspect of New York law not challenged here, an out-of-court declaration introduced to impeach a witness cannot be used as substantive evidence. *See* N.Y.C.P.L. 60.35(2); *Fitzgibbons Boiler Co. v. National City Bank*, 287 N.Y. 326, 39 N.E.2d 897, *motion den.*, 287 N.Y. 843, 41 N.E.2d 169 (1942). Accordingly, even had Judge Cacace permitted Lipinski to question Bendetson regarding the taped conversation, the jury would probably have been instructed that any inconsistencies that might be revealed could be considered only to neutralize Bendetson's testimony, and not to raise doubts concerning the veracity of Starrish. Of course, it is possible that such instructions might have made no impact on the jury. But Lipinski can hardly complain that the application of the voucher rule prevented him from circumventing a rule of evidence that not even he has challenged.

[4] Finally, we underscore that Lipinski was amply warned that he would not be permitted to impeach Bendetson and that he was endangering his case by eliciting testimony that confirmed Starrish's story. Lipinski chose to proceed despite the trial judge's repeated cautioning. The fact that Bendetson gave damaging testimony that Lipinski could have kept from the jury entirely had he heeded the judge's warnings does not constitute a denial of due process.



8. *See* Schatz, *Evidence—Impeachment of One's Own Witness: Present New York Law and Proposed Changes*, 27 Cornell L.Q. 377, 385–86 (1942).

9. *See Chambers v. Mississippi*, 410 U.S. at 297–98, 93 S.Ct. 1038.

No claim of how pets. in custody "in violation of the Constitution or laws or treaties of the United States" 28 § 2254(a).

No reference to any fed. constl. provision

No citation to any case

Petition merely recites the history of the state §440.10(i)(g) proceeding

Pet. is really a request that fed. ct. sit in app. review of state ct. denial of 440.10.

But this is not purpose of h.c. esp. where no fed. constl. issue is presented.

No fed. constl issue presented to this ct.

None was presented to state ct. in 440.10 motion

thus, no exhaustion of state remedies.

Further, pet. is hard put to seek fed. relief when he did not do everything possible to obtain pet the ev. that might entitle him to relief. Pet. abandoned his efforts to get statement from 1 "accomplice", & never tried to get statement from the others.

If he had gotten these statements, perhaps a §440.10 ev. hearing might have been in order, but in posture before state ct, his affs. did not come close to meeting requirements of newly disc. ev.

No.

GRAND JURY ROOM

PEOPLE

vs.

Butler

✓Thomas (237) ~~370~~ - saw B as man H accused of picking his pocket
✓Had seen B in #Mosque #7.
✓Thomas (381) - saw B sitting in audience
✓Thomas (242) (332) - saw B + H move to f/o stage + shoot

✓Thomas (678) - saw at least 3 shells eject from B's hand

✓De Pina (814) - saw B standing up shooting
✓De Pina (819) (912) - saw B run away

✓De Pina (910) - says B shot H 5x.

✓Davis (1096) ~~1098~~ - B sitting next to him

✓Timberlake (1373) B the person people chased after the shooting.

✓Williams (1516) B one of the person in the 1593 argument who stood up.

✓Blackwell - (1622) B + H running at stage shooting, B a Luger
✓Blackwell - (1624) B + H ran from stage.

No.

GRAND JURY ROOM

PEOPLE

vs.

Johnson

√Thomas (230) – saw J in ballroom upon entering

Thomas (503) – saw J sitting in audience

√Thomas (240) saw J standing f/o stage w. shotgun. Had seen J several times before at #7.

√Temple (663) 665 – saw J in ballroom upon arriving

√Temple (664) – had seen J 1x before at Chicago Mosque.

√Williams (1522) – J f/o stage w. shotgun

Williams (1594) – had seen J crouching on floor

√Blackwell (1627) J ran into ladies lounge

No.

GRAND JURY ROOM

PEOPLE

vs.

Newly Disc. Ev.

Cr.

F Rule Cr. P. 33

U.S. v Herman
3rd Cir.
2/20/80

* U.S. v Mitchell
C.A. 4 No. 78-5016
7/6/79

✓ U.S. v Brown, 582 F2d 197, 202
2nd Cir.
8/7/78

"The guilt or innocence of the accused, as an independent consideration, is not relevant [on a habeas corpus proceeding.]"

Joseph G. Cook, Constitutional Rights of the Accused: Post-Trial Rights, The Lawyers Co-Operative Publishing Co. (1976), p 205-6, # 86.

U.S. ex. rel. Tisi v Tod 264 U.S. 131, 133 (1924)

38 U Chicag. L.R. 142 (1970)

Kaufman v U.S. 394 U.S. 217, 235-6)

Requirement of st. ct. to hear post-conviction claims:

53 Colum L. R. 1143

Mooney v Holohan 294 U.S. 103 (1935)

Frank v Mangum 237 US 309, 335

Moore v Dempsey 261 US 86, 91

Young v Regan 337 US 235 (1949)

Jennings v Illinois, 342 U.S. 104 (1951)

* McNabb v U.S. 318 U.S. 332 (1943)
Mallory v US. 354 US 449 (1957)

Thompson v Louisville 362 US. 199 (1960)

Shuttlesworth v Birmingham 382 US 87 (1965)

DuBose v Lefevre, 79-2234 (CA2nd) - perjured test = denial of dp

Currie v Smith 79-4675 (Griesa) - guilty plea (12/4/79)

33 Harv LR 1038 (1970)

Fay v Noia 372 US 391 (1963) → 440-1

40 Cal LR 335 (1952)

→ 70 Harv. LR 1

76 " 441

* Peyton v Rowe 391 US 54, 58 (1968)

* Waley v Johnson 316 US 101, 104-5 (1942)

Mackey v U.S. 401 US 667, 687 (1971)

435 F.S-pp 886 WDNY. 1977

Howard v Olgiati

Sole task of fed. ct. in h.c.: "...sole task is to determine whether the errors allegedly committed by the state courts constitute violations of pet's rights under the United States Constitution."

Schaefer v Leone 443 F2d 182 (2nd Cir, 1971) cert. denied 404 US 939 (1971)

Fed. ct. has juris of h.c. pet. only if pet. raises a q. of "constitutional significance" (184)

not the proper role of fed ct in h.c. to serve as an additional appellate ct. (185)

Draft

U.S. ex rel Tisi v Tod, 264 US 131 (1924)

Deportation. Tisi said no evidence to sustain finding that he knew of seditious nature of material he possessed. Tisi says this denied him due process of law. – He says Sec. of Labor erred in admitting the ev. & in deciding the ev. was substantial enough to convict him.

S. ct. does not discuss the ev. for & vs Tisi's knowledge "The denial of a fair hearing is not established by proving merely that the decision was wrong." Chin Yow v United States, 208 US. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence. "[illegible] the error... may, of course, be so flagrant as to convince a court that the hearing had was not a fair one [Citations omitted]. (33) But here no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion is shown." (134)
See also, Engles v Samuels, 329 U.S. 304, 311-12 (1946); Bridges v Wixon 326 US. 135, 156 (1945).

~~326 US 156~~

~~329 US 311~~

~~401 US 246~~

But, Boilermakers v Hardeman, 401 US 233 (1971)

"We have repeatedly held that conviction on charges unsupported by any evidence is a denial of due process..." (246) (citing Tisi). Only "some evidence" is required to satisfy "d.p." (245-7)

Appendix to Fed. Hab. Petition

A1-2	Original notice of motion dated 12/6/77	✓
A3-4	Nureddin Faiz affidavit - 12/5/77	✓
A5-7	Hagan's original affidavit - 11/30/77	✓
A8	Butler's aff - 11/23/77	✓
A9	Johnson's aff - 11/22/77	✓
A10-15	Kunstler's original aff - 12/5/77	✓
A16	Cert. of service - 12/6/77	✓
A17	Notice of motion - 12/8/77	✓
A18-19	K's aff - 12/8/77	✓
A20 - 43	K's aff - 12/19/77, + Gene Roberts' testimony	✓
A44-45	Johnson + Butler retaining K	
A46-7	Chance's aff - 12/31/77	✓
A48-9	Pinckney's aff - 1/18/78	✓
A50-3	K's notice of motion - 1/5/78 - to produce Os in ct.	
A54-6	K's aff. - 1/19/78	✓
A57-70	K's reply aff - 2/11/78	✓
A71-2	K's aff - 2/28/78	✓
A73-7	Hagan's supplemental aff - 2/25/78	✓

A78 - 88	K's aff - 4/3/78 + FBI documents	✓
A89 - ~~139~~ 150	K's aff - (undated) + FBI documents	✓
A140 - 50	K's aff - 4/29/78 + FBI documents	✓
A151 - 2	K's aff - 5/12/78 + FBI document	✓
A153 - 5	Goodman's aff - 5/15/78	✓
A156 - 9	Goodman's (Karim's) aff - 7/21/78	✓
A160 - 5	K's aff - 7/18/78	✓
A166 - 8	K's aff - 9/12/78	✓
B169 - 74	Rothwax's decision - 11/1/78	✓
C175	FBI document ?? (see instant petition at p. 7, ¶7).	??
D176 - 80	K's motion for leave to appeal to App. Div.	✓
E181	Fein's order denying leave	✓

1
372 U.S. 925

Clyde BATES, petitioner, v. CALIFORNIA. No. 1061, Misc.

Bates, pro se.

Stanley Mosk, Atty. Gen. of California, and Arlo E. Smith, Chief Asst. Atty. Gen., for respondent.

Petition for writ of certiorari to the Supreme Court of California.

Feb. 22, 1963. Denied.

2
372 U.S. 925

Hassle Cane MARTIN, petitioner, v. KENTUCKY. No. 743, Misc.

Former decision, 83 S.Ct. 553.

Facts and opinion, Ky., 361 S.W.2d 654.

Feb. 22, 1963. Petition for rehearing denied

3
372 U.S. 923

Leo Daniel LUTON, petitioner, v. TEXAS et al. No. 937, Misc.

Former decision, 369 U.S. 846, 82 S. Ct. 878.

Facts and opinion, 303 F.2d 899; 310 F.2d 445.

William Vandercreek, for petitioner.

Waggoner Carr, Atty. Gen. of Texas, Sam R. Wilson, Asst. Atty. Gen., and Henry Wade, for respondents.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Feb. 18, 1963. Denied.

4
372 U.S. 904

George W. SHELDON et al., petitioners, v. Charles M. MERRILL, United States Circuit Judge for the Ninth Circuit, et al. No. 823, Misc.

Hayden C. Covington, for petitioners.

Feb. 18, 1963. Motion for leave to file petition for writ of mandamus denied.

* Absent a complete lack of evidence for the conviction, the question of whether there was sufficient proof for the conclusion reached by the trier of fact is not cognizable on federal habeas review. United States ex. rel. Tippy - Henderson 462 F.2d 1125 (2nd Cir. 1972) (& others) (1030)

Since it cannot be said that there was a complete lack of evidence to support petitioner's conviction [there is no] issue of constitutional dimension on which federal h.c. relief may be granted. (1030)

Stephens v LeFevre, 467 F. Supp 1026 (SDNY, 1979)

* Mapp v Clement, 451 F Supp 505 (SDNY, 1978), aff'd 591 F.2d 1330 (2nd Cir. 1979), cert. denied 99 S. Ct. 1428 (1979)

"...newly discovered evidence only warrants habeas corpus relief where it bears on the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state petitioner is not a ground for relief on federal habeas corpus." [Citing Tvs, 372 U.S. at 317

372 U.S. 293

Charles TOWNSEND, Petitioner,

v.

Frank G. SAIN, Sheriff of Cook County, et al.

No. 8.

Reargued Oct. 8 and 9, 1962.

Decided March 18, 1963.

State prisoner's habeas corpus proceeding. From an adverse judgment of the United States District Court for the Northern District of Illinois, the petitioner appealed. The Court of Appeals affirmed, 276 F.2d 324. The Supreme Court granted certiorari, and, speaking through Mr. Chief Justice Warren, held that where it could not be ascertained by the district court what standard had been applied by the trial judge in admitting a confession and in instructing jurors that they could disregard the confession if they believed defendant's expert who testified concerning a drug injection, and where the trial court had made no express findings and no implied findings could be reconstructed, and previous habeas corpus petitions had been denied without evidentiary hearings, an evidentiary hearing was required in federal court.

Reversed and remanded.

Mr. Justice Stewart, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice White, dissented.

1. Criminal Law ⇐736(2)

Under Illinois law, admissibility of confession is solely for judge, but question of voluntariness may also be presented to jury.

2. Criminal Law ⇐519(1), 520(1), 522(1)

If an individual's will was overborne or if his confession was not product of rational intellect and free will, his confession is inadmissible because coerced, and these standards are applicable whether confession was coerced by physical intimidation or psychological pressure, and are equally applicable to a drug-induced statement.

3. Criminal Law ⇐519(1)

Whether scopolamine produces true confessions or false confessions, if it in fact caused person to make statements which he made to police, statements were constitutionally inadmissible.

4. Criminal Law ⇐519(1)

If drug had properties as a truth serum, it was not significant whether drug was administered and questions asked by persons unfamiliar with such properties of the drug, and admissibility of confession rested on whether questioning by police officers in fact produced confession which was not product of free intellect

5. Criminal Law ⇐532

Trier of facts would be required to consider, in determining whether injection of drug caused person to confess, all relevant circumstances of case such as person's lack of counsel, drug addiction, fact that he was "near mental defective", and his youth and inexperience.

6. Habeas Corpus ⇐54

Habeas corpus petition which alleged, in effect, injection of drug having properties of truth serum, that police doctor willfully suppressed information as to qualities of drug and as to his intent to induce physiological and psychological state susceptible to interrogation resulting in confessions and that injection caused confession alleged deprivation of constitutional rights. 28 U.S.C.A. § 2243.

7. Habeas Corpus ⇐90

Term "issues of fact" as used in relation to power and duty of federal judges to hold evidentiary hearings on habeas corpus meant basic, primary or historical facts; facts in sense of recital of external events and credibility of their narrators, and did not include mixed questions of fact and law requiring ap-

plication of legal standard to historical-fact determinations. 28 U.S.C.A. § 2243.

See publication Words and Phrases for other judicial constructions and definitions.

8. Habeas Corpus ⇐90

Act extending federal habeas corpus writ to state prisoners was designed to afford trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detentions. 28 U.S.C.A. § 2243.

9. Habeas Corpus ⇐45.2(2)

Function of federal habeas corpus is to test by way of original civil proceeding, independent of normal channels of review of criminal judgments, the very gravest allegations, and state prisoners are entitled to relief only on proving that their detention violates the fundamental liberties of the person, safeguarded against state action by federal Constitution. 28 U.S.C.A. § 2243.

10. Habeas Corpus ⇐45.2(2)

Opportunity for redress against detention in violation of fundamental liberties of person, safeguarded against state action by federal Constitution, though such opportunity presupposes opportunity to be heard, to argue and present evidence, must never be totally foreclosed. 28 U.S.C.A. §§ 2243, 2254.

11. Habeas Corpus ⇐90

Power of inquiry on federal habeas corpus is plenary, and where applicant alleges facts which, if proved, would entitle him to relief, federal court to which application is made has power to receive evidence and try facts anew. 28 U.S.C.A. § 2243.

12. Habeas Corpus ⇐90

Federal court on habeas corpus must hold evidentiary hearing if applicant did not receive full and fair evidentiary hearing in state court, either at time of trial or in collateral proceeding. 28 U.S.C.A. § 2243.

13. Habeas Corpus ⇐90

Federal court must grant evidentiary hearing to habeas corpus applicant if (1) merits of factual dispute were not resolved in state hearing; (2) state factual determination is not fairly supported by record as a whole; (3) fact finding procedure in state court was not adequate to afford full and fair hearing; (4) there is substantial allegation of newly discovered evidence; (5) material facts were not adequately developed at state court hearing; or (6) for any reason it appears that state trier of fact did not afford applicant full and fair fact hearing. 28 U.S.C.A. § 2243.

14. Habeas Corpus ⇐90

If no express findings of fact have been made by state court, federal district court on habeas corpus must initially determine whether state court impliedly found material facts; and no relevant findings were made unless state court decided on the merits the constitutional claim tendered by defendant. 28 U.S.C.A. § 2243.

15. Habeas Corpus ⇐90

If state court has decided merits of habeas corpus claim but has made no express findings, federal district court may be able to reconstruct findings, but if it cannot, district court will be compelled to hold hearing. 28 U.S.C.A. § 2243.

16. Habeas Corpus ⇐85.1(1), 90

If it is unclear whether state finder of facts applied correct constitutional standards in disposing of constitutional claim, federal district court must hold hearing, but district judge ordinarily may properly assume, absent reason to suspect that incorrect standard was in fact applied, that correct standards of federal law were applied to facts by state trier of fact. 28 U.S.C.A. § 2243.

17. Criminal Law ⇐922(3)

New trial is required in criminal case if trial judge or jury, in finding facts, was guided by erroneous standard of law.

18. Habeas Corpus ⇐90

If statements of state trier of fact do no more than create doubt as to whether correct standard of law was applied, federal district court on habeas corpus must hold hearing to determine constitutional issue. 28 U.S.C.A. § 2243.

19. Criminal Law ⇐522(1)

Third-degree methods necessarily produce coerced confession.

20. Habeas Corpus ⇐90

If federal court on habeas corpus cannot exclude possibility that trial judge believed facts which showed deprivation of constitutional rights and yet concluded that relief should be denied, hearing must be held. 28 U.S.C.A. § 2243.

21. Habeas Corpus ⇐90

Where fundamental liberties of person are claimed to have been infringed, federal courts carefully scrutinize state court record, and duty of federal district court on habeas corpus is no less exacting. 28 U.S.C.A. § 2243.

22. Habeas Corpus ⇐90

If state trial judge made serious procedural errors respecting claim pressed in federal habeas corpus in such things as burden of proof, federal hearing is required. 28 U.S.C.A. § 2243.

23. Habeas Corpus ⇐90

Even where procedure employed does not violate Constitution, if it appears to be seriously inadequate for ascertainment of truth, it is federal judge's duty on habeas corpus to disregard state findings and take evidence anew. 28 U.S.C.A. § 2243.

24. Habeas Corpus ⇐30(1)

There are procedural errors so grave as to require appropriate federal court order directing habeas corpus applicant's release unless state grants new trial forthwith. 28 U.S.C.A. § 2243.

25. Habeas Corpus ⇐90

Where newly discovered evidence is alleged in habeas corpus application, evidence which could not reasonably have been presented to state trier of facts, federal court must grant evidentiary hearing, providing such evidence bears on constitutionality of applicant's detention. 28 U.S.C.A. § 2243.

26. Habeas Corpus ⇐25.1(1)

Existence merely of newly discovered evidence relevant to guilt of state prisoner is not ground for relief on federal habeas corpus. 28 U.S.C.A. § 2243.

27. Habeas Corpus ⇐90

District judge is under no obligation to grant hearing in habeas corpus upon frivolous or incredible allegation of newly discovered evidence. 28 U.S.C.A. § 2243.

28. Habeas Corpus ⇐90

If, for any reason not attributable to inexcusable neglect of habeas corpus petitioner, evidence crucial to adequate consideration of constitutional claim was not developed at state hearing, federal hearing is compelled. 28 U.S.C.A. § 2243.

29. Habeas Corpus ⇐90

Duty of federal court on habeas corpus to try facts anew exists in every case in which state court did not after full hearing reliably find relevant facts. 28 U.S.C.A. § 2243.

30. Habeas Corpus ⇐90

In cases where holding of evidentiary hearing on habeas corpus is not mandatory, such hearing is discretionary with district judge where material facts are in dispute, and if he concludes that applicant was afforded full and fair hearing by state court resulting in reliable findings, he may and ordinarily should, but need not, accept facts as found. 28 U.S.C.A. § 2243.

31. Habeas Corpus ⇐90

In every case on habeas corpus, federal district court has power, constrained only by judge's sound discretion, to receive evidence bearing on applicant's constitutional claim. 28 U.S.C.A. § 2243.

32. Habeas Corpus ⇐90

District judge on habeas corpus may not defer to state court's findings of law but must apply applicable federal law to state court fact findings independently. 28 U.S.C.A. § 2243.

33. Habeas Corpus ⟹8503(2)

Federal District Court sitting in habeas corpus has power to compel production of complete state-court records. 28 U.S.C.A. §§ 2245, 2247, 2249.

34. Habeas Corpus ⟹90

If because no record can be obtained the district judge on habeas corpus has no way of determining whether full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. 28 U.S.C.A. §§ 2243, 2245, 2247, 2249.

35. Habeas Corpus ⟹90

On habeas corpus, district court's inquiry was not properly limited to study of undisputed portions of the record. 28 U.S.C.A. § 2243.

36. Habeas Corpus ⟹90

Where it could not be ascertained by federal district court on habeas corpus what standard had been applied by trial judge in admitting confession and in instructing jurors that they could disregard confession if they believed defendant's expert who testified concerning drug injection, and where trial court had made no express findings and no implied findings could be reconstructed, and previous habeas corpus petitions had been denied without evidentiary hearings, evidentiary hearing was required in federal court. 28 U.S.C.A. § 2243.

37. Habeas Corpus ⟹90

Failure of medical expert in murder prosecution to testify fully as to nature of drug as truth serum could not realistically be regarded as inexcusable default of defendant whose confession given after drug injection was admitted in evidence, and in absence of such testimony there was not fair, rounded development of facts during trial, and evidentiary hearing on federal habeas corpus was necessary. 28 U.S.C.A. § 2243.

38. Habeas Corpus ⟹85.3(1, 2)

Where evidentiary hearing is required on federal habeas corpus because of unresolved factual dispute, state-court record of criminal prosecution is competent evidence, and either party may choose to rely solely upon evidence there- opportunity to present other testimonial and documentary evidence relevant to disputed issues. 28 U.S.C.A. § 2243.

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George N. Leighton, Chicago, Ill., for petitioner.

Edward J. Hladis, Chicago, Ill., for respondent.

Mr. Chief Justice WARREN delivered the opinion of the Court.

[1] This case, in its present posture raising questions as to the right to a plenary hearing in federal habeas corpus, comes to us once again after a tangle of prior proceedings. In 1955 the petitioner, Charles Townsend, was tried before a jury for murder in the Criminal Court of Cook County, Illinois. At his trial petitioner, through his court-appointed counsel, the public defender, objected to the

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introduction of his confession on the ground that it was the product of coercion. A hearing was held outside the presence of the jury, and the trial judge denied the motion to suppress. He later admitted the confession into evidence. Further evidence relating to the issue of voluntariness was introduced before the jury. The charge permitted them to disregard the confession if they found that it was involuntary. Under Illinois law the admissibility of the confession is determined solely by the trial judge, but the question of voluntariness, because it bears on the issue of credibility, may also be presented to the jury. See, e. g., People v. Schwartz, 3 Ill.2d 520, 523, 121 N.E.2d 758, 760; People v. Roach, 369 Ill. 95, 15 N.E.2d 873. The jury found petitioner guilty and affixed the death penalty to its verdict. The Supreme Court of Illinois affirmed the conviction, two justices dissenting. People v. Townsend, 11 Ill.2d 30, 141 N.E.2d 729, 69 A.L.R.2d 371. This Court denied a writ of certiorari. 355 U.S. 850, 78 S.Ct. 76, 2 L.Ed.2d 60.

Petitioner next sought post-conviction collateral relief in the Illinois State

dismissed his petition without holding an evidentiary hearing. The Supreme Court of Illinois by order affirmed, holding that the issue of coercion was *res judicata*, and this Court again denied certiorari. 358 U.S. 887, 79 S.Ct. 128, 3 L.Ed.2d 115. The issue of coercion was pressed at all stages of these proceedings.

Having thoroughly exhausted his state remedies, Townsend petitioned for habeas corpus in the United States District Court for the Northern District of Illinois. That court, considering only the pleadings filed in the course of that proceeding and the opinion of the Illinois Supreme Court rendered on direct appeal, denied the writ. The Court of Appeals for the Seventh Circuit dismissed an appeal. 265 F.2d 660. However, this Court granted a petition for certiorari, vacated the judgment and remanded for a decision as to whether, in the light of the

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state-court record, a plenary hearing was required. 359 U.S. 64, 79 S.Ct. 655, 3 L.Ed.2d 634.

On the remand, the District Court held no hearing and dismissed the petition, finding only that "Justice would not be served by ordering a full hearing or by awarding any or all of [the] relief sought by Petitioner." The judge stated that he was satisfied from the state-court records before him that the decision of the state courts holding the challenged confession to have been freely and voluntarily given by petitioner was correct, and that there had been no denial of federal due process of law. On appeal the Court of Appeals concluded that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record" and that the undisputed portions of this record showed no deprivation of constitutional rights. 276 F.2d 324, 329. We granted certiorari to determine whether the courts below had correctly determined and applied the standards governing hearings in federal habeas corpus. 365 U.S. 866, 81 S.Ct. 907, 5 L.Ed.2d 859. The case was first argued during the October Term 1961. Two of the Justices were unable to participate in a decision, and we subsequently ordered it reargued. 369 U.S. 834, 82 S.Ct. 864, 7 L.Ed.2d 841. We now have it before us for decision.

The undisputed evidence adduced at the trial-court hearing on the motion to suppress showed the following. Petitioner was arrested by Chicago police shortly before or after 2 a. m. on New Year's Day 1954. They had received information from one Campbell, then in their custody for robbery, that petitioner was connected with the robbery and murder of Jack Boone, a Chicago steelworker and the victim in this case. Townsend was 19 years old at the time, a confirmed heroin addict and a user of narcotics since age 15. He was under the influence of a dose of heroin administered approximately one and one-half hours before his arrest. It was his practice to take injections three to five hours apart. At about 2:30 a. m.

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petitioner was taken to the second district police station and, shortly after his arrival, was questioned for a period variously fixed from one-half to two hours. During this period, he denied committing any crimes. Thereafter at about 5 a. m. he was taken to the 19th district station where he remained, without being questioned, until about 8:15 p. m. that evening. At that time he was returned to the second district station and placed in a line-up with several other men so that he could be viewed by one Anagnost, the victim of another robbery. When Anagnost identified another man, rather than petitioner, as his assailant, a scuffle ensued, the details of which were disputed by petitioner and the police. Following this incident petitioner was again subjected to questioning. He was interrogated more or less regularly from about 8:45 until 9:30 by police officers. At that time an Assistant State's Attorney arrived. Some time shortly before or after nine o'clock, but before the arrival of the State's attorney, petitioner complained

to Officer Cagney that he had pains in his stomach, that he was suffering from other withdrawal symptoms, that he wanted a doctor, and that he was in need of a dose of narcotics. Petitioner clutched convulsively at his stomach a number of times. Cagney, aware that petitioner was a narcotic addict, telephoned for a police physician. There was some dispute between him and the State's Attorney, both prosecution witnesses, as to whether the questioning continued until the doctor arrived. Cagney testified that it did and the State's Attorney to the contrary. In any event, after the withdrawal symptoms commenced it appears that petitioner was unresponsive to questioning. The doctor appeared at 9:45. In the presence of Officer Cagney he gave Townsend a combined dosage by injection of 1/8-grain of phenobarbital and 1/230-grain of hyoscine. Hyoscine is the same as scopolamine and is claimed by petitioner in this proceeding to have the properties of a "truth serum."

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The doctor also left petitioner four or five 1/4-grain tablets of phenobarbital. Townsend was told to take two of these that evening and the remainder the following day. The doctor testified that these medications were given to petitioner for the purpose of alleviating the withdrawal symptoms; the police officers and the State's Attorney testified that they did not know what the doctor had given petitioner. The doctor departed between 10 and 10:30. The medication alleviated the discomfort of the withdrawal symptoms, and petitioner promptly responded to questioning.

As to events succeeding this point in time on January 1, the testimony of the prosecution witnesses and of the petitioner irreconcilably conflicts. However, for the purposes of this proceeding both sides agree that the following occurred. After the doctor left, Officer Fitzgerald and the Assistant State's Attorney joined Officer Cagney in the room with the petitioner, where he was questioned for about 25 minutes. They all then went to another room; a court reporter there took down petitioner's statements. The State's Attorney turned the questioning to the Boone case about 11:15. In less than nine minutes a full confession was transcribed. At about 11:45 the questioning was terminated, and petitioner was returned to his cell.

The following day, Saturday, January 2, at about 1 p. m. petitioner was taken to the office of the prosecutor where the Assistant State's Attorney read, and petitioner signed, transcriptions of the statements which he had made the night before. When Townsend again experienced discomfort on Sunday evening, the doctor was summoned. He gave petitioner more 1/4-grain tablets of phenobarbital. On Monday, January 4, Townsend was taken to a coroner's inquest where he was called to the witness stand by the State and, after being advised of his right not to testify, again confessed. At the time of the inquest petitioner was without counsel. The public defender was not

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appointed to represent him until his arraignment on January 12.

Petitioner testified at the motion to suppress to the following version of his detention. He was initially questioned at the second district police station for a period in excess of two hours. Upon his return from the 19th district and after Anagnost, the robbery victim who had viewed the line-up, had identified another person as the assailant, Officer Cagney accompanied Anagnost into the hall and told him that he had identified the wrong person. Another officer then entered the room, hit the petitioner in the stomach and stated that petitioner knew that he had robbed Anagnost. Petitioner fell to the floor and vomited water and a little blood. Officer Cagney spoke to Townsend 5 or 10 minutes later, Townsend told him that he was sick from the use of drugs, and Cagney offered to call a doctor if petitioner would "cooperate" and tell the truth about the Boone murder. Five minutes later the officer had changed his tack;

he told petitioner that he thought him innocent and that he would call the doctor, implying that the doctor would give him a narcotic. The doctor gave petitioner an injection in the arm and five pills. Townsend took three of these immediately. Although he felt better, he felt dizzy and sleepy and his distance vision was impaired. Anagnost was then brought into the room, and petitioner was asked by someone to tell Anagnost that he had robbed him. Petitioner then admitted the robbery, and the next thing he knew was that he was sitting at a desk. He fell asleep but was awakened and handed a pen; he signed his name believing that he was going to be released on bond. Townsend was taken to his cell but was later taken back to the room in which he had been before. He could see "a lot of lights flickering," and someone told him to hold his head up. This went on for a minute or so, and petitioner was then again taken back to his cell. The next morning petitioner's

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head was much clearer, although he could not really remember what had occurred following the injection on the previous evening. An officer then told petitioner that he had confessed. Townsend was taken into a room and asked about a number of robberies and murders. "I believe I said yes to all of them." He could not hear very well and felt sleepy. That afternoon, after he had taken the remainder of the phenobarbital pills, he was taken to the office of the State's Attorney. Half asleep he signed another paper although not aware of its contents. The doctor gave him six or seven pills of a different color on Sunday evening. He took some of these immediately. They kept him awake all night. The following Monday morning he took more of these pills. Later that day he was taken to a coroner's inquest. He testified at the inquest because the officers had told him to do so.

Essentially the prosecution witnesses contradicted all of the above. They testified that petitioner had been questioned initially for only one-half hour, that he had scuffled with the man identified by Anagnost, and not an officer, and that he had not vomited. The officers and the Assistant State's Attorney also testified that petitioner had appeared to be awake and coherent throughout the evening of the 1st of January and at all relevant times thereafter, and that he had not taken the pills given to him by the doctor on the evening of the 1st. They stated that the petitioner had appeared to follow the statement which he signed and which was read to him at the State's Attorney's office. Finally they denied that any threats or promises of any sort had been made or that Townsend had been told to testify at the coroner's inquest. As stated above counsel was not provided for him at this inquest.

There was considerable testimony at the motion to suppress concerning the probable effects of hyoscine and phenobarbital. Dr. Mansfield, who had prescribed for

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petitioner on the evening when he had first confessed, testified for the prosecution. He stated that a full therapeutic dose of hyoscine was 1/100 of a grain; that he gave Townsend 1/230 of a grain; that "phenobarbital * * * reacts very well combined with [hyoscine when] * * * you want to quiet" a person; that the combination will "pacify" because "it has an effect on the mind"; but that the dosage administered would not put a person to sleep and would not cause amnesia or impairment of eyesight or of mental condition. The doctor denied that he had administered any "truth serum." However, he did not disclose that hyoscine is the same as scopolamine or that the latter is familiarly known as "truth serum." Petitioner's expert was a doctor of physiology, pharmacology and toxicology. He was formerly the senior toxicological chemist of Cook County and at the time of trial was a professor of pharmacology, chemotherapy and toxicology at the Loyola University School of Medicine. He testified to the effect of the injection upon a hypo-

thetical subject, obviously the petitioner. The expert stated that the effect of the prescribed dosage of hyoscine upon the subject, assumed to be a narcotic addict, "would be of such a nature that it could range between absolute sleep * * * and drowsiness, as one extreme, and the other extreme * * * would incorporate complete disorientation and excitation * * *." And, assuming that the subject took 1/8-grain phenobarbital by injection and 1/2-grain orally at the same time, the expert stated that the depressive effect would be accentuated. The expert testified that the subject would suffer partial or total amnesia for five to eight hours and loss of near vision for four to six hours.

The trial judge summarily denied the motion to suppress and later admitted the court reporter's transcription of the confession into evidence. He made no findings of fact and wrote no opinion stating the grounds of his decision.[1]

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Thereafter, for the purpose of testing the credibility of the confession, the evidence relating to coercion was placed before the jury. At that time additional noteworthy testimony was elicited. The identity of hyoscine and scopolamine was established (but no mention of the drug's properties as a "truth serum" was made). An expert witness called by the prosecution testified that Townsend had such a low intelligence that he was a near mental defective and "just a little above moron." Townsend testified that the officers had slapped him on several occasions and had threatened to shoot him. Finally, Officer Corcoran testified that about 9 p. m., Friday evening, before the doctor's arrival, Townsend had confessed to the Boone assault and robbery in response to a question propounded by Officer Cagney in the presence of Officers Fitzgerald, Martin and himself. But although Corcoran, Cagney and Martin had testified extensively at the motion to suppress, none had mentioned any such confession. Furthermore, both Townsend and Officer Fitzgerald at the motion to suppress had flatly said that no statement had been made before the doctor arrived. Although the other three officers testified at the trial, not one of them was asked to corroborate this phase of Corcoran's testimony.

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It was established that the homicide occurred at about 6 p. m. on December 18, 1953. Essentially the only evidence which connected petitioner with the crime, other than his confession, was the testimony of Campbell, then on probation for robbery, and of the pathologist who performed the autopsy on Boone. Campbell testified that about the "middle" of December at about 8:30 p. m. he had seen Townsend walking down a street in the vicinity of the murder with a brick in his hand. He was unable to fix the exact date, did not know of the Boone murder at the time and, so far as his testimony revealed, had no reason to suspect that Townsend had done anything unlawful previous to their meeting.

The pathologist testified that death was caused by a "severe blow to the top of his [Boone's] head * * *." Contrary to the statement in the opinion of the Illinois Supreme Court on direct appeal there was no testimony that the wounds were "located in such a manner as to have been inflicted by a blow with a house brick * * *." 11 Ill.2d at 45, 141 N.E.2d at 737. In any event, that court characterized the evidence as mea-

1. The final defense witness who testified at the motion to suppress was excused. The following then transpired:

"Mr. Branion [a defense attorney]: That's all we have, if the Court please.

"The Court: The defense rests on this hearing?

"Mr. Branion: Defense rests.

"The Court: Anything further from the State?

"Mr. McGovern: The State rests for the purpose of this hearing, Judge.

"The Court: Gentlemen, the Court will deny the motion to suppress and admit the statement into evidence and we will proceed with the presentation of the evidence [to the jury]."

gre and noted that "it was brought out by cross-examination that Campbell had informed on the defendant to obtain his own release from custody." 11 Ill.2d at 44, 45, 141 N.E.2d at 737. Prior to petitioner's trial Campbell was placed on probation for robbery. Justice Schaefer, joined by Chief Justice Klingbiel in dissent, found Campbell's testimony "inherently incredible." 11 Ill.2d at 49, 141 N.E.2d at 739.

The theory of petitioner's application for habeas corpus did not rest upon allegations of physical coercion. Rather, it relied upon the hitherto undisputed testimony and alleged: (1) that petitioner vomited water and blood at the police station when he became ill from the withdrawal of narcotics; (2) that scopolamine is a "truth serum" and that this fact was not brought out at the motion to suppress

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or at the trial; (3) that scopolamine "either alone or combined with Phenobarbital, is not the proper medication for a narcotic addict [and that] * * * [t]he effect of the intravenous injection of hyoscine and phenobarbital * * * is to produce a physiological and psychological condition adversely affecting the mind and will * * [and] a psychic effect which removes the subject thus injected from the scope of reality; so that the person so treated is removed from contact with his environment, he is not able to see and feel properly, he loses proper use of his eye-sight, his hearing and his sense of perception and his ability to withstand interrogation"; (4) that the police doctor willfully suppressed this information and information of the identity of hyoscine and scopolamine, of his knowledge of these things, and of his intention to inject the hyoscine for the purpose of producing in Townsend "a physiological and psychological state * * * susceptible to interrogation resulting in * * * confessions * * *"; (5) that the injection caused Townsend to confess; (6) that on the evening of January 1, immediately after the injection of scopolamine, petitioner confessed to three murders and one robbery other than the murder of Boone and the robbery of Anagnost. Although there was some mention of other confessions at the trial, only the confession to the Anagnost robbery was specifically testified to.

Initially, in their answer, respondents stated: "Respondents admit the factual allegations of the petition well pleaded, but deny that Petitioner is held in custody by Respondents in violation of the constitution or laws of the United States * * *." However, in the course of the first argument before the District Court it appeared that respondents admitted nothing alleged in the petition but merely took the position that the petition, on its face, was insufficient to entitle Townsend either to a hearing or to his release. In the course of the second argument after the remand by this Court, respondents admitted

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that "if the allegations of the petition are taken as true, then the petitioner is entitled to the relief he seeks * * *," and that Townsend had confessed to at least five crimes after the injection of hyoscine. But respondents denied that "petitioner was adversely influenced by its [the hyoscine's] administration to the extent that his confession was obtained involuntarily"; that "Hyoscine is the truth serum"; that "the police surgeon or the prosecution concealed pertinent, material and relevant facts"; or that hyoscine was an improper medication under the circumstances. Despite respondents' concession that a dispute as to these facts existed, the district judge denied Townsend the opportunity to call witnesses or to produce other evidence in support of his allegations and dismiss the petition.

Before we granted the most recent petition for certiorari we requested respondents to submit an additional response directed to certain of the allegations of the petition for habeas corpus. Respondents submitted an "additional answer to petition for habeas corpus" in which they again admitted that Town-

send had made confessions immediately after the injection of drugs. Specifically they admitted that petitioner confessed to the robberies of Anagnost and one Joseph Martin and to the murders of Boone, Thomas Johnson, Johnny Stinson, and Willis Thompson. The additional answer revealed the following additional information respecting Townsend's confessions to these crimes. Anagnost had identified another person, rather than petitioner, as his assailant. Thomas Johnson, before his death, had stated that his injury had been an accident. The Assistant State's Attorney did not even bother to transcribe Townsend's statement with respect to Thompson's murder "because the defendant could not recall the details of the assault which led to the death * * *." At the Thompson coroner's inquest, when

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the deputy coroner noted that Townsend was then unable to remember even that he had committed the crime, Officer Cagney complained: "Why shouldn't we be given credit for these Clean-ups." Despite these circumstances which made conviction for the Anagnost robbery and the Johnson and Thompson murders, at best, a remote possibility, petitioner was indicted for all of the crimes to which he had confessed. However, after a jury trial, he was acquitted of the murder of Johnny Stinson, and on the very day that he was sentenced to death for the Boone murder, on the motion of the prosecutor, the indictments for the murders of Johnson and Thompson and for the robberies of Anagnost and Martin were dismissed.

Although the petition for habeas corpus contains allegations which would constitute a claim that the police doctor, at the trial, had perjured himself, the heart of Townsend's claim is that his confession was inadmissible simply because it was caused by the injection of hyoscine. We must first determine whether petitioner's allegations, if proved, would establish the right to his release.

I.

[2-5] Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's "will was overborne" [2] or if his confession was not "the product of a rational intellect and a free will," [3] his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought

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about by a drug having the effect of a "truth serum." [4] It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.[5] The

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Court has usually so stated the test. See, e. g., Stroble v. California, 343 U. S. 181, 190, 72 S.Ct. 599, 603, 96 L.Ed. 872: "If the confession which petitioner made * * * was in fact involuntary, the conviction cannot stand * * *." And in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.

[6] Thus we conclude that the petition for habeas corpus alleged a deprivation of constitutional rights. The remaining question before us then is whether the District Court was required to hold a hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question.

[7] The problem of the power and duty of federal judges, on habeas corpus, to hold evidentiary hearings—that is, to try issues of fact [6] anew—is a recurring one. The Court last dealt at length with it in Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L.Ed. 469, in opinions by Justices Reed and Frankfurter, both speaking for a majority of the Court. Since then,

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we have but touched upon it.[7] We granted certiorari in the 1959 Term to consider the question, but ultimately disposed of the case on a more immediate ground. Rogers v. Richmond, 365 U.S. 534, 540, 81 S.Ct. 735, 739, 5 L.Ed.2d 760. It has become apparent that the opinions in Brown v. Allen, supra, do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results.[8] We

2. Reck v. Pate, 367 U.S. 433, 440, 81 S.Ct. 1541, 1546, 6 L.Ed.2d 948.

3. Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242.

4. Of course, there are many relevant circumstances in this case which a district judge would be required to consider in determining whether the injection of scopolamine caused Townsend to confess. Among these are his lack of counsel at the time, his drug addiction, the fact that he was a "near mental defective," and his youth and inexperience.

5. Respondents do not dispute this. In fact at the time of the second argument before the District Court respondents stated:

"If it was a fact—to put it very bluntly as we will very shortly, and elaborate upon it—if a truth serum was administered to the petitioner and he was influenced by the truth serum and gave an involuntary confession, upon which his conviction was obtained, then that is it."

It is at least generally recognized that the administration of sufficient doses of scopolamine will break down the will. Thus, it is stated in The Dispensatory of the United States (25th ed. 1955) 1223: "Many persons are excessively susceptible to scopolamine and toxic symptoms may occur; such symptoms are often very alarming. There are marked disturbances of intellection, ranging from complete disorientation to an active delirium * * *." The early literature on the subject designated scopolamine as a "truth serum." It was thought to produce true confessions by criminal suspects. E. g., House, Why Truth Serum Should be Made Legal, 42 Medico-Legal Journal 138 (1925). And as recently as 1940 Dean Wigmore suggested that scopolamine might be useful in criminal interrogation. 3 Wigmore on Evidence (3d ed. 1940) § 998 at 642. However, some more recent commentators suggest that scopolamine's use is not likely to produce true confessions. On the contrary it is said:

"Unfortunately, persons under the influence of drugs are very suggestible and may confess to crimes which they have not committed. False or misleading answers may be given, especially when questions are improperly phrased. For example, if the police officer asserted in a confident tone 'You did steal the money, didn't you?', a suggestible suspect might easily give a false affirmative answer." MacDonald, Truth Serum, 46 J.Crim.L. 259, 259-260 (1955). We make no findings as to either the medical properties of scopolamine or the likely effect of the dosage administered to Townsend. However, whether scopolamine produces true confessions or false confessions, if it in fact caused Townsend to make statements, those statements were constitutionally inadmissible.

6. By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators * * *." Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 446, 97 L. Ed. 469 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

7. See Thomas v. Arizona, 356 U.S. 390, 78 S.Ct. 885, 2 L.Ed.2d 863; Rogers v. Richmond, 357 U.S. 220, 78 S.Ct. 1365, 2 L.Ed 2d 1361 (denial of certiorari with accompanying statement); United States ex rel. Jennings v. Ragen, 358 U.S. 276, 79 S.Ct. 321, 3 L.Ed.2d 296 (per curiam); Townsend v. Sain, 359 U.S. 64, 79 S.Ct. 655, 3 L. Ed.2d 634 (per curiam) (vacating judgment on authority of United States ex rel. Jennings v. Ragen, supra).

8. See, e. g., United States ex rel. Tillery v. Cavell, 294 F.2d 12 (C.A.3d Cir.); Schlette v. People, 284 F.2d 827 (C.A.9th

mean to express no opinion on the correctness of particular decisions. But we think that it is appropriate at this time to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings.

II.

[8] The broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus are reviewed at length in the Court's opinion in Fay

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v. Noia, 372 U.S. 391, 83 S.Ct. 822, and need not be repeated here. We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day. We pointed out, too, that the Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and determine the facts *de novo* in the largest terms, restated what apparently was the common-law understanding. Fay v. Noia, 372 U.S., p. 416, 83 S.Ct., p. 837, n. 27. The hearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 U.S.C. § 2243. In construing the mandate of Congress, so plainly designed to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detentions, this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention. "Since Frank v. Mangum, 237 U.S. 309, 331, 35 S.Ct. 582, 588, 59 L.Ed. 969, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution,' even though the events which were alleged to infringe did not appear upon the face of the record of his conviction." Hawk v. Olson, 326 U.S. 271, 274, 66 S.Ct. 116, 118, 90 L.Ed. 61. Brown v. Allen and numerous other cases have recognized this.

[9–11] The rule could not be otherwise. The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal

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channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See Frank v. Mangum, 237 U.S. 309, 345–350, 35 S.Ct. 582, 594–596, 59 L.Ed. 969 (dissenting opinion of Mr. Justice Holmes). It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

III.

[12] We turn now to the considerations which in certain cases may make exercise of that power mandatory. The appropriate standard—which must be considered to supersede, to the extent of any inconsistencies, the opinions in Brown v. Allen—is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required

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unless the state-court trier of fact has after a full hearing reliably found the relevant facts.[9]

[13] It would be unwise to overly particularize this test. The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus. But experience proves that a too general standard—the "exceptional circumstances" and "vital flaw" tests of the opinions in Brown v. Allen—does not serve adequately to explain the controlling criteria for the guidance of the federal habeas corpus courts. Some particularization may therefore be useful. We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

[14] (1) There cannot even be the semblance of a full and fair hearing unless the state court actually reached and

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decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits. If relief has been denied in prior state collateral proceedings after a hearing but without opinion, it is often likely that the decision is based upon a procedural issue—that the claim is not collaterally cognizable—and not on the mer-

Cir.); Bolling v. Smyth, 281 F.2d 192 (C.A.4th Cir.); Chavez v. Dickson, 280 F.2d 727 (C.A.9th Cir.); Gay v. Graham, 269 F.2d 482 (C.A.10th Cir.); United States ex rel. Rogers v. Richmond, 252 F.2d 807 (C.A.2d Cir.), cert. denied with accompanying statement, 357 U.S. 220, 78 S.Ct. 1365, 2 L.Ed.2d 1361; United States ex rel. Alvarez v. Murphy, 246 F.2d 871 (C.A.2d Cir.); Tyler v. Pepersack, 235 F.2d 29 (C.A.4th Cir.); Cranor v. Gonzales, 226 F.2d 83 (C.A.9th Cir.); United States ex rel. De Vita v. McCorkle, 216 F.2d 743 (C.A.3d Cir.). See also Note, Habeas Corpus: Developments Since Brown v. Allen: A Survey and Analysis, 53 Nw.U.L.Rev. 765; Comment, Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion, 68 Yale L.J. 98.

9. In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law.

The existence of the exhaustion of state remedies requirement (announced in Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 and now codified in 28 U.S.C. § 2254) lends support to the view that a federal hearing is not always required. It presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in habeas corpus.

its. On the other hand, if the prior state hearing occurred in the course of the original trial—for example, on a motion to suppress allegedly unlawful evidence, as in the instant case—it will usually be proper to assume that the claim was rejected on the merits.

[15] If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

[16–19] Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal

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constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence, such as was present in Rogers v. Richmond, that there is reason to suspect that an incorrect standard was in fact applied.[10] Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

[20] In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] so blended that they cannot be severed in consideration." Rogers v. Richmond, supra, 365 U.S. at 546, 81 S.Ct. at 742. See Frank v. Mangum, supra, 237 U.S. at 347, 35 S.Ct. at 595 (Holmes, J., dissenting). Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal

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court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

[21] (2) This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. Fiske v. Kansas, 274 U.S. 380, 385, 47 S.Ct. 655, 656, 71 L.Ed. 1108; Blackburn v. Alabama, 361 U.S. 199, 208–209, 80 S.Ct. 274, 281, 4 L.Ed.2d 242. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, e. g., Blackburn v. Alabama, supra; Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167. The duty of the Federal District Court on habeas is no less exacting.

[22–24] (3) However, the obligation of the Federal District Court to scrutinize the state-court findings of fact goes farther than this. Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew. Of course, there are procedural errors so grave as to require an appropriate order directing the habeas applicant's release unless the State grants a new trial forthwith. Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.

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[25–27] (4) Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation of newly discovered evidence.

[28] (5) The conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment is, however, in some respects too limited to provide complete guidance to the federal district judge on habeas. If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, 372 U.S., p. 438, 83 S.Ct., p. 848 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in Fay v. Noia adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by, passing of state procedures. Compare Price v. Johnston, 334 U.S. 266, 291, 68 S.Ct. 1049, 1063, 92 L. Ed. 1356: "The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

[29] (6) Our final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded. It is the province of the district judges first to determine such necessities in accordance

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with the general rules. The duty to try the facts anew exists in every case in which the state court has not after a full hearing reliably found the relevant facts.

IV.

It is appropriate to add a few observations concerning the proper application of the test we have outlined.

10. Of course, under Rogers v. Richmond, a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law. However, there will be situations in which statements of the trier of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary.

[30, 31] *First.* The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice or to waste the time of the federal courts in the trial of frivolous claims.

[32] *Second.* Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in Brown v. Allen, supra, 344 U.S. at 506, 73 S.Ct. at 445 (opinion of Mr. Justice Frankfurter).

[33, 34] *Third.* A District Court sitting in habeas corpus clearly has the power to compel production of the complete

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state-court record. Ordinarily such a record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. See United States ex rel. Jennings v. Ragen, 358 U.S. 276, 79 S.Ct. 321, 3 L.Ed.2d 296; Townsend v. Sain, 359 U.S. 64, 79 S.Ct. 655, 3 L.Ed.2d 634. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so.

Fourth. It rests largely with the federal district judges to give practical form to the principles announced today. We are aware that the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area.

V.

[35, 36] Application of the foregoing principles to the particular litigation before us is not difficult. Townsend received an

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evidentiary hearing at his original trial, where his confession was held to be voluntary. Having exhausted his state remedies without receiving any further such hearing, he turned to the Federal District Court. Twice now, habeas corpus relief has been denied without an evidentiary hearing. On appeal

from the second denial, the Court of Appeals held that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record." That formulation was error. And we believe that on this record it was also error to refuse Townsend an evidentiary hearing in the District Court. The state trial judge rendered neither an opinion, conclusions of law, nor findings of fact. He made no charge to the jury setting forth the constitutional standards governing the admissibility of confessions. In short, there are no indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession. The Illinois Supreme Court opinion rendered at the time of direct appeal contains statements which might indicate that the court thought the confession was admissible if it satisfied the "coherency" standard. Under that test the confession would be admissible "[s]o long as the accused [was] capable of making a narrative of past events or of stating his own participation in the crime * * *." 11 Ill.2d at 43, 141 N.E.2d at 736. As we have indicated in Part I of this opinion, this test is not the proper one. Possibly the state trial judge believed that the admissibility of allegedly drug-induced confessions was to be judged by the "coherency" standard.[11] However, even if this possibility

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could be eliminated, and it could be ascertained that correct standards of law were applied, it is still unclear whether the state trial judge would have excluded Townsend's confession as involuntary if he had believed the evidence which Townsend presented at the motion to suppress. The problem which the trial judge faced was novel and by no means without difficulty. We believe that the Federal District Court could not conclude that the state trial judge admitted the confession because he disbelieved the evidence which would show that it was involuntary. We believe that the findings of fact of the state trier could not be successfully reconstructed. We hold that, for this reason, an evidentiary hearing was compelled.[12]

[37] Furthermore, a crucial fact was not disclosed at the state-court hearing: that the substance injected into Townsend before he confessed has properties which may trigger statements in a legal sense involuntary.[13] This fact was vital to whether his confession was the product of a free will and therefore admissible. To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the conclusion

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that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury, mere laymen, intelligently to grasp the nature of the substance under in-

11. The charge to the jury dealt only with the issues of credibility so far as the confession was concerned. Even accepting the relevance of the instructions, there is nothing in the charge to the jury to show that the trial judge, like the Supreme Court, did not think that voluntariness was conclusively established by a showing that the defendant was coherent.

12. The dissent fails to say why a hearing was not required for this reason. And "accepting the Court's * * * hearing standards" as the dissent does, it cannot seriously be argued that a hearing was not compelled. True the state trial judge instructed the jury that it *could* disregard the confession on grounds of credibility if it believed the petitioner's expert. But this hardly indicates whether the trial judge, at the motion to suppress, himself disbelieved the expert or whether he thought that, notwithstanding the truth of the expert's testimony, the confession was voluntary.

13. It appears that at the suppression hearing it was not disclosed that hyoscine (the substance injected, along with phenobarbital, into Townsend) was identical to scopolamine, and neither was it disclosed that scopolamine is familiarly known as "truth serum." Later on in the trial, there was testimony that hyoscine is identical to scopolamine, but not that scopolamine (or hyoscine) is a "truth serum."

quiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a "truth serum" was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. See Fay v. Noia, 372 U.S., p. 438, 83 S.Ct., p. 848 (Part V).

[38] On the remand it would not, of course, be sufficient for the District Court merely to hear new evidence and to read the state-court record. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence,[14] and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. This was not done here.

In deciding this case as we do, we do not mean to prejudge the truth of the allegations of the petition for habeas corpus. We decide only that on this record the federal district judge was obliged to hold a hearing.

Reversed and remanded.

Mr. Justice GOLDBERG, concurring.

I join in the opinion and judgment of the Court and add a few words by way of comment on the dissenting opinion of my Brother STEWART.

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I cannot agree with Mr. Justice STEWART that the instructions given to the jury by the trial judge on the issue of credibility indicate the application of a proper constitutional test to measure the voluntariness—and hence the admissibility—of the petitioner's disputed confession of the Boone murder. In my view, the very portions of the instructions excerpted by my Brother STEWART support, if anything, the contrary conclusion that an improper and constitutionally impermissible standard was utilized by the trial judge himself in the suppression hearing.

If, as suggested by my Brother STEWART, these instructions are taken to evidence the exclusionary standard applied by the trial judge in ruling on the petitioner's motion to suppress, they reflect error of constitutional dimension, as does the standard of admissibility contained in the affirming opinion of the Illinois Supreme Court. While the appellate court, as pointed out in the opinion of THE CHIEF JUSTICE, see pp. 760–761, appears to have adopted a test of "coherency" to measure the admissibility of the confession, the trial court seemingly concluded that inducement of amnesia was a prerequisite to disregard of the confession. Both standards, whether or not intended to incorporate similar elements, fail to conform to the requisite test.

The third paragraph of the instructions quoted by my Brother STEWART in footnote 2, p. 766, advises the jury that it might discount the confession if it found that administration of the drug caused the petitioner to "lose his memory," to suffer "a state of amnesia" during the period of questioning, *and* to be unable "to control his answers or to assert his will by denying the crime charged." By use of the conjunctive to incorporate the requirement of loss of control, this instruction indicates the trial court's apparent view that if the drug had the effect of overbearing the petitioner's will but did not also cause loss of

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memory, the confession would nonetheless remain acceptable evidence of guilt. This conclusion is buttressed by the instruction quoted in the concluding paragraph of note 2 in my Brother STEWART'S dissenting opinion, in

14. Cf. 28 U.S.C. §§ 2245, 2247.

which the trial court indicates that the confession might be disregarded by the jury not simply if the drug had the effect asserted by the petitioner's expert in response to a hypothetical question, but only if, *in addition*, the drug so affected the petitioner's consciousness that "he did not know what he was doing." The petitioner may have been fully aware of what he was doing in confessing and may have suffered no loss of memory, but that is not the issue. The crucial question, and the measure of evidentiary propriety under the Constitution, is whether the drug—whatever label was or was not affixed to it—so overbore the petitioner's will that he was unable to resist confessing. Whether or not he was conscious of what he was doing, the petitioner could, because of the drug, have been wholly unable to stop himself from admitting guilt.*

In the absence of contrary indications, I think we must recognize that the misconception of the constitutional standard evidenced by these instructions may well have infected the trial judge's ruling at the suppression hearing. The inference of error is not negatived by the remainder of the instructions, which permit disregard of the confession if induced by force, physical or mental, duress, or promise of reward. In the context of the instructions as a whole, these references to "voluntariness" do not meet the problems raised by the administration of the drug to the petitioner and do not vitiate the crucial inference that

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the trial judge viewed exclusion as dependent upon the presence of facts in addition to a drug-induced sterilization of the petitioner's will.

For the reasons contained in the opinion of the Court, and on the basis of what I believe to be the wholly fair inference that the trial court misconceived the proper constitutional measure of admissibility of the petitioner's confession, the lack of any indication that the trial court did utilize the correct test, and the state appellate court's apparent application of a similarly erroneous standard, I agree that a hearing must be held below.

Finally, the Court's opinion does not warrant my Brother STEWART'S criticism as to the propriety or wisdom of articulating standards to govern the grant of evidentiary hearings in habeas corpus proceedings. The setting of certain standards is essential to disposition of this case and a definition of their scope and application is an appropriate exercise of this Court's adjudicatory obligations. Particularly when, as here, the Court is directing the federal judiciary as to its role in applying the historic remedy in a difficult and sensitive area involving large issues of federalism, the careful discharge of our function counsels that, "[i]n order to preclude individualized enforcement of the Constitution in different parts of the Nation, [we] lay down as specifically as the nature of the problem permits the standards or directions that should govern the district judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts." Brown v. Allen, 344 U.S. 443, 501–502, 73 S.Ct. 397, 443, 97 L.Ed. 469 (separate opinion of Mr. Justice Frankfurter).

Mr. Justice STEWART, whom Mr. Justice CLARK, Mr. Justice HARLAN, and Mr. Justice WHITE join, dissenting.

The basis for my disagreement with the Court can perhaps best be explained if I define at the outset the several areas in which I am entirely in accord with the Court's

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opinion. First, as to the under-

*The petitioner's initial resistance to admitting guilt, his sudden change in attitude, and the veritable flood of confessions succeeding immediately upon administration of the drug to him, see pp. 753–754, all indicate the real possibility that his will was so overborne. Moreover, the reliability of a number of these confessions is seriously impaired. See *ibid.*

lying issue of constitutional law, I completely agree that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. Secondly, I agree that the Court of Appeals in this case stated an erroneous standard when it said that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record. * * *" 276 F.2d 324, 329. Thirdly, I agree that where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the *power* to receive evidence and try the facts anew.[1]

I differ with the Court's disposition of this case in two important respects. First, I strongly doubt the wisdom of using this case—or any other—as a vehicle for cataloguing in advance a set of standards which are inflexibly to compel district judges to grant evidentiary hearings in habeas corpus proceedings. Secondly, I think that a *de novo* evidentiary hearing is not required in the present case, even under the very standards which the Court's opinion elaborates.

I.

I have no quarrel with the Court's statement of the basic governing principle which should determine whether a hearing is to be had in a federal habeas corpus

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proceeding: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." P. 757. But the Court rightly says that "[i]t would be unwise to overly particularize this test," and I think that in attempting to erect detailed hearing standards for the myriad situations presented by federal habeas corpus applications, the Court disregards its own wise admonition.

The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary of District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.

More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case before us, and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date. See e. g., Marine Cooks & Stewards v. Panama S. S. Co., 362 U.S. 365, 368, n. 5, 80 S.Ct. 779, 4 L.Ed.2d 797; International Association of Machinists v. National Labor Relations Board, 362 U.S. 411, 415, 80 S.Ct. 822, 825, 4 L.Ed.2d 832 n. 5. I regard these reasons as peculiarly persuasive in the present context. We should not try to hedge in with inflexible rules what is essentially an extraordinary writ, designed to do justice in extraordinary and often unpredictable situations.

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II.

Even accepting the Court's detailed hearing standards *in toto*, however, I cannot agree that any one of them requires the District Court to hold a new evidentiary hearing in the present case. And I think, putting these rigid formulations to one side, that accepted principles governing the fair and prompt administration of criminal justice within our federal system affirmatively counsel *against* a *de novo* federal court hearing in this case.

The Court refers to two specific defects which it feels compel a hearing in the District Court: the absence of "indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession" and the fact that it was not disclosed in the state hearing that "the substance injected into Townsend before he confessed has properties which may trigger statements in a legal sense involuntary." Since the lengthy extracts from the testimony and pleadings in the Court's opinion do not seem to me to bear on these issues, it becomes necessary to sketch the prior proceedings in this case to indicate why I think the Court is mistaken in concluding that a new hearing is required.

During the early morning hours of January 1, 1954, the petitioner was arrested by the Chicago police. He admitted having given himself an injection of heroin 90 minutes before his arrest. Within an hour of his arrest, he was questioned for 30 minutes about various crimes, all of which he denied having committed. He was not questioned again until that evening.

Shortly after the evening questioning began, the petitioner complained of stomach pains and requested a doctor. A police surgeon was summoned, and he administered an injection consisting of 2 cc.'s of a saline solution in which 1/230 grain of hyoscine hydrobromide and 1/8

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grain of phenobarbital were dissolved. Slightly more than an hour later, the petitioner confessed to the murder of Boone. The following day, 15 hours after the police surgeon had administered the hyoscine, the petitioner initialed a copy of his previous night's statement in the offices of the State's Attorney General. At the coroner's hearing on January 4, the petitioner again confessed to the Boone killing.

A. The Standard of Federal Law Applied by the State Trial Court in Ruling Upon the Admissibility of the Confession.

At the trial, the petitioner's lawyer objected to introduction of the confession on the ground that it was involuntary. In accordance with Illinois practice, the motion to suppress was argued before the judge in the absence of the jury. During this proceeding, the petitioner testified that the injection had produced a temporary state of amnesia, that he could not remember making any confession, and that various other physical effects were produced. The police officers present at the petitioner's questioning stated that no change in the petitioner's demeanor suggesting any loss of his mental faculties had taken place as a result of the injection. On the question of the possible effects of the injection administered to the petitioner, Dr. Mansfield, the police surgeon and a licensed physician, testified for the State that he had treated thousands of narcotics addicts suffering from withdrawal symptoms, that in about 50% of such cases he had used the same treatment administered to the petitioner, and that he could recall no case in his ex-

1. Indeed, the original version of 28 U.S.C. § 2243 directed the court to "proceed in a summary way to *determine the facts* of the case, *by hearing the testimony* and arguments, and thereupon to dispose of the party as law and justice require." See Walker v. Johnston, 312 U.S. 275, 283–284, 61 S.Ct. 574, 577, 578, 85 L.Ed. 830. (Emphasis added.) The statute was later revised so that it now provides that "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The Revisers' notes indicate that the change was one of "phraseology" and not substance.

Where the state court has reliably found facts relevant to any issue, the district judge in such a hearing should, of course, give appropriate deference to such findings. See p. 760.

perience where his use of hyoscine had produced loss of memory. A doctor of pharmacology (who was not a licensed physician) testified on behalf of the petitioner, and in answer to a hypothetical question stated that a person in the petitioner's condition at the time of interrogation could have

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been suffering amnesia and partial loss of consciousness as the result of the treatment which had been administered to relieve the narcotic withdrawal symptoms. On cross-examination, this witness revealed that he had never actually seen the effects of hyoscine on a human and admitted that he was unfamiliar with its use in treating drug addicts. It is evident that a finder of fact could with reason have accorded more credibility to the evidence offered by the prosecution than to that offered by the defense.

It is true, as the Court today says, that in overruling the motion to suppress the confession, the trial judge did not explicitly spell out the exclusionary standards he was applying. The instructions to the jury at the end of the case, however, although directed to the question of credibility—since that was the issue before the jury under Illinois procedure—were couched in terms of voluntariness, and they clearly established that the trial judge was aware of the correct constitutional standards to be applied.[2]

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Nothing in the record indicates that an incorrect standard was applied at the suppression hearing. Given these circumstances, I think it completely impermissible for us to assume that the trial judge did not apply "the proper standard of federal law in ruling upon the admissibility of the confession." Where, as here, a record is totally devoid of any indication that a state trial judge employed an erroneous constitutional standard, the presumption should surely be that the judge knew the law and correctly applied it. Certainly it is improper to presume that the trial judge did *not* know the law which the Constitution commands him to follow. Yet that is precisely the presumption which the Court makes in this case.

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B. Disclosure of the "Properties" of the Medicine Administered to the Petitioner.

Much of the evidence which had been presented to the judge alone was subsequently brought before the jury by defense counsel in an attempt to diminish the weight to be given to the confession. Additional evidence was also adduced by the prosecution, including testimony by another licensed physician, who made clear that hyoscine was identical with scopolamine. The case was submitted to the jury under unexceptionable instructions,[3] and the petitioner was convicted and sentenced to death. The Illinois Supreme Court, after reviewing in detail the evidence bearing on the voluntariness of the confession, affirmed the conviction. 11 Ill.2d 30, 141 N.E.2d 729. This Court denied certiorari, 355 U.S. 850, 78 S.Ct. 76, 2 L.Ed.2d 60; rehearing denied, 355 U.S. 887, 79 S.Ct. 128, 3 L.Ed.2d 115.

The petitioner then instituted post-conviction proceedings in the state trial court. His claim in these proceedings was that the confession had been procured as a result of the administration of scopolamine, that the witnesses for the State were aware of the identity of scopolamine and hyoscine and had deliberately withheld the fact of this identity at trial, and that the petitioner had consequently not been afforded an opportunity to make clear the basis for his claim that his confession had been coerced. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed. In an unpublished opinion, that court concluded as follows:

"A study of our opinion on [the original appeal] discloses that all of the evidence with respect to the injection of hyoscine and phenobarbital was carefully considered by us in resolving the issue of the validity of petitioner's confession. (People vs.

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Townsend, 11 Ill.2d 30, 35, 44, 141 N.E.2d 729, 732, 736). Thus, it is clear that the issue of the effect of the drug on the confession was before us * * *. The only matter which was not presented then was the fact that hyoscine and scopolamine are identical. In an attempt to escape from the doctrine of *res judicata*, the present petition for a writ of error contends that this fact could not have been presented to us because it was unknown to petitioner and his counsel at the time. Assuming for the moment the truth of this statement, we are of the opinion that the mere fact that the drug which was administered to petitioner is known by two different names presents no constitutional issue. At the original trial there was extensive medical testimony as to the properties and effects of hyoscine. If hyoscine and scopolamine are, in fact, identical, the medical testimony as to these properties and effects would be the same, regardless of the name of the drug. In determining the effect of the drug on the validity of petitioner's confession, the vital issue was its nature and its effect, rather than its name. This issue was thoroughly presented, both in the trial court and in this Court. Furthermore, the claim by petitioner now that the State 'suppressed' this identity of hyoscine and scopolamine at the trial is destroyed by reference to the bill of exceptions from the original trial. A State medical witness, on cross-examination by peti-

2. Among the instructions given were the following:

"There has been admitted into evidence a written confession alleged to have been made freely and voluntarily by the defendant.

"You are further instructed that a confession made freely and voluntarily by a person charged with a crime may be considered by you, but if you find from the evidence that any force, physically or mentally, has been exerted upon the defendant by those having the defendant in charge after his arrest in order to obtain a confession, or that those persons made any promises to reward him if he would make such a confession, then you may totally disregard such confession.

"You are further instructed that if you find from the evidence that the defendant was given drugs and that said drugs caused him to lose his memory and create a state of amnesia in the defendant during the questioning of this defendant by the police or State's Attorney and that the defendant was not able to control his answers or to assert his will by denying the crime charged, then you may totally disregard such confession.

"You are instructed that if you find from the evidence that any influence was used on the defendant which amounted to duress upon his mind or body which caused him to make the confession, then you may totally disregard the confession.

* * * * *

"You are further instructed that if you believe from the evidence in this case that duress or influence either physically or mentally was exerted upon the defendant which caused him to make the written confession which has been introduced into evidence, then you may further consider whether this influence was still in existence at the time the defendant appeared at the coroner's inquest and is alleged to have made a confession there.

"There has been introduced into evidence the testimony of a witness, who is in the category known as an 'Expert Witness,' who testified as to what influence or effect certain drugs had upon a hypothetical person.

"You are further instructed that you may take this testimony into consideration in determining whether the drugs alleged to have been administered to the defendant by Dr. Mansfield would have the same effect upon the defendant that the drug in the opinion of the 'Expert Witness' had upon the hypothetical person, and if you believe from all the evidence in this case that the drugs had the effect upon the defendant to cause his consciousness to be impaired to the extent that he did not know what he was doing while he was being questioned by police officers or the Assistant State's Attorney, then you may totally disregard any statement or confession that he is alleged to have made during the time such influence, if any, was exerted upon him."

3. See footnote 2, supra.

tioner's counsel stated: 'Scopolamine or hyoscine are the same.' "

Even under the detailed hearing requirements announced today by the Court, therefore, I think it is clear that the district judge had no choice but to conclude, on the basis of his examination of the full record of the state proceedings, that a new hearing on habeas corpus would

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not be proper. For the record of the state proceedings clearly shows that the petitioner received a full and fair hearing as to the factual foundation for his constitutional claim—i. e., as to the properties of the drug which had been administered to him and the circumstances surrounding his confession. A total of 3 medical experts and 17 lay witnesses testified. Their testimony was in conflict. The trial court determined upon this conflicting evidence that there was no factual basis for the petitioner's claim that his confession had been involuntary. There is nothing whatever in the record to support an inference that the trial court did not scrupulously apply a completely correct constitutional standard in determining that the confession was admissible.[4] The trial court's determination was fully reviewed by the Supreme Court of Illinois on appeal, and reviewed again in state post-conviction proceedings. To be sure, no witness at the trial used the phrase "truth serum"—a phrase which has no precise medical or scientific meaning. Yet I cannot but agree with the Supreme Court of Illinois that the mere fact that a drug may be known by more than one name hardly presents a constitutional issue.

Under our Constitution the State of Illinois has the power and duty to administer its own criminal justice. In carrying out that duty, Illinois must, as must each State, conform to the Due Process Clause of the Fourteenth Amendment. I think Illinois has clearly accorded the petitioner due process in this case. To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus.

I would affirm.

4. See pp. 766–767, supra.

372 U.S. 477

Ward LANE, Warden, Petitioner,

v.

George Robert BROWN.

No. 283.

Argued Jan. 16 and 17, 1963.

Decided March 18, 1963.

Habeas corpus proceeding by a state prisoner. The United States District Court for the Northern District of Indiana, South Bend Division, 196 F.Supp. 484, granted the writ and the warden appealed. The Court of Appeals, 302 F.2d 537, affirmed, and the warden petitioned for certiorari. The Supreme Court, Mr. Justice Stewart, held that an Indiana prisoner who, following refusal of public defender to take an appeal was prevented from taking an appeal from denial of a writ of error coram nobis because he was an indigent, unable to purchase a transcript, was denied equal protection of the law in view of fact such appeal could have been maintained if prisoner had funds to purchase a transcript.

Judgments of Court of Appeals and of District Court vacated and case remanded for entry of orders in accordance with opinion.

1. Constitutional Law ⇐250

Equal protection of the law requires that a state with an appellate system which makes available trial transcripts to those who can afford them must provide as adequate appellate review to indigent defendants. U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐250

Once a state chooses to establish appellate review in criminal cases, the equal protection clause of the Fourteenth Amendment requires that the state not foreclose indigents from access to any phase of that procedure because of their poverty, and such principle is not to be limited to direct appeals from criminal convictions but extends alike to state postconviction proceedings. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐250

Principle that equal protection of the law requires that once the state chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty, applies even though the state has already provided one review on the merits. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐250

Indiana procedure whereby a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from denial of a writ of error coram nobis, but an indigent can, at will of the public defender, be entirely cut off from any appeal did not meet constitutional standards of equal protection of the law. U.S.C.A.Const. Amend. 14; Burns' Ann.St.Ind. §§ 13–1401 et seq., 13–1402, 13–1404, 13–1405; Supreme Court Rules Ind. rules 2–6, 2–40.

5. Constitutional Law ⇐250

An Indiana prisoner who, following refusal of public defender to take an appeal was prevented from taking an appeal from denial of a writ of error coram nobis because he was an indigent, unable to purchase a transcript, was denied equal protection of the law in view of fact such appeal could have been maintained if prisoner had funds to purchase a transcript. U.S.C.A.Const. Amend. 14; Burns' Ann.St.Ind. §§ 13–1401 et seq., 13–1402, 13–1404, 13–1405; Supreme Court Rules Ind. rules 2–6, 2–40.

William D. Ruckelshaus, Indianapolis, Ind., for petitioner, pro hac vice, by special leave of Court.

Nathan Levy, South Bend, Ind., for respondent.

Mr. Justice STEWART delivered the opinion of the Court.

The respondent, George Robert Brown, is in an Indiana prison under sentence of death. He is an indigent.

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In a federal habeas corpus proceeding the District Court held that Indiana has deprived Brown of a right secured by the Fourteenth Amendment by refusing him appellate review of the denial of a writ of error *coram nobis* solely because of his poverty. 196 F.Supp. 484. The Court of Appeals affirmed. 302 F.2d 537. We agree that the Indiana procedure at issue in this case falls short of the requirements of the Fourteenth Amendment of the United States Constitution.

In the administration of its criminal law, Indiana seems to have long pursued a conspicuously enlightened policy in the quest for equal justice to the destitute, and it is not without irony that the constitutional problem in this case stems from legislation evidently enacted to enlarge that State's existing system of aid to the indigent. For more than a hundred years the Indiana Constitution has guaranteed the assistance of counsel to every defendant in a criminal trial.[1]

1. Ind.Const. Art. 1, § 13 (1851). In 1854 the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen

CHAPTER 153—HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a

factual determination by the State court shall be admissible in the Federal court proceeding.

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89–711, § 2, 80 Stat. 1105.

Historical and Revision Notes

Reviser's Note. This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S.Ct. 448, 321 U.S. 114, 88 L.Ed. 572.) 80th Congress House Report No. 308.

Senate Revision Amendment. For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 47.

1966 Amendment. Catchline. Pub.L. 89–711, § 2(a), substituted "Federal courts" for "State courts".

1966 Amendment. Subsec. (a). Pub.L. 89–711, § 2(b), added subsec. (a).

Subsecs. (b), (c). Pub.L. 89–711, § 2(c), designated the first of the two existing paragraphs of this section as subsec. (b) and the second as subsec. (c).

Subsecs. (d) to (f). Pub.L. 89–711, § 2(d), added subsecs. (d) to (f).

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts. Pub.L. 94–426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94–349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules Governing Proceedings Under this Section and Section 2255 of this Title. Rules and forms governing proceedings under this section and section 2255 of this title proposed by Supreme Court order of Apr. 26, 1976 effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94–349, set out as a note under section 2071 of this title.

Legislative History. For legislative history and purpose of Pub.L. 89–711, see 1966 U.S.Code Cong. and Adm.News, p. 3663.

Cross References

Appeal to Supreme Court from state court or from United States court of appeals improvidently taken regarded as petition for writ of certiorari, see section 2103 of this title.

Appeals to Supreme Court from state courts, see section 2104 of this title.

Issuance of writ of habeas corpus; hearing; decision, see section 2243 of this title.

Priority of criminal case on appeal to Supreme Court from state court, see section 2102 of this title.

Review of final state court judgments by appeal or certiorari by Supreme Court, see section 1257 of this title.

Stay of state court proceedings by federal justice or judge, see section 2251 of this title.

Time for appeal or certiorari to Supreme Court, see section 2101 of this title.

Supreme Court Rules

Appeal, see rule 10 et seq., this title.
Certiorari, see rule 19 et seq.

Library References

Habeas Corpus ⟸45 to 45.3, 50 et seq. C.J.S. Habeas Corpus §§ 62 et seq., 76, 105.

West's Federal Forms

District court practices, see § 8031 et seq.
Supreme Court,
Application, see §§ 443, 444 Comments.
Petition, see § 338.

Notes of Decisions

For Detailed Alphabetical Note Index, see the Various Subdivisions.

I. GENERALLY

Subdivision Index

CHAPTER 153—HABEAS CORPUS

Historical Note

1966 Amendment. Pub.L. 89-711, § 3, Nov. 2, 1966, 80 Stat. 1106, substituted "Federal courts" for "State Courts" in item 2254.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

Historical and Revision Notes

Reviser's Notes. Based on Title 28 U.S.C., 1940 ed., §§ 451, 452, 453. (R.S. §§ 751, 752, 753; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Feb. 13, 1925, c. 229, § 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of Title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts. 80th Congress House Report No. 308.

1966 Amendment. Subsec. (d). Pub.L. 89-590 added subsec. (d).

Defendant Hagan p2751 Never saw Butler or Johnson before

Morris p2773 Knows Butler and did not see him in the ballroom

p2779 Knows Johnson and did not see him in the ballroom

Ahmed p2899 Knows Butler and did not see him in the ballroom

p2914 Has seen Johnson before but not in the ballroom

Greene p2919 Describes man with shotgun (different from defendant)

p2923 Has seen Johnson in Mosque 7

p2927 Was asked by Mosque Official to testify on behalf of Johnson

Kochiyama Cannot identify defendants

Larsen " " "

Theresa Butler p3020 Butler was home with her at time of shooting Butler's legs were injured causing him to

T. Butler (cont.)

walk with limp

p 3034 Butler's leg trouble

p 3044 Butler was home at time of shooting resting injured legs

p 3051 Same as above

p 3054 "

p 3067 "

p 3072 Knew Johnson

Gloria Wells (Butler's friend)

p 3092 Spoke to Butler on phone at his home at time of shooting

Juanita Gibbs (Butler's friend)

p 3115 Spoke to Butler on the phone at home at time of shooting

p 3124 Same as above

p 3133 Was seen Johnson

Defendant Hagan

p 3145 Confesses and says Butler and Johnson did not participate

Saslowe (Butler's doctor) p 3183 Butler saw doctor morning before shooting
Doctor examined him and diagnosed thrombophlebitis

Defendant Butler p 3250 Left house at 8AM on day of shooting and went to hospital

p 3252 Left hospital and went to Shalagg restaurant at approximately 11 AM.

p 3256 Arrived home at 1PM
Did not go to Audobon ballroom that day

p 3277 Knew Johnson

p 3304 Left home at 8AM

p 3309 Went to hospital on day of shooting

p 3311 Went to Shalagg restaurant to buy newspaper after hospital

p 3319 Was home at time of shooting and received phone calls

p 3324 Was listening to radio at approximately 3PM and answered phone call from Gloria

Butler (cont.)

p3328 Butler called Mosguet after call from Gloria

p3342 Called Mosguet at approximate time of shooting

p3343 Conversation with Gloria at time of shooting

p3347 Butler called Mosguet from home at time of shooting

p3350 Mosguet returned his call at his home

Etta Johnson

p3470 Was at home with her husband at time of shooting. They heard about it on television Mrs. Long came to visit them & her husband came over shortly after

p3442 Butler had visited the Johnsons on occasion

p3443 Johnson had been ill with rheumatic fever just prior to February 21, 1965

Muriel Long (Johnsons' friend)

p3465 Didn't arrive at Johnsons' until after 5 PM Johnson was home when she arrived

Edward Long

p 3470 Went to Johnsons' between 3:30 and 4:30

p 3475 Knows Butler

Long (cont.)

p 3484 Long left Mosque at 3:15-3:45 the day of shooting

p 3494 Thinks he arrived at Johnsons' between 3:30 and 4:30.

Defendant Johnson

p 3517 Was at home the day of the shooting

p 3520 Long come to see him to tell him Malcolm X had been shot

p 3624 Longs come to his apartment in the afternoon

p 3658 Longs were at Johnsons' the day of the shooting

Butler and Johnson Identification

Witness

Thomas ✓ p 230 Identifies Johnson as Thomas 15. Saw him sitting in ballroom upon entering.

p 235 Identifies Hagan as man who stood up and accused another of pickpocketing. Had seen Hagan twice at Mosque 7.

✓ p 237 Identifies Butler as Norman 3x. Was the man Hagan accused. Had seen Butler at Mosque 7.

✓ p 240 States man standing in front of stage w/ sawed-off shotgun was Johnson. Johnson turned and faced audience. Had seen Johnson on previous occasions at Mosque 7.

✓ p 242 Saw Hagan & Butler move to front of stage & start shooting.

p 267-77 Witness has criminal record

p 277 Witness received psychiatric treatment at Bellevue

Thomas (cont.)

p280 Witness used heroin for 2 years

p293 Witness sold heroin

p304 Witness owns guns

✓ p310 Saw Hagan accuse Butler of being pick-pocket

✓ p332 Saw Hagan & Butler move toward stage

p353 Witness court-marshalled numerous times

✓ p381 Saw Butler sitting in audience

✓ p503 Saw Johnson sitting in audience

✓ p576 Saw at least 3 shells ejected from Butler's hand.

p588 Describes how Butler & Johnson were dressed

p633 Witness treated in Bellevue

p647-59 Grand Jury testimony (same identification)

Temple ✓ p663 Identifies Johnson. Saw him in ballroom when he first arrived.

✓ p664 Had seen Johnson once before at Morgue in Chicago.

p665 States Johnson was sitting near rear entrance and describes how he was dressed.

p669 Identifies Hagan as man who accused another of pick-pocketing. Had seen Hagan previously (selling papers + in Morgue?)

p681 Saw Hagan + another run to the rear entrance after the shooting

p788-95 Grand Jury testimony (identifies Hagan + Johnson)

DePina ✓ p814 Identifies Butler standing up and shooting

✓ p819 Saw Butler run away

p828 Witness has criminal record

Di Pina (cont.) p 845-6 Never saw defendants before

p 868 Witness has criminal record

✓ p 910 States Butler shot Malcolm X 5 times

✓ p 912 Saw Butler run away after shooting. Never saw him before.

Whitney p 955 Could not identify Butler or Johnson

p 1068 Did not see Butler at ballroom. Was known him for 3 years.

Jasper Davis ✓ p. 1096 Identifies Butler as man sitting next to him in ballroom.

✓ p 1148 Discusses sitting next to Butler

p 1166 States he identified Butler's photograph

p 1167 Had not seen Butler previously

p 1189-91 Grand Jury testimony -- Witness chooses Butler in a line-up

John Davis Only identifies Wagon

Timberlake p 1373 Identifies Butler as man witness chased after shooting

Williams ✓ p 1516 Identifies Butler as one ~~man~~ of the men engaged in an argument

✓ p 1522 Identifies Johnson as the man in front of stage w/ shotgun.

✓ p 1593 Butler had been sitting behind witness. Stood up when argument started

✓ p 1594 Saw Johnson crouching on floor.

Blackwell ✓ p 1622 Identifies Hagan & Butler running toward stage, firing shots. Butler pointed a Luger at witness.

✓ p 1624 Saw Hagan & Butler retreated from stage after shooting. Witness chased them.

✓ p 1627 Identifies Johnson as man running into ladies' lounge.

p 1662, 1691 & 1695 Witness made inconsistent statements (of some importance) to the Grand Jury

Blackwell (cont.) p1700-17 Grand Jury testimony

Cavellero-Policeman p1816 Arrested Butler at his home on 2/26/65

Wallace Didn't see any of the defendants in ballroom -- never saw them before.

~~Keeley~~

Shabazz (Malcolm X's widow) Couldn't identify them

Keeley-Policeman p2459 Arrested Johnson on 3/3/65

Moore Couldn't identify Butler or Johnson

People rest.