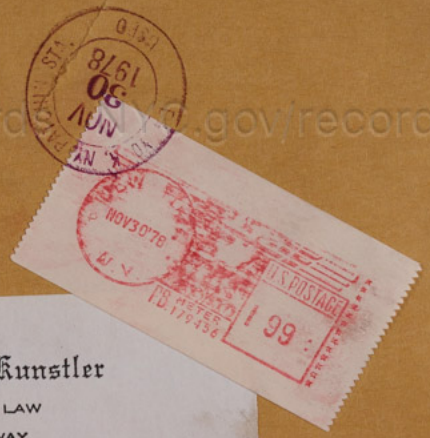
Δ's motion to Appellate Division
for leave to appeal Rothwax's
denial of § 440.10 motion.

FIRST CLASS



FROM
William M. Kunstler
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To: ADA Alan Alpert
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155 Leonard Street
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804

Malcolm X Murder

First Class

P. v Muhammad Abdul Aziz (Norman 3X Butler)
+
Khalil Islam (Thomas 15X Johnson)

FIRST CLASS

Ind. No. 871/65

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 35

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : Indictment Number

MUHAMMAD ABDUL AZIZ (Norman 3X Butler) : 871/65

and :

KHALIL ISLAM (Thomas 15X Johnson), :

Defendants-Movants. :

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SUPPLEMENTARY MEMORANDUM IN OPPOSITION TO MOTION TO VACATE JUDGMENTS

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

THE PEOPLE OF THE STATE OF NEW YORK,	:	
Respondent,	:	
-against-	:	Indictment Number
MUHAMMAD ABDUL AZIZ (Norman 3X Butler)	:	871/65
and	:	
KHALIL ISLAM (Thomas 15X Johnson),	:	
Defendants-Movants.	:	

SUPPLEMENTARY MEMORANDUM
IN OPPOSITION TO MOTION TO
VACATE JUDGMENTS

INTRODUCTION

On March 10, 1966, Butler, Johnson and Thomas Hagan were convicted after a jury trial of Murder in the First Degree for shooting Malcolm X to death on February 21, 1965 in the Audubon Ballroom in Manhattan.

On December 5 and 8, 1977, Butler and Johnson moved, pursuant to Criminal Procedure Law Section 440.10(1), (b), (F), (g) and (h), to vacate their judgments of conviction. On

various dates from approximately December 5, 1977 through January 24, 1978, a total of ten affidavits were filed in support of this motion. Respondent's affidavits and memorandum in opposition were served and filed on February 9, 1978. A reply affidavit was served on respondent in the morning of February 15, 1978.

In the afternoon of February 15, 1978, the Honorable Harold Rothwax heard the oral argument of Mr. William Kunstler, the attorney for Butler and Johnson on the instant motion. Justice Rothwax told Mr. Kunstler that the moving papers before the court did not provide any basis on which to order a hearing or to vacate the judgments of conviction (Justice Rothwax characterized Hagan's affidavit as "frivolous" - Minutes of February 15, 1978 at page 9), and he adjourned the matter in order to give Mr. Kunstler an opportunity to submit any additional information in support of the motion.

On or about March 1, 1978, Mr. Kunstler filed the supplementary affidavit of Thomas Hagan, dated February 25, 1978. Additionally, on or about April 5, 1978, Mr. Kunstler filed a supplementary affidavit of his own together

with an internal Federal Bureau of Investigation memorandum dated January 22, 1969.

As the following discussion demonstrates, these additional papers do not add significantly to the moving papers which were before this court on February 15, 1978. Nothing in the moving papers mandates or warrants this court in granting any of the relief Butler and Johnson seek, and their motion should be denied in its entirety.

HAGAN'S SUPPLEMENTARY AFFIDAVIT DOES NOT ADD SIGNIFICANTLY TO HIS ORIGINAL AFFIDAVIT. THE INFORMATION IN THESE AFFIDAVITS IS NOT OF A CHARACTER AS TO CREATE A PROBABILITY OF A MORE FAVORABLE VERDICT HAD HAGAN TESTIFIED TO THIS INFORMATION AT THE TRIAL.

Hagan's supplementary affidavit of February 25, 1978, in its description of the details of the origin, planning and execution of the plot to kill Malcolm X, is largely a restatement of his original affidavit of November 30, 1977. For example, in both affidavits, Hagan states that in the summer of 1964 he was approached by two Muslims named "Lee" and "Ben" concerning the killing of Malcolm X; and that they agreed that Malcom X should be killled because he was a "hypocrite" who had expressed opposition to the teachings

of Elijah Muhammad, whom the men revered. Similarly, Hagan stated in both affidavits that he, Lee, Ben and two other Muslims named "Willie X" and "Wilbur" met several times to discuss how to kill Malcolm X; that some of these meetings took place as the men drove around in a car; that they ultimately determined that the only place where Malcolm X would be accessible to them and where they would have a good chance of escaping from was the Audubon Ballroom on the afternoon of February 21, 1965; and, that they visited the Audubon Ballroom on the night of February 20 in order to "check it out". Likewise, Hagan stated in both affidavits that the scheme, which they carried out just as they had planned, called for Hagan, armed with a .45 calibre automatic, and Lee, armed with a Luger, to take seats at the front of the auditorium, and for Ben and Willie, who was armed with a shotgun, to sit right behind them; just as Malcolm X began to speak, Wilbur, who was to sit in the back of the auditorium, was to accuse someone in the audience of picking his pocket and was to throw a smoke bomb; Willie was then to fire his shotgun at Malcom X, Hagan and Lee

were to shoot Malcom X with their handguns, and, in the confusion which the men felt was sure to follow, the asassins were to run for the exits.

Moreover, the details of the planning and execution of Malcom X's murder which are contained in Hagan's affidavits of November 30, 1977 and February 25, 1978, had been testified to by Hagan at the trial in 1966. (See, Respondent's Memorandum in Opposition to Motion to Vacate Judgments (hereinafter "Memorandum"), at pages 6-8).*

Butler and Johnson urge, though, that Hagan's February 25, 1978 affidavit adds significantly to his November 30, 1977 affidavit (a document which, as noted above, this court found to be "frivolous") because in the latest affidavit Hagan provides somewhat more information than he had earlier provided concerning the identity of the men he claims were his accomplices in the murder of Malcolm X.

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*Hagan's testimony at the trial and his statements in his affidavits differed concerning his motive for killing Malcolm X. At trial, Hagan testified that he committed the murder on the promise that he would receive money (Hagan: 3152, 3154, 3161, 3239). In both of his affidavits, he cites religious fervor and his allegiance to Elijah Muhammad as his motives.

Butler and Johnson have not shown, however, that the description by Hagan of his alleged accomplices in the manner stated in his February 25, 1978 affidavit is evidence "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 [them]" CPL Section 440.10(1)(g). Indeed, the indications are all to the contrary.

The essence of Hagan's testimony was not that certain, specific individuals killed Malcolm X, but that Butler and Johnson did not, and the jury heard Hagan so testify. Furthermore, when he testified at the trial, Hagan put himself in the posture designed to give him the greatest credibility in the eyes of the jury. Hagan testified that in order to prevent two "innocent" people from being wrongly convicted, he was willing to confess his part in the murder. Hagan, however, had no interest in helping to convict those who he said killed Malcolm X. For Hagan then to have shifted responsibility from Butler and Johnson to the men who he claimed were actually responsible for Malcolm X's murder, especially when Hagan did not admit that the murder was morally wrong, would have altered Hagan's

intended image from martyr to "snitch," and would have lessened Hagan's credibility in the eyes of the jury.

Moreover, Hagan's testimony at the trial, as well as the testimony he now says he could have given at the trial, cannot be analyzed alone. They must be weighed against the evidence of the guilt of Butler and Johnson. Their guilt, as the Appellate Division and Court of Appeals correctly determined, was "overwhelmingly established" by "abundant" proof. See, Memorandum, pages 10-13. It is inconceivable, given the nature and quantity of the evidence establishing Butler's and Johnson's guilt, and keeping in mind that the jury rejected Hagan's exculpatory testimony as not worthy of belief, that the jury's verdict would probably, as opposed to possibly, People v. Crimmins, 38 N.Y. 2d 407, 418 (1975), have been more favorable to Butler and Johnson had Hagan "identified" his alleged accomplices at the trial as he does in his affidavit of February 25, 1978. The jury found Hagan to be not credible, and cast aside the tale he told. The mere addition by Hagan of the kind of details he now proffers would not have changed the jury's determination.

BUTLER'S AND JOHNSON'S MOVING PAPERS TOTALLY FAIL TO SUBSTANTIATE THEIR CLAIM THAT LAW ENFORCEMENT AUTHORITIES WERE "INVOLVED" IN THE MURDER OF MALCOLM X.

Moreover, despite Justice Rothwax's request on February 15, 1978 that the movants provide "elaboration" and "detail" as to the allegations underlying their motion (Minutes of February 15, 1978 at page 23), Butler and Johnson have failed to set forth any relevant information in support of their claim that "the murder of Malcolm X was procured, instigated or arranged by the Federal Bureau of Investigation and/or the New York City Police Department." (Mr. Kunstler's affidavit of April 3, 1978). No allegations of fact have been added to the moving papers which Justice Rothwax indicated were factually deficient at the oral argument.

For example, Mr. Kunstler has attached to his affidavit of April 3, 1978, a seven-page internal FBI memorandum dated January 22, 1969, The memorandum deals with the methods by which groups such as the Nation of Islam could be discredited in the eyes of the black community or

through which factionalism among the group's leadership could be created. Out of this memorandum, Mr. Kunstler has gleaned one sentence - "Factional disputes have been developed - the most notable being MALCOLM X LITTLE" - to support the movants' theory of the involvement of law enforcement authorities in the murder of Malcolm X. Even assuming that this sentence, when read together with Mr. Kunstler's summary of the "Church Committee Report" (See,Mr. Kunstler's April 3, 1978 affidavit at para. 4), supports the contention that it was a tactic of the FBI to foment violence among certain black groups, there is nothing advanced by the movants, as Justice Rothwax noted, to establish that any law enforcement authority institigated or encouraged the violence "in this particular case". Minutes of February 15, 1978 at page 24.

In any event, even if this outlandish hypothsis were deemed worthy of belief, it would be of no help to Butler and Johnson: to say that law enforcement authorities "procured, instigated or arranged" the murder of Malcolm X, says nothing about the involvement of Butler and Johnson as Malcolm X's actual murderers.

Nor have appellants, either in their original moving papers, or in Mr. Kunstler's reply affidavit of February 11, 1978 or his supplementary affidavit of April 3, 1978, advanced anything to indicate that Detective Roberts possessed exculpatory evidence or that he could provide any testimony relevant to the contention that law enforcement authorities were involved in Malcolm X's murder. Indeed, the evidence, unrefuted by movants, is to the contrary. (See, Detective Roberts' affidavit of January 12, 1978.)

The same is true of Reuben Francis. Francis was one of Malcolm X's bodyguards. As Hagan and Butler fled from the ballroom after shooting Malcolm X, Francis shot Hagan in the leg. Francis then went to the stage to attend to Malcolm X. At this point, Charles Blackwell handed Francis a Luger which Blackwell had found on the floor of the ballroom. Francis eventually left the ballroom with the Luger. The Luger was not introduced into evidence at the trial, and it is unclear what became of the Luger after Francis took it from the ballroom.

Neither Butler nor Johson have alleged anything to indicate that Francis would have exculpated them or inculpated any law enforcement agency in the murder of Malcolm X. There was thus no obligation on the People to inform the defense of Francis' whereabouts. It is probable, moreover, that Francis would have corroborated the testimony of the People's witnesses that the man fleeing with Hagan was Norman Butler, that Hagan and Butler had just shot Malcolm X, and that Butler had shot Malcolm X with a Luger. (See, Memorandum at pages 11-13).

Nor is it strange that Francis, after he jumped bail, surrendered to the FBI rather than to the New York City Police Department or New York County District Attorney's Office, or that the People chose not to call Francis as a witness. Francis had been indicted by a New York County Grand Jury for the assault on Hagan. Indictment Number 873/65. He failed to appear in court on May 20, 1965, and remained at large until February 2, 1966 when he surrendered to thre FBI. Francis pleaded guilty to Possession of a Weapon on June 2, 1966, after the instant trial had concluded.

Thus, during the instant trial, Francis was a defendant in a pending criminal matter. It is no wonder that, given the overwhelming evidence of Butler's and Johnson's guilt, the prosecutor, not willing to risk the possibility that Francis might lie in order to help himself on his pending assault charge, chose not to call Francis as a witness for the People.

X X X

Butler and Johnson have totally failed, in their original moving papers as well as in their supplementary papers submitted in response to the "second chance" afforded them by Justice Rothwax, to allege sufficient facts to warrant any of the relief they request. Their motion should therefore be denied.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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(212) 732-7300

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys
of Counsel

April, 1978

APPELLATE DIVISION
FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

-v-

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

Defendants

No. _____

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that defendants herein, by their undersigned counsel, will move this Court, upon the annexed affidavit of WILLIAM M . KUNSTLER, duly verified the 29th day of November, 1978, and all the proceedings heretofore had herein, pursuant to §450.15, subdivision 1, Criminal Procedure Law, at the Courthouse, Madison Avenue and 25th Street, New York, N.Y. on the 12th day of December, 1978, at 9:30 o'clock in the forenoon thereof or as soon thereafter as counsel can be heard, for a certificate granting them leave to appeal thereto from an order of the Supreme Court of the State of New York, County of New York, General Trial Term, Part 35, Rothwax, J., denying their motion for the vacation of judgments of conviction duly entered against them on the 14th day of April, 1966, sentencing them to imprisonment for the term of their natural lives, which said order was duly made and entered on the 1st day of November, 1978.

Yours, etc.,

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

Attorney for !etitioners

Dated: New York, N.Y.
November 29, 1978

APPELLATE DIVISION
FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

-v-

MUHAMMAD ABDUL AZIZ (NORMAN 3X BUTLER0 and KHALIL ISLAM (THOMAS 15X JOHNSON),

Defendants.

No. _____

AFFIDAVIT

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

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

1. I am the attorney for defendants herein and I am making this affidavit in support of their motion for a certificate granting them leave to appeal to this Court from an order of the Supreme Court of the State of New York, County of New York, General Trial Term, Part 35, Rothwax, J., duly made and entered the 1st day of November, 1978, denying their motion, pursuant to §440.10, Criminal Procedure Law, for the vacations of their judgments of conviction duly entered against them the 14th day of April, 1966, and appropriate alternative relief. Said order is attached hereto as Exhibit A.

2. Defendants were convicted by a jury on March 11, 1966, of the murder, on February 21, 1965, of Malcolm X, who was shot to death on the latter date while addressing the members of the Organization of Afro-American Unity, a break away group from the Nation of Islam, at the Audubon Ballroom in Manhattan.

3. During their trial, Thomas Hagan, a co-defendant, took the stand on behalf of defendant AZIZ and testified that neither the latter nor defendant ISLAM had had anything to do with the said murder. However, he refused to name his accomplices and the jury

subsequently convicted both defendants.

4. In October of 1977, said Hagan informed Imam Nuriddin Faiz, a New York State Chaplain, that he wished to elaborate on his aforesaid testimony so that two innocent men could be freed. Accordingly, on November 30, 1977, and on February 25, 1978, he executed two affidavits in which he gave the names, descriptions and last known locations of his confederates, as well as all pertinent details of the crime's planning and execution. These affidavits can be found on pp. 5 and 73 of Exhibit B, */ attached hereto, the material submitted to the court below in conjunction with defendant's motion pursuant to §440.10, CPL.

5. In addition, one Benjamin Goodman, who introduced Malcolm X to the audience on the day of the latter's death, furnished 2 affidavits stating that neither defendant was present in the Ballroom on the fatal day. Mr. Goodman's affidavits can be found at pp. 153 and 156 of Exhibit B.

6. Moreover, a great deal of information has come to light following defendants' convictions indicating that the Federal Bureau of Information and the New York City Police Department might have been implicated in the murder of Malcolm X. Among other things, the following has been learned:

a. When Malcolm X was shot, an undercover officer of the New York City Police Department was present on the ballroom stage but was never called to testify or had his identity made known to the defense. Ex. B, pp.20-43.

b. Although Malcolm X's house had been almost totally destroyed by a bomb a week before his death, there was no police presence at the ballroom on February 21, 1965, except for two who were hidden in an adjoining room and one in the Emergency Room of the Presbyterian Hospital (to which Malcolm X's body was eventually taken) and the three were in contact by walkie-talkie radios. This tiny number of hidden officers is in direct contrast to the hundreds who had been

*/ For the Court's convenience, Ex. B has been numbered consecutively on the bottom right hand portion of each page.

in regular attendance at all of Malcolm X's previous public appearances. Pp. 23 et seq. Ex. B.

c. The FBI had a wealth of information indicating that Hagan's version of the identity of the other assassins was correct. See pp. 89-150, Ex. B.

d. One alleged murder weapon was removed from the scene by a Reuben Francis and never recovered although Mr. Francis was in FBI custody during defendants' trial. P. 61, Ex. B.

e. Several months ago, counsel learned that one of the assasins named by Mr. Hagan was in state custody at a New Jersey penitentiary and furnished this information to the People. Pp. 166 et seq., Ex. B.

f. At much the same time, counsel discovered the addresses of two other assassins named by Hagan and also turned over this information to the People. In both instances, the People refused to do any investigating of any of the men involved. Id.

g. The FBI had been engaged in a deliberate campaign since the defection of Malcolm X to create hostility between him and the Nation of Islam, all of which is fully documented in the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee) Report No. 94-755. 94th Congress, 2d Session. Friction between Malcolm X and his Organization of Afro-American Unity and the Nation of Islam was created by the FBI in a number of ways, including the sending of anonymous letters and the planting of informants. PP. 78 et seq., Ex. B.

7. As the Court can see from the 168 pages of material submitted to the Court below, there is a wealth of information which, in the event of a new trial for these defendants, might, and, indeed, probably would, result in a different verdict. While an attempt has been made above to summarize some of this material, only by a reading of the various documents is it possible to appreciate the enormity of the information presently available. An evidentiary hearing, which was denied below, is the only way by

which it would be possible to complete the picture. It is defendants' belief that they have submitted more than enough to merit such a hearing. As the Court must realize, they are working against a backdrop of some thirteen years and from jail cells, and it has been difficult to assemble the material which is here attached. It is felt that simple and elemental justice requires at least the granting of an evidentiary hearing. As the Court knows, the House Assassinations Committee, which is not considering the death of Malcolm X, has opened up two other assassinations of the '60s but only defendants have been the moving force behind the third assassination of the era.

8. It is hoped that, in view of the seriousness of the charges against both defendants and the punishments imposed upon them that this Court will issue the certificate prayed for in the notice of motion. Only by the issuance of such a certificate will the serious and significant issues posed hereby be heard and determined by the Court.

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

WHEREFORE, defendants pray that the appropriate certificate granting them leave to appeal to this Court be issued.

WILLIAM M. KUNSTLER

Sworn to before me this 29th
day of November, 1978

NOTARY PUBLIC

MARGARET L. RATNER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-3211710, County
Qualified in New York County
Commission Expires March 30, 19

SUPREME COURT : NEW YORK COUNTY

GENERAL TRIAL TERM: PART 35

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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.

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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

Exhibit A

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.