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Malcolm X (Az)

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District Attorney's Office
COUNTY OF NEW YORK

Original oral argument

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FBI Memos

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Additional FBI memos

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COUNTY OF NEW YORK

Additional FBI memo

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER, :

Petitioner, :

-against- : Pro Se

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, : 76 Civ. 0534

:

Respondent. :

RESPONDENT'S MEMORANDUM

PRELIMINARY STATEMENT
AND
HISTORY OF THE CASE

Petitioner, Norman Butler, seeks a writ of habeas corpus from the United States District Court for the Southern District of New York. Petitioner's application is based on his claims that

a) the exclusion of spectators and members of the press from the courtroom during the testimony of two of the People's witnesses was not based on any showing of need for exclusion, was not within the court's inherent power, and violated petitioner's right to a public trial under the United States and New York State Constitutions,

b) the jury was influenced by the improper receipt of evidence of the defendants' religious beliefs which was introduced in order to show a motive for the murder,

c) the court, by rebuking defense counsel in the presence of the jury, deprived the defendants of a fair trial, and

d) basic fairness required that the defendants be provided a list of the people who had been interviewed by the police during the investigation of the murder, a list of the people who had testified in the Grand Jury, and a list of the people who the State intended to call as witnesses at trial.

Malcolm X, born Malcolm Little, was a prominent spokesman and leader of a segment of the black community in the United States. He had been an important member of the Nation of Islam, commonly known as the Black Muslims, but in a bitter dispute had left or had been expelled from that group, taking many of its members with him. In the afternoon of February 21, 1965, as Malcolm X addressed a meeting of his followers in the Audubon Ballroom in Manhattan, Norman Butler, Thomas Hagan and Thomas Johnson, all members of the Nation of Islam, rose from the assemblage and killed Malcolm X by shooting him repeatedly with a shotgun and pistols.

On March 10, 1965, a New York County Grand Jury returned a one count indictment against Butler, Hagan and Johnson, charging them with Murder in the First Degree. Indictment No. 871/65.

Trial commenced on December 6, 1965 (MARKS, J., and a jury). On March 10, 1966, Butler, Hagan and Johnson

were each found guilty of Murder in the First Degree, and on April 14, 1966 were each sentenced to life imprisonment.

On May 22, 1968, the Appellate Division, First Department, unanimously affirmed the judgments of conviction. (People v. Thomas Hagan A/K/A Talmadge Hayer A/K/A Thomas Hayer, Norman Butler A/K/A Norman 3X Butler, and Thomas Johnson A/K/A Thomas 15X Johnson, 29 A.D.2d 931 (1st Dept., 1968)).

On April 16, 1969, the Court of Appeals unanimously affirmed the judgments (People v. Thomas Hagan A/K/A Talmadge Hayer A/K/A Thomas Hayer, Norman Butler A/K/A Norman 3X Butler, and Thomas Johnson A/K/A Thomas 15X Johnson, 24 N.Y.2d 395 (1969)).*

On October 27, 1969, the United States Supreme Court denied certiorari (Hayer A/K/A Hagan, et al. v. New York, 396 U.S. 886).

Petitioner, more than six years after the United States Supreme Court denied certiorari, commenced the instant proceeding for a writ of habeas corpus in the United States District Court.

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*The opinions of the Appellate Division and Court of Appeals are attached hereto.

THE EVIDENCE

The People's Case

Eyewitness testimony

Twelve witnesses, present in the Audubon Ballroom at the time Malcolm X was assassinated, testified for the prosecution. Because their testimony was largely cumulative and overlapping, it is summarized here in narrative form. The witnesses were, in the order in which they testified:

CARY THOMAS, a former member of Mosque Number 7, the Harlem unit of the Nation of Islam, and a follower of Malcolm X after the latter founded his Organization of Afro-American Unity and the Muslim Mosque, Inc. (226-8);*

VERNAL TEMPLE, a member neither of the Black Muslims nor of the deceased's newly founded organization, but a visitor to functions of both groups (660, 662);

EDWARD DE PINA, a long term acquaintance of Malcolm X, who had never been a member of the Black Muslims, but who joined his friend's independent organization in 1964 (807-08);

GEORGE WHITNEY, a former member of the Black Muslims at Mosque Number 7, who followed Malcolm X after the latter broke with that group to form his organization (944-5).

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*References, unless otherwise indicated, are to pages of the record on appeal.

JASPER DAVIS, a member of neither the Black Muslims nor the Organization of Afro-American Unity, but a man interested simply in hearing Malcolm X speak (1092);

JOHN DAVIS, an acquaintance of the deceased for fifteen years, former member of the Black Muslim group in Philadelphia and, since October, 1964, a member of the Malcolm X's new organization (1218-19);

RONALD TIMBERLAKE, a member of the Organization of Afro-American Unity, who insisted that the courtroom be cleared of press and spectators because he had received anonymous telephone threats upon his life (1303);

FRED HERMAN WILLIAMS, a follower of Malcolm X who was initiated into the new organization on the very day of the killing, and who drove the deceased to the Audubon Ballroom from Harlem (1504-05, 1506-08);

CHARLES BLACKWELL, former member of Mosque Number 7, who quit that group with the deceased and became a member of the Organization of Afro-American Unity and, on the fatal day, was assigned as a bodyguard to Malcolm X (1605, 1609-10);

RONALD B. WALLACE, a member of Malcolm X's organization (1924);

BETTY SHABAZZ, the wife of the deceased (2397-8); and

CHARLES MOORE, a free lance reporter for A.B.C. Radio, who was present in the Audubon Ballroom to cover the story of the ill-fated meeting (2490-91).

On the day of his assassination, Malcolm X arrived by car at the Audubon Ballroom sometime between 2:00 and 3:00 p.m. (Williams, 1507-08). As he waited for a bus on Broadway and 146th Street, he had accepted the offer of a ride from Fred Williams, one of his recent followers, who was driving to the rally with his wife and Charles Blackwell (Williams, 1507-08; Blackwell, 1607-08). At approximately 3:00 p.m., an aide to the deceased known as "Brother Benjamin" began to address the audience of some three hundred people, ending his address by introducing Malcolm X (Thomas, 233; Temple, 667-8; Whitney, 947-8; John Davis, 1222-3; Timberlake, 1305; Williams, 1512; Blackwell, 1612-13). Malcolm X approached the speaker's podium and addressed his audience with the customary Muslim greeting, "Salaam Aleikum, brothers and sisters" (Temple, 668; De Pina, 810-11; Whitney, 947-8; Blackwell, 1613; Shabazz, 2400; Moore, 2494-5). Suddenly, the defendant Hagan rose from his seat in the midst of the audience and shouted at Butler who sat beside him, "What are you doing with your hand in my pocket?" (Thomas, 235-7; Temple, 669-70, 675, 798; De Pina, 811, 813; Whitney, 948-9; Jasper Davis, 1098-1101; Williams, 1513-14, 1516; Blackwell, 1614-15). The disturbance disrupted the meeting, and lured the bodyguards of Malcolm X away from the area of the stage, leaving him unprotected. Simultaneously, Malcolm pleaded for the audience to be calm (Temple, 675-6; Whitney, 951;

Timberlake, 1307; Williams, 1517; Blackwell, 1616; Wallace, 1929; Shabazz, 2401-02). Within seconds after the disturbance, the defendant, Thomas Johnson, stood up at the front of the hall with a sawed-off shotgun in his hands, and fired two blasts at Malcolm X from a distance of about fifteen feet. Malcolm X pressed his arms to his chest and fell prostrate upon his back (Thomas, 240-42; Whitney, 951-2; Williams, 1520-22; Wallace, 1927-8). Simultaneously, a crude "smoke bomb" was ignited in the audience and quickly extinguished by a spectator (Wallace, 1929, 1932-3, 1934, 1943).

Immediately after the shotgun blast, Hagan and Butler raced toward the stage, firing repeatedly at the prone body of Malcolm X, Hagan from a .45 calibre automatic pistol and Butler from a German Luger (Thomas, 242-3, 249; De Pina, 814-15, 821-2; Whitney, 958; Blackwell, 1617-18; Moore, 2498, 2500, 2507). After firing at least ten shots, both men fled toward the rear exit, pursued by several member of the audience (Temple, 681-2, 683-4; De Pina, 816-820, 822; Whitney, 955-7, 962; John Davis, 1230-35; Timberlake, 1310-1317; Blackwell, 1624; Moore, 2503, 2509, 2511). While Butler and Johnson made good their escape, Hagan was set upon by the angry followers of Malcolm X on the sidewalk outside the Ballroom, and later taken into custody by the police (De Pina, 825-6; Whitney, 962-4; Timberlake, 1311, 1312; Blackwell, 1624, 1627; Moore, 2512).

Charles Blackwell retrieved a sawed-off shotgun, People's Exhibit 3, from the ballroom floor at the approximate place where Johnson had been firing it (Blackwell, 1628-9; Williams, 1522-3, 1525). Ronald Timberlake recovered Hagan's .45 calibre pistol from the stairway leading to the street (Timberlake, 1313-14). He later gave this gun, People's Exhibit 12, to John C. Sullivan, an F.B.I. agent (1318, 1323).

Police testimony

Nine police officers and the Chief Medical Examiner testified concerning the arrests of the defendants, the recovery of the weapons and other physical evidence found in the Audubon Ballroom, and the results of the autopsy performed on the body of the deceased.

After Hagan was rescued by the police from the angry mob which had attacked him outside the Ballroom, he was driven to the 34th Precinct station house in Sergeant Alvin Aronoff's radio car. During the trip, Aronoff removed from Hagan's pocket a cartridge clip containing four .45 calibre cartridges (Aronoff, 1465-6). It was later established that the bullets found in this clip had once been placed in and extracted from the .45 automatic pistol, People's Exhibit 12, which Timberlake found on the stairs after Hagan fled to the street (Scaringe, 2187; Sullivan, 1780-82; Reich, 2258-9, 2266-7, 2305, 2307). And certain bullets extracted from the

body of Malcolm X were indisputably shown to have been fired from this gun (Halpern, 2094, 2099; Reich, 2280-81, 2284). Hagan's fingerprint was found on a strip of film which formed part of the contents of the home-made smoke bomb found in the ballroom (Keeley, 1962-3, 2241; Meagher, 1978, 1983, 1991-2; Alexander, 1996-8; Meyer, 2027-8).

The sawed-off shotgun found in the ballroom by Charles Blackwell was later obtained by Detective Ferdinand Cavallaro (Cavallaro, 1808, 2593). This weapon bore no fingerprints (Meagher, 1976-7). Two spent 12-gauge shells were found in the barrels of the weapon (Scaringe, 2174). And an examination of certain metal pellets taken from the body of the deceased disclosed that those pellets were of the identical type that were once contained in the empty shells found in the shotgun (Scaringe, 2179; Reich, 2332-5, 2336, 2344, 2341; Halpern, 2086, 2088-9, 2094). The dispersion pattern of the shotgun wounds inflicted upon the body of Malcolm X indicated that the shotgun pellets which struck him were fired from a distance of some fifteen feet (Reich, 2352-8).

Also removed from the deceased's body were various metal fragments indicating that he had been shot with a German Luger (Scaringe, 2195, 2197-8; Reich, 2320-23, 2329). At least three different types of weapons were used to kill him (Halpern, 2104).

Thomas Johnson was arrested at his home at 923 Bronx Park South on March 3, 1965, and arraigned the following morning (Keeley, 2459, 2461-2). Norman Butler was arrested sometime before midnight on February 25, 1965, at his home on Rosedale Avenue in the Bronx (Cavallaro, 1815-16). He was arraigned at approximately 10:30 a.m. the following day (Cavallaro, 1816).

The Defense

On behalf of Hagan

LEROY A. MOSELY testified that he had known Thomas Hagan all his life. Prior to his arrest, Hagan never discussed with the witness the Black Muslim meetings (2640-41).

KATHLEEN MOSELY, Hagan's half-sister, testified that prior to the defendant's arrest, she had visited him about 4 or 5 times a month in her father's house (2643-4). At no time did her brother ever discuss with her the Black Muslim movement, Malcolm X or any Black Nationalist organization (2644).

HORACE EDWARD HAYER,* brother to the defendant Hagan, testified that his brother never discussed with him any Black Nationalist organization, Malcolm X, or Elijah Muhammad (2645-7).

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*Although charged under the name Thomas Hagan, this defendant's true name apparently was Talmadge Hayer.

BETTY HAYER, the defendant's wife, testified that neither she nor her husband was ever a Black Muslim (2664).

On February 21, 1965, her husband left their home at 347 Marshall Street, Patterson, New Jersey sometime between 12:00 and 1:00 p.m. He said he was going to his father's house to fix his car (2674).

STANLEY SCOTT, a reporter from United Press International, testified on behalf of the defendant Hagan that he was in the Audubon Ballroom on the day of the killing (2816). He was seated in the twelfth row on the right side of the ballroom but did not see who shot Malcolm X (2824). Although he caught a momentary glance of the disturbance which occurred just prior to the shooting, he was unable to discern who was involved in it (2825).

The defendant, Thomas Hagan, testified that he was never a member of the Black Muslim organization (2676). On February 21, 1965, he attended the rally sponsored by Malcolm X's organization at the Audubon Ballroom (2677-8). At no time while there did he have in his possession a .45 calibre pistol, and he never discussed plans to kill Malcolm X with anyone (2678).

Upon his arrival in the ballroom Hagan entered the men's room. In one of the toilet booths in that room he found a clip containing .45 calibre bullets on the floor,

picked it up, and put it in his pocket (2680-81). Thereafter, he took a seat in the audience on the left side of the stage (2681-2). A man spoke for approximately 15 minutes before introducing Malcolm X. After the deceased greeted the gathering, an argument broke out in the audience behind the witness (2682). Turning around, Hagan heard a loud bang and ducked to the floor. As he did so, he heard further shots coming from the direction of the stage. When the shooting stopped, he ran toward the exit until his leg went numb from a bullet wound he received. Despite this injury, he succeeded in sliding or hopping down the stairs to the street below. There, he was set upon, struck and kicked by the pursuing mob until rescued by police officers and taken to the 34th Precinct in a police car (2683-4). Hagan denied having uttered the words, "Get your hands out of my pocket," or having shot Malcolm X (2686). He had never seen his co-defendants Butler and Johnson prior to the day of the shooting (2690) and had never knowingly handled the fragment of film which bore his thumb print and was found in the improvised smoke bomb (2692-3).

/Hagan returned to the stand as a witness for his codefendants, and, exonerating them, he recanted his previous testimony and confessed his guilt. See pp. 17, 18, infra./

On behalf of Butler and Johnson

CHARLES MORRIS testified that he was a Muslim and a member of Mosque Number 7 (2757-8). He knew Malcolm X from his association with the Mosque for eight or nine years. Morris left the Mosque with Malcolm X to form the Muslim Mosque, Inc. and Organization for Afro-American Unity, the latter being a political organization and the former a religious one (2758-9). Both were headed by Malcolm X (2761). Eventually a split developed between the two organizations (2760), because the Muslims did not wish to accept the political aims of the Organization of Afro-American Unity, which, the Muslims believed, were being "controlled from downtown" by "the members of the Communist Party" (2761).

About a week prior to the assassination, the witness had had a conversation with Malcolm X relative to the attitudes toward integration of James 67X, Ruben Fracis, John 57X, Earl Grant and Langston (2770, 2769), members of Malcolm X's group. Although Malcolm X had been a "total separationist" before his trip to Mecca, he no longer held such a rigid position (2770-71).

Morris arrived in the Audubon Ballroom on the fatal day at 2:00 p.m. (2763). He went there to watch certain individuals within the deceased's own organization--namely, James 67X and others (2764) who were supposedly the security guards for the deceased (2766).

As he entered the ballroom, he saw two uniformed police officers standing outside on each street corner near the ballroom entrance (2767). Entering the main room, he took a seat in the rear while Brother Benjamin was speaking. At this time, Morris was watching James 67X (2768) as well as certain other members of the guard (2769).

After being introduced by Benjamin, Malcolm X moved to the speaker's stand. As he began to speak, an argument began between two men in the audience to Morris' left (2776). These men approached the stage in a crouch, and as Malcolm X pleaded, "Take it easy," a sequence of shots, sounding like firecrackers, was heard. Amid the sound of falling chairs, Morris heard someone running out. Later, on the street, he saw the defendant Hagan in a police car (2776-7).

The witness at no time saw Butler or Johnson in the ballroom (2773, 2779). He acknowledged a past conviction for robbery (2783).

On cross-examination, Morris indicated that the members of Mosque Number 7, of which Malcolm X had formerly been a minister, were "separationists," that Malcolm X had become an "integrationist" since his return from Mecca, and that since the time the deceased established his own organization, various members of Mosque Number 7 had called him a hypocrite and stated that he should be killed (2867-71). Both Butler and Johnson were active members of Mosque Number 7.

Butler's position in that organization was "rostrum guard" (2872) and Johnson was a "squad lieutenant" (2873).

Recalled, the witness testified that within the organization of Mosque Number 7 was a special one-hundred-man squad known as the "enforcers." Both Johnson and Butler were members of this group. It was the function of the "enforcers" to see that members of the Mosque abided by the policies set and to this end violent measures had sometimes been taken (3413-14).

OMAR ABU AHMED, an orthodox Muslim, testified that he arrived in the Audubon Ballroom shortly after Benjamin began to address the audience (2891). After Benjamin had introduced Malcolm X, he left the stage and Malcolm X greeted the audience (2893). At this time two guards were in front of the stage. Hearing the sound of a shot, the witness turned around and stared. There followed three or four further shots (2894) and Ahmed was pulled to the floor by Charles Hale (2896). Although he heard the disturbance which occurred before the shooting and heard someone say, "Take your hand out of my pocket," (2905) he did not recognize any of the people involved in this commotion. He was "quite a distance" from the area of the commotion (2906). The witness could not state definitely whether Johnson or Butler was in the ballroom (2915-16).

LEONARD E. LARSEN testified that on the day of the assassination he was standing behind the railing in the rear

of the main auditorium at the Audubon Ballroom (3017). Although he heard the sound of gunfire and saw flashes in the front of the room he could not see who was firing. After the shooting, the people in the audience started to run in all directions and chairs were falling (3017-18). Prior to the shooting, the witness did not notice any disturbance in the audience.

ERNEST GREENE, a member of Mosque Number 7 (2923), testified that he arrived at the Audubon Ballroom on the fatal day at 2:30 p.m. The witness stated that the man who shot Malcolm X with a shotgun was "stout and very dark and had a very deep beard" (2919).

Greene stated that he came to the rally on the fatal day with friends whose names he could not recall (2922). After Greene gave Captain Joseph, an official of Mosque Number 7, the description of the man he had seen shoot Malcolm X with a shotgun (2925), Joseph requested Greene to testify in behalf of the defendant Johnson (2927). As a member of the organization, Greene obeyed orders from Captain Joseph (2932).

From his position in booth number 8 (2935), Greene noticed a commotion in one of the aisles, but could not determine who was involved (2936). After he heard the shotgun blasts, he dropped to the floor, and three or four further shots followed (2933-5).

MARY KOCHIYAMA testified that she met Malcolm X on October 16, 1963, and had been a member of his Liberation School (3012). On the fatal day, she was seated in the Audubon Ballroom in either the third or fourth booth on the left of the stage. She heard a commotion directly across from her booth.

Recalled as a defense witness for Norman Butler, the defendant, Thomas Hagan, testified that he had a conversation with Butler and Johnson that very day in the detention cell adjacent to the courtroom (3144). Hagan told his co-defendants that he knew they were innocent of the murder of Malcolm X, because he himself took part in the slaying (3145). He knew the names of the other people involved, and he intended to exculpate Butler and Johnson, who were completely innocent (3146).

Hagan admitted that he fired the .45 calibre automatic pistol (People's Exhibit 3) at Malcolm X on February 21, 1965 (3150). But he denied the testimony of the People's witnesses who stated that before the shooting, he had stood up in the audience and shouted to Butler, "Get your hand out of my pocket" (3151). Although he knew the persons involved in that disturbance, he refused to reveal their identities (3151), to disclose the assassination plot, or reveal any of those involved in that plot (3152). He stated that he had been offered money to kill Malcolm X, but never received it (3154). He

stated that he was not a Black Muslim, or a member of Mosque Number 25 on the day of the assassination.

Besides himself, Hagan stated, three other persons were involved in the shooting (3155, 3237). The witness testified that the plan of assassination called for two men to sit in the first row with pistols and a man with the shotgun to sit in the fourth row. Finally, a fourth man, sitting in the rear was to start a disturbance with the words, "Get your hand out of my pocket." This action was to draw the stage guards to the area of the disturbance and was the cue for the armed men in the front to open fire on Malcolm X. The witness stated that he was one of the two gun men sitting in the front row (3156, 3160). The man who sat with him in front had a German Luger (3157). After shooting at Malcolm X, Hagan turned and ran toward the rear of the ballroom (3166), dropping his weapon before he reached the stairs (3168). He admitted having prepared the crude "smoke bomb" consisting of various pieces of film placed inside a man's sock on the day of the assassination (3176).

NORMAN 3X BUTLER testified that he was a Black Muslin and a lieutenant in the organization of Mosque Number 7 (3247). As a Muslim, he subscribed to certain rules set down by Elijah Muhammad. Certain of those rules proscribed the breaking of any laws of the United States or acting as an

aggressor (3248).

On February 21, 1965, Butler rose at 7:00 a.m. (3248). Because of the pain his right leg (3249), he left his house at 7:45 a.m. and drove to Jacobi Hospital, arriving at approximately 9:15 a.m. There he was examined by Dr. Saslowe and other doctors (3250-51). After two bandages were put on his leg and he had received instructions concerning the treatment of the leg, Butler left the hospital at approximately 11:00 a.m. (3252). Immediately thereafter, he drove to the Shabazz Restaurant, a business owned and operated by the Black Muslim organization (3253). He stayed in the restaurant a very short time and then went home (3255). He stated that he reached his home sometime before 1:00 p.m. (3318). When the phone rang sometime after 3:00 p.m., he hobbled into the kitchen to answer it and spoke briefly to Sister Gloria (3319-20).

On the day of the assassination, Butler had a scab on his left leg (3253). The condition of both legs on February 21, 1965, prevented him from running at a rapid speed (3258-9). He testified that he was in no way involved in the assassination of Malcolm X (3259), that he was not in the Audubon Ballroom on the fatal day (3256) and that he had never in his life seen Thomas Hagan prior to his arrest (3259). He did, however, know Thomas 15X Johnson through his activity in Mosque Number 7 (3277).

Butler knew Captain Joseph since he became a member of the Mosque. Joseph's duties were to teach the lieutenants the manner of instruction to be given to the other members and to insure that the laws of the organization were followed by them. Johnson was committed to obey any lawful order given by Captain Joseph (3284). He denied that there was within the organization of the Mosque a group of men known as the "doom" squad of which he was leader (3301).

When Butler first became a member of the Mosque, Malcolm X was minister there. Butler spoke with the deceased once or twice during the latter's tenure at the Mosque. After Malcolm X left to form his own organization, Butler never paid very much attention to his activities and never even learned the name of the new organization (3287-8). Following his departure, Malcolm X was denounced by many members as a hypocrite (3288-9, 3291) and in Butler's opinion, he was a hypocrite (3289-90). But Butler never heard any members of the Mosque call for his death (3294). Such an act of violence would have been a violation of Muslim law (3294-5).

According to Muslim teachings, the Caucasian or European races brought death to the Nation of Islam (3926). But his religion did not teach that persons of these races should be eliminated by violence (3297).

THERESA 7X BUTLER, Butler's wife, testified that on February 21, 1965, her husband left her home sometime between 7:00 and 8:00 a.m. in the morning and returned before 1:00 p.m. He did not leave the house again that day since his legs had been injured and he walked with a limp. At approximately 12:55 p.m., and later at 3:30 p.m., the telephone rang. Her husband answered it both times (3021, 3023). The first caller was Sister Gloria (3022), and the second was Sister Juanita (3023). Both were fellow Muslims and members of Mosque Number 7.

A member of Mosque Number 7 at the time Malcolm X was minister there, Mrs. Butler recalled that after Malcolm's departure from the Mosque he had been called a hypocrite several times by persons active in Mosque Number 7 (3028-9).

The witness testified that she remembered the precise hour her husband left the house and returned on the day in question because she always looked at the clock when he left the house (3033).

GLORIA WILLS, a member of the Mosque Number 7 and long-standing acquaintance to Mr. and Mrs. Butler, testified that on February 21, 1965, she called the home of Norman Butler at approximately 3:05 p.m. and spoke to Butler and his wife (3091-2).

The witness indicated that she had for the three years regularly attended meetings at Mosque Number 7 (3094). On the afternoon of February 21, 1965, Mrs. Wills was at home (3095). She remembered that she called the Butler home at 3:05 on that day, because whenever she called someone or received a call, it was her habit to look at the clock (3096). She called Mrs. Butler to let her know that Malcolm X had been killed. Mrs. Edna Smith, the witness' mother-in-law had called her at 3:02 to tell her that she had heard of the shooting on the radio (3099).

JUANITA GIBBS, a member of Mosque Number 7 and an old friend of the Butlers, testified that on February 21, 1965, she called the home of Norman Butler (3115). Although she could not recall the precise time of the call, she knew it was sometime between 3:00 and 3:30 p.m. (3116). It was sometime during the same period that Mrs. Gibbs had heard a radio news flash that Malcolm X had been shot, and she called Mrs. Butler to tell her the news (3121).

Doctor KENNETH E. SASLOWE testified concerning a record of Jacobi Hospital kept in the ordinary course of business relating to Norman Butler (3182-3). The record indicated that Butler entered the emergency room of the hospital at 9:43 a.m. on February 21, 1965. He complained to Dr. Saslowe of pain in his right leg. The witness diagnosed the condition as a superficial thrombophlebitis of the leg (3183), and recommended or gave to Butler an Ace bandage (3185). He

recommended that Butler go home, stay in bed and elevate his leg (3185). The record also indicated that Butler was treated on January 22, 1965, for infected wounds of both shins (3185-6). On February 21, 1965, Butler left the hospital approximately one hour after he entered (3186). The hospital record further showed that Butler returned to the hospital on February 25, 1965, at 1:20 p.m. (3199). Although his leg was not fractured, the tissues of his ankle were inflamed (3199-3200).

The defendant, THOMAS 15X JOHNSON, testified that on February 21, 1965, he remained in his home all day. He rose at 5:00 a.m. and participated in family prayer (3518). Thereafter, he read from the Koran, fed the children, and helped his wife to clean the apartment (3519-20). Sometime during the afternoon, Edward 4X Long came to the Johnson apartment and inquired about the slaying of Malcolm X (3520-21). Later during the evening, Long's wife arrived. It was not until dusk that Johnson left the house for the first time to buy ice cream (3520-21).

The witness stated that he was not in the Audubon Ballroom on the day of the killing and that at no time that day did he see Norman Butler (3522).

When Johnson became associated with Mosque Number 7 in 1962, Malcolm X was the minister in charge (3566-7). After the deceased severed his connection with the Mosque in 1964,

Johnson heard him called a hypocrite and a defector (3567-8). Approximately twenty people left the Mosque with Malcolm X to join his new Muslim Mosque, Inc. (3570).

Johnson testified that he had met Cassius Clay, also known as Muhammad Ali, prior to his arrest and had his picture taken with him (3634-5). He denied, however, having acted as Clay's bodyguard while he was in New York (3635).

The witness acknowledged numerous prior convictions of various crimes (3521, 3523-8).

ETTA X JOHNSON, wife of the defendant Thomas Johnson, testified that on February 21, 1965, she was at home with her husband, her four children and her mother (3418). She and her husband rose that morning at 5:00 a.m. Her husband read while she dozed off to sleep again (3419). Sometime thereafter, the defendant Johnson helped his wife to clean the house (3422-3). Sometime in mid-afternoon, while she and her husband were watching television, Mrs. Muriel Long, a neighbor, entered the house (3420). While Mr. Johnson was listening to a newscast concerning something that had occurred at the Audubon Ballroom, the defendant was in the living room dressed in pajamas (3421). A short time after Mrs. Long arrived, Mr. Long, her husband, entered the Johnson home (3422). Sometime between 3:30 and 4:00 p.m., Mr. and Mrs. Johnson were discussing with Mr. and Mrs. Long the news of Malcolm X's death which they had heard on the radio (3425). The Longs left Mrs. Johnson's

apartment sometime between 9:00 and 10:00 p.m. (3427).

Mr. and Mrs. Johnson had been members of Mosque Number 7 for approximately four and one-half years (3428-9). She knew Norman Butler from the Mosque (3441) and Butler had visited the Johnson house on several occasions before the assassination (3442). Since her husband's arrest, Mrs. Johnson visited the Butler home on several occasions (3442).

MURIEL LONG, a neighbor of the Johnsons, testified that on February 21, 1965, she arrived at the Johnson home sometime after 5:00 p.m. (3463). She found Mr. and Mrs. Johnson and their children at home. The defendant Johnson was dressed in bed clothes (3464).

Mrs. Long testified that she had been a member of the Nation of Islam for six years (3464). She stated that she did not know of her own knowledge where the defendant Johnson was at 3:00 p.m. that afternoon.

EDWARD 4X LONG, husband of Muriel Long, testified that he and his wife live in the same apartment building as the Johnson family (3469). On February 21, 1965, he visited the Johnsons sometime between 3:30 and 4:30 p.m. Johnson was dressed in pajamas (3470). He stated that he did not personally know where Johnson was at 3:00 p.m. (3514).

The witness indicated that he had been a member of the Nation of Islam for ten years and, subsequent to his joining the organization, had met Thomas Johnson who held the rank

of lieutenant (3471-2). He also knew Norman Butler who was a lieutenant in the organization (3475-6). He admitted three previous convictions for narcotics, criminally receiving stolen property, and pickpocketing, prior to his membership in the Black Muslims (3472, 3514).

People's Rebuttal

FRANKLIN X DURANT testified that he was a member of the Black Muslims (2839). In the spring of 1963, he took certain pictures at a bazaar held at Mosque Number 25 in Newark, New Jersey (2841). He identified People's Exhibits 87 and 88 as photographs he had taken at the bazaar (2842, 2848). The photographs depicted, among other individuals, the defendant Hagan as a participant in a Karate demonstration (2843-5) (rebutting Hagan's testimony at pp. 2745-50).

Recalled, JOHN FARRELL measured, on the scaled diagram he had prepared, the distance from the point where Ernest Greene testified the man with the shotgun fired, to the position of Malcolm X as he stood on the stage. That distance was twenty-nine and one-half feet (3662-3).

ROBERT KIMMELBLATT, a news editor for WABC Radio News, testified that in February, 1965, he was a radio writer and reporter for that station (3533). On February 21, 1965, he was working in the office of the station (3534). Between three and eleven minutes after 3:00 p.m., Kimmelblatt received a phone call from Charles Moore, a free lance reporter who was

at the Audubon Ballroom (3535-6). Moore reported that Malcolm X had been shot (3536).

The first news flash relative to the shooting was broadcast at 3:15 p.m. (3538). This was the first time that any news bulletin was broadcast on any radio station relative to the shooting of Malcolm X (3544).

POINT I

THE EXCLUSION OF THE PUBLIC DURING THE TESTIMONY OF PROSECUTION WITNESSES TIMBERLAKE AND SULLIVAN WAS A PROPER EXERCISE OF THE COURT'S DISCRETION, AND DID NOT DENY THE PETITIONER A PUBLIC TRIAL (answering petitioner's points A, B and C).

During a short recess between the testimony of prosecution witnesses, Mr. W. Eugene Sharpe introduced himself to the court as the attorney for one Ronald Timberlake, who was to be the next witness. He told the court that his client wished to continue to cooperate with the prosecution, but that he was "in mortal fear of testifying in an open courtroom because threats have been made on his life consistently since the incident which is at issue here at trial" (1273-4). Timberlake himself told the court that he had received anonymous threatening telephone calls (1282). The court undertook to assure Timberlake that security measures had been taken in the courthouse, referring, presumably, to the fact that all spectators were being searched for weapons before being admitted to the courtroom (166-7). When Mr. Sharpe suggested that his client would be placing himself in grave danger outside the courtroom the judge said he had been told by the district attorney that Timberlake had declined an offer of police protection. The offer was renewed, but on behalf of his client, Mr. Sharpe declined the protection as inadequate. Extremely reluctant to clear the courtroom, the

judge sought to persuade Mr. Sharpe to change his position. Mr. Sharpe simply advised the court that the decision was Timberlake's and that Timberlake had decided that if the courtroom were not cleared, he would not testify though he be directed to do so on pain of contempt. For his part, Mr. Sharpe tried to persuade the court that the matter was one of discretion, and that the court should in the circumstances, exercise its discretion in favor of exclusion (1278). In this impasse, the court ruled that the witness would have to take the witness stand, make his refusals, and accept the consequences. This resolution, however, was unacceptable to the defendants, who objected in concert, citing the prejudicial effects of a steadfast refusal of a fearful witness to testify, played out in the jury's presence (1281-7). Thereupon, the court recessed for lunch.

When the court reconvened for the afternoon session, Judge Marks ordered all spectators and press excluded during the taking of testimony from Timberlake (1288). Elaborating upon his ruling, the court quoted from the opinion of Judge Fuld in People v. Jelke, 308 N.Y. 56, 63 (1954), to the effect that the right to a public trial, although a basic privilege, has "never been viewed as imposing a rigid, inflexible strait jacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in a courtroom, to protect the rights of parties and

witnesses, and generally further the administration of justice" (1289). The court found Timberlake sincere in his belief that he was in mortal peril, and further, decided that the witness would persist in his refusal to testify in a public courtroom, thus thwarting the proper administration of justice. Accordingly, the court felt itself warranted in exercising its inherent power to exclude (1290-1).

Later in the presentation of the People's case, an agent of the Federal Bureau of Investigation, John C. Sullivan, was called. He had interviewed Timberlake on the day of the murder and had received from him a gun which Timberlake recovered at the scene (Exh. 12). To accord the jury a fair and complete account of this aspect of the case, Sullivan would of necessity be required to mention Timberlake's name, so that his evidence could be considered along with Timberlake's. Hence the court, consistently, excluded the press and public during Sullivan's testimony to make meaningful the protection accorded to Timberlake (1768-72).

The court's actions were fully warranted and did not deprive petitioner of a public trial.

As the United States Court of Appeals for the Second Circuit has recently pointed out in United States ex. rel. Lloyd v. Vincent, 520 F.2d 1272 (2nd Cir. 1975):

> . . . the right to a public trial, guaranteed by the sixth amendment and made applicable to the states by virtue of the due process clause of the fourteenth amend-

> ment. . . is clearly not an absolute right. Rather, the courts have recognized. . . that the right to a public trial must be balanced against other interests which might justify the closing of the courtroom to the public (520 F.2d at 1273-74).

Thus, courtrooms have been closed in varying degrees to the public and press for a variety of reasons.* There is no doubt that a trial judge has the inherent power to exclude the public and press from the courtroom in order to protect a witness from embarrassment or intimidation or to maintain the fairness and orderliness of the proceedings. United States ex. rel. Bruno v. Herold, 368 F.2d 187 (2nd Cir., 1966), 408 F.2d 125 (2nd Cir., 1969), cert. denied 397 U.S. 957 (1970). In Bruno, DiBari was the sole identification witness for the People. When DiBari took the witness stand, the judge noticed that thirty to forty people were grinning and grimacing at DiBari who turned white, trembled and was speechless. Determining, from what he saw, that DiBari was in "mortal fear" of these people, the judge cleared the courtroom of all but a few people who were known to the court

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*E.g., United States v. Bell, 464 F.2d 667 (2nd Cir., 1972), cert. denied 409 U.S. 991 (1972), at a motion to suppress evidence, over defendant's objection, public was barred during testimony concerning confidential skyjacker profile; Sheppard v. Maxwell, 384 U.S. 333 (1966), limitations imposed on news media in order to protect defendant; Stamicarbon N.V. v. American Cyanimid Co., 506 F.2d 532 (2nd Cir., 1974), court can limit or deny access to court in order to protect trade secrets; Melanson v. O'Brien, 191 F.2d 963 (1st Cir., 1951), state statute authorizing exclusion of public in sex case where victim is less than 18 years old is constitutional.

and who were sitting in the well (408 F.2d at 126-7). The Second Circuit found that the Sixth Amendment was not violated since there was no in camera or secret trial and that, in any event, Bruno did not show that he had been prejudiced in any way (408 F.2d at 127, 129).

Similarly, in United States ex rel. Orlando v. Fay, 350 F.2d 967 (2nd Cir., 1965), cert. denied 384 U.S. 1008 (1965), upon the People's representation that a prosecution witness had been threatened with loss of a job if he testified against Orlando, and after disruptive behavior in the courtroom by several spectators, the court cleared the courtroom of all spectators; later, the judge readmitted members of the press and bar but continued to exclude all spectators. Noting that the Sixth Amendment "has always been interpreted as being subject to the trial judge's power to keep order in the courtroom" and "to prevent unnecessary pressures or embarrassment to a witness" (350 F.2d at 971), the Second Circuit held that:

> . . . where, as in Orlando's trial, there is reason to believe that unrestricted admission of the defendant's sympathizers to the courtroom has made it possible for such sympathizers to see the witnesses and then threaten and intimidate them, and there is reason to believe this might continue unless such persons are not permitted to see the witnesses, the trial judge has the power to bar access to the courtroom to such persons. (350 F.2d at 971).

More recently, the Second Circuit has specifically approved the exclusion of all spectators in order to protect the witness from retaliation. United States ex rel. Smallwood v. La Valle, 377 F. Supp. 1148 (E.D.N.Y., 1974), aff'd 508 F.2d 837 (2nd Cir., 1974), cert. denied 421 U.S. 920 (1975), involved a prosecution in King's County for manslaughter. The only eyewitness to the crime was a girl who was fifteen or sixteen years old and four months pregnant; conviction was impossible without her testimony. The prosecutor informed the trial judge that the witness said she was afraid, that she lieved on the same block as the defendant, and that the defendant and his friends, although not threatening her, had spoken with her. Over the defendant's objection, the judge cleared the courtroom of all spectators during the witness' testimony. In denying a writ of habeas corpus, the District Court commented that "the right to a public trial is not a 'limitless imperative'" (377 F. Supp. at 1151) and held that the exclusion of all members of the public for the duration of the witness' testimony was a proper exercise of the trial judge's discretion and did not violate the right to a public trial.

In accord is United States ex rel. Lloyd v. Vincent, supra, which involved a state prosecution in Nassau County for violations of the narcotics laws. The State's primary witnesses were two undercover police officers. Upon the

application of the People, and over objection by defendant, the trial judge excluded all spectators during the testimony of the two officers. The Second Circuit recognized that requiring the officers to testify in public might expose them to peril and reduce their future usefulness and held, as had the courts in New York State, that "preserving his future usefulness, and safeguarding his life provides an adequate justification for excluding the public for that limited period while an undercover agent is testifying " (520 F.2d at 1274-75).

In the case at bar, the soundness of the trial judge's order is demonstrated by two criteria: First, the record supplies an adequate foundation for the court's finding of a proper basis for exclusion; second the exclusion was minimal in duration.

BASIS

If, as cannot be doubted, a trial judge may exclude the public in deference to the possible embarrassment which a witness might suffer in relating the details of a sex case, who can doubt the authority of the court to take the same expedient to protect the life of a witness whose testimony before a wide audience might lead the defendant's friends and associates to mark him for death? The nature of the case was such that the court had already expressed concern about hostile persons who might sit undetected among the spectators, and had

taken the unusual precaution of searching all members of the public before they were admitted to the courtroom. Indeed, at least one juror had expressed fear for his personal safety when his identity had become known (Carter: 75-6), and the People's first witness had been afraid to testify in the Grand Jury (Thomas: 472).

Beyond the record, it is fair to assume that the court had some reason to believe that partisans, who had already demonstrated that violence was within their organization's repertoire, might infiltrate the audience. And surely the mass media coverage could be expected to reach some who might be similarly disposed. Under these circumstances, the court might well conclude the witness' timidity was well-founded. Even the bare possibility of a justified fear warranted minimal measures of protection.

It is not constitutionally required that the trial judge hold an evidentiary hearing or take testimony under oath before he excludes the public. Indeed, in United States ex rel. Lloyd v. Vincent, supra, United States ex. rel. Orlando v. Fay, supra, United States ex. rel. Bruno v. Herold, supra, and United States ex rel. Smallwood v. LaValle, supra, no testimony was taken as to the basis for or reasonableness of the witness' fear; the trial judges in those cases acted merely on the statements of the prosecutors or on their own observations. In the case at bar, moreover, rather than the prosecutor who had an

interest in the outcome of the trial, it was Timberlake's own attorney, who could have no interest other than his client's, who pleaded with the court to exclude the public. Timberlake's attorney informed the court of Timberlake's fear and the reason for it; he recounted the murder of Arnold Shuster who had been slain after having given information against the notorious Willie Sutton; and he conveyed the depth and sincerity of Timberlake's fear by noting that Timberlake would rather accept the certain punishment of contempt for a refusal to testify than risk the possibility of retaliation if he did testify. Timberlake himself, moreover, told the court that he had received anonymous threatening telephone calls. Nor could the court overlook the fact that the very substance of the trial involved the assassination of a man who was seen as harmful to the militant organization to which petitioner belonged. Timberlake did not have to cite Shuster to explain his apprehension; he could have pointed to the murder of Malcolm X himself. Based on what it had heard from Timberlake's attorney, from Timberlake's own statement, and from its observation of Timberlake who must have looked like a very frightened man, the court had an adequate basis on which to exclude the public.

DURATION

Of enormous significance in the present case is the minimal duration of the exclusion, for as was stated in United

States ex. rel. Smallwood v. LaValle, supra, at 1151-52, when dealing with exclusion of the public in order to protect a witness, it is the length of time of the exclusion, rather than the number of people excluded, that is important. In the case at bar, Timberlake was only one of some twenty-three prosecution witnesses. His entire testimony occupied 144 pages of a 4, 414 page trial record; Sullivan's testimony occupied only 21 pages. The courtroom was closed only seven hours out of a three-month trial.

Moreover, the evidence Timberlake gave, as reiterated by Agent Sullivan, primarily dealt with the recovery of Hagain's gun, and was only one stitch in the fabric of proof that convicted the defendants. Timberlake did not actually see the petitioner shoot Malcolm X; many others testified to that. Timberlake's testimony, as it related to petitioner, dealt with petitioner running away from the scene of the shooting and was merely cumulative of the testimony of several other witnesses.

As Judge Moore stated in concurring in United States ex. rel. Bruno v. Herold, supra:

> . . . the broadest discretion should be given to the trial judge who is in a position to sense and appraise the courtroom situation before him and to take such action, as may be necessary, to secure a fair trial. Federal courts should be reluctant to substitute their judgments, based only on a printed record and long after the event, as to the action which should or should not have been taken by the state trial judge with respect to the necessity for clearing the courtroom. (368 F.2d at 189)

Although the beneficial effects of public presence in general cannot be gainsaid, it is highly dubious that particular benefit was lost to the petitioner here by total exclusion for such a limited time. No principle of public trial was sacrificed in this miniscule ban, and no prejudice was suffered warranting the overturn of the jury's just verdict, predicated, in overwhelming proportion, on evidence adduced in the full light of unrestricted public attendance.

POINT II

THE TESTIMONY CONCERNING THE DEFENDANTS' MEMBERSHIP IN THE BLACK MUSLIM ORGANIZATION AND THE FORMER RELATIONSHIP OF MALCOLM X TO THAT ORGANIZATION WAS PROPERLY RECEIVED AND DID NOT VIOLATE ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS (answering Petitioner's Point D).

In his opening statement, the prosecutor promised the jury that the testimony would establish that Malcolm X joined the Black Muslim organization in 1952; that he advanced in rank and eventually became the minister of the Black Muslim's Mosque Number 7 in New York City; that on November 23, 1963, he was suspended from this organization and relieved of his duties at the Mosque; that in March of 1964, he founded his own associations known as the Organization for Afro-American Unity and the Moslem Mosque, Inc., and that he induced many members of the Balck Muslim group to leave that organization for his own newly-founded groups. Finally, the jury were told that the defendants, on the day of the killing, were members of the Black Muslim sect from which Malcolm had broken (170-173). (Defense counsel's objection to the prosecutor's opening remarks was overruled by the court on the ground that this testimony was relevant on the issue of possible motive (170)). In due course, the People's witnesses testified to these things, as outlined by the prosecutor in his opening statement (Thomas, 226-8, 230-31, 236-7, 241; Whitney, 944-5; John Davis, 1218-19; Blackwell: 1603-5).

Thereafter, several defense witnesses, including the defendants Butler and Johnson, testified concerning the membership of Johnson and Butler in Mosque Number 7, Malcolm X's former relationship to the Mosque, and the circumstances attending his dismissal from his position of leadership there (Morris, 2757-61; Theresa Butler, 3028-29; Butler, 3247, 3277, 3284, 3287-9, 3291; Etta Johnson, 3428-9; Johnson, 3566-70). On direct examination, Norman Butler testified that he was a lieutenant in Mosque Number 7 and that as a Muslim, he subscribed to the rules and regulations formulated by Elija Muhammad. Those rules forbade the breaking of any laws of the United States and the use of violence (3248). On cross-examination he was asked about his duties within the Black Muslim group. He testified that after Malcolm X had been expelled from the Mosque, Malcolm was considered by the members to be "hypocrite." He denied that any member of the Mosque had called for Malcolm's death because this would have violated Muslim law (3287-95). However, Charles Morris, a defense witness called by Butler, controverted this claim, indicating that after Malcolm founded his own organization, various members of Mosque Number 7 had called for his death (2871). Morris gave, as the reason for Malcolm's break with Mosque Number 7, the change in Malcolm's personal philosophy from "separationist" to "integrationist." It was this change in political outlook,

Morris said, which caused Malcolm X to fall out of favor with the members of Mosque Number 7 (2867-71).

Butler indicated that he himself thought that the deceased was a hypocrite (3289-90) but he denied the existence within the Mosque of a "doom" squad (3301). However, Charles Morris, Butler's witness, testified that within the Mosque was a 100-man squad known as "the enforcers," whose function it was to see that the policies of the Mosque were followed by the members and to employ violent measures, if necessary, to this end (3413-14). Moreover, he related that both Johnson and Butler were members of this squad (3414).

This, in brief, is the sum of the evidence relating to the defendant's and the deceased's connection with the Black Muslims. The evidence violated none of petitioner's constitutional rights and, indeed, petitioner does not point to any specific constitutional violation. It was relevant and probative on the issues, providing proper background for the events and furnishing proof of motive, and it was not utilized beyond these proper purposes.

Petitioner contends that it was improper to allow testimony regarding the defendants' membership in the Black Muslims, presumably because religion is normally irrelevant in a criminal trial. He further claims that testimony of what the Black Muslims thought about Malcolm X was not necessarily what petitioner thought and thus served to enable the

jury to assign the collective guilt of the Black Muslims to petitioner (See Butler's Petition for a Writ of Habeas Corpus, items 10(d) and 11(d)).

To begin, the challenged evidence was properly admitted to establish that the protagonists were not strangers to one another. That their common ground happened to be a "religious" sect rather than a social club surely can not affect admissibility. Moreover, a number of the witnesses who identified the defendants testified that they were previously acquainted with them, having seen them at the Black Muslim Mosque. It is elementary that an identifying witness may describe to the jury, which will assess the reliability of his crucial evidence, the fact and the circumstances of any prior contact between himself and the person he identifies (See, People v. Agron, 10 N.Y.2d 130 (1961)). Certainly, the admissibility of such evidence is to no degree diminished by the incidental fact that their prior contact occurred in a "religious" organization. Thus, on the most common principles, the brief and limited use which the prosecution made of the defendants' membership in the Muslim sect was altogether fair and faultless.

But, more importantly, the petitioner here challenges testimony from which the jury would have been justified in inferring that the defendants, as members of a sect inimical to

that of Malcolm X, had a motive to kill him. And even if the challenged testimony related to nothing but motive, it would have been admissible on this ground alone. Motive to commit murder may be shown from knowledge of circumstances which tend to excite an emotion of resentment or hatred. II Wigmore on Evidence, §389 (3d Edition, 1940). And a defendant's sympathy toward, relationship with, or membership in a group overtly hostile to the deceased may provide a reason to kill. Sam v. State, 33 Ariz. 383, 265 Pac. 609 (1928); State v. Sing, 114 Ore. 267, 229 Pac. 921, 924-5 (1924); McManus v. Commonwealth, 91 Pa. 57, 66; Hester v. Commonwealth, 85 Pa. 139, 155; II Wigmore on Evidence, §390 (3d Edition, 1940). As the Supreme Court of Arizona stated in Sam v. State, supra, in affirming a conviction for murder:

> This evidence, of course, was offered for the purpose of showing motive on the part of defendants. If, as a matter of fact, deceased was a member of one of the tongs [i.e., Chinese societies], or a partisan thereof, and if as a matter of fact the defendants or any of them were members or partisans of the opposite tong, the evidence objected to would be admissible, its weight, of course, being for the jury. (265 Pac. at 620).

From the facts elicited here, the jury would have been justified in believing that the defendants knew Malcolm X prior to his expulsion from Mosque Number 7, that they knew that Malcolm had attracted many members away from their own group, and that, by their continuing membership in the Mosque, they disagreed with him and shared the general feeling

of anger prevalent in the Mosque. Indeed, on cross-examination, both Johnson and Butler admitted as much (Butler, 3289; Johnson, 3568). Because such evidence tended to show a reason for the defendants to harbor aggressive feelings toward the deceased, it was relevant.

The petitioner's chief objection to this aspect of the case, as indicated in his petition, is his contention that hatred of Malcolm X, although perhaps ascribable to the Black Muslims as a group, or to certain "factions" of the group, could not properly be translated into guilt of the defendants merely because of their membership in that organization.

What petitioner fails to see is that his guilt was not shown by the sentiments of the Black Muslims or his membership in that group; such testimony merely established the reason for the murder. Rather, proof of petitioner's individual guilt rested on eyewitness testimony that petitioner did, in fact, shoot Malcolm X.

Butler's unsupported assertion in his petition to the contrary notwithstanding, proof of motive may be inferential. The difference in the rule between proof of guilt and proof of motive is simply this: many may be motivated to do an act which only one or some of them perform. Thus, guilt can not be established by proof of motive alone, and imputed motive never amounts to imputed guilt. Moreover, since motive is, by definition, a subjective state of mind, proof must be

derived from actions or associations which have a reasonable relationship to attitudes. The petitioner in seemingly insisting on proof of expressions of hostility from the defendants personally, go far beyond the ordinary rules of relevance controlling proof of motive. It is sufficiently likely that a person shares the common feelings of members of a group to which he voluntarily belongs to render proof of such beliefs relevant to the defendant's attitude. Such evidence does not prove the defendant committed the crime, but indisuptably it tends to establish that he, along with others, had a motive to do so. That is the situation in the present case, and the petitioner makes no claim that the jury was not well instructed on this elementary distinction.

In sum, it is impossible to conceive of a complete trial of the defendants for the murder of Malcolm X without testimonial reference to the previous common associations of the parties, the split with its attendant recriminations, and the formation of a rival sect by the former leader of the organization to which defendants performed "enforcement" duties. For at heart, the entire theory of the prosecution, borne out by the evidence, was that Malcolm X was killed in a vengeful assassination. Motive is always relevant, and in the instant case, omission of the affiliations of the protagonists would have rendered the events totally meaningless and seemingly wanton. The rules of evidence do not require that such a false

impression be left with the fact finder. Evidence of the defendants' active membership in a group which considered Malcolm X an antagonist was a proper source of inferred motive. And the mere fact that the group in question had a religious orientation affects this sound and authoritively approved principle not a whit.

POINT III

THE TRIAL JUDGE'S CONDUCT WITH RESPECT TO DEFENSE COUNSEL WAS FAIR AND RESTRAINED AND DID NOT VIOLATE ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS (answering petitioner's Point E).

Petitioner claims that the trial judge repeatedly rebuked defense counsel in the presence of the jury and that this deprived petitioner of an impartial trial (See Butler's petition for a Writ of Hebeas Corpus, items 10(e) and 11(e)). Petitioner's contentions are for the most part vague and imprecise and are not supported by the record. To the contrary, the record shows that in the face of continuous improper behavior by experienced defense attorneys, the judge maintained his composure, behaved in a restrained manner and went to great lengths to insure a fair trial.

Petitioner cites only two specific examples to support his argument. It is indicative of the weakness of petitioner's argument that the two examples he cites involve Mr. Peter Sabbatino, who was the attorney for defendant Hagan; petitioner does not claim that the trial judge behaved improperly with respect to Mr. Williams or Mr. Chance, who were the attorneys for petitioner. In any event, the instances cited by petitioner reflect, in the first case, an appropriate attempt by the trial judge to limit unduly long cross-examination, and in the second case, a reasoned, restrained attempt to cope with Mr. Sabbatino's improper and obstreperous conduct

so that the trial could proceed in an orderly manner. The record shows clearly that the trial judge was careful to make certain that none of the interplay between the court and counsel inured to the detriment of the defendants. Immediately after the court dealt with some intemperate remarks by Mr. Sabbatino, it addressed the jury directly:

> THE COURT: ". . .I am now stating to the jury that in all these discussions you are not to be prejudiced against his /Mr. Sabbatino's/ client or any defendant because of any of these outbursts on the part of counsel or any counsel, or any statements made by this Court as to any conduct on the part of counsel. You are not in any way to consider it detrimental to the interests of the defendants, prejudicial to him in any way whatsoever. That is something entirely outside of the record as to any conduct on the part of the counsel in this case." (3638-39)

To a remarkable degree, this 4, 414 page record is free of inappropriate behavior or comment by the trial judge. The trial was conducted without rancor by a judge who maintained control of the proceedings and who treated the defense and prosecution evenly and courteously. Nothing that the trial judge said or did can reasonably be construed as depriving petitioner of a fair and impartial trial.

POINT IV

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE PEOPLE PROVIDE PETITIONER WITH LISTS OF ALL THOSE INTERVIEWED BY THE POLICE, THOSE WHOM THE PEOPLE INTENDED TO CALL AS WITNESSES AT TRIAL, AND THOSE WHO TESTIFIED IN THE GRAND JURY; THE TRIAL JUDGE'S REFUSAL TO COMPEL THE PEOPLE TO PROVIDE SUCH LISTS WAS A PROPER EXERCISE OF JUDICIAL DISCRETION (answering petitioner's points F and G).

Petitioner contends that he was entitled to have the People provide him with lists of all the persons interviewed by the police during the investigation of the murder, of those persons the People intended to call at trial as witnesses, and of those persons who had testified before the Grand Jury. He claims that "basic fairness" required that he be provided these lists and that "the trial judge abused his discretion" when he declined to order the People to furnish the lists.

Although the wording of items 10(f) and (g) and 11(f) and (g) of Butler's petition for a writ of habeas corpus is unclear, it would appear that in his petition Butler is addressing himself to the lists that were requested by defense counsel after the trial had begun.*

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*Prior to trial, in his request for a Bill of Particulars, defendant Butler had requested a list of the persons present at the Audubon Ballroom when the police arrived after the shooting, the statements of all witnesses to the shooting, and the Grand Jury testimony of everyone who appeared before that body. The court denied these pre-trial requests. Butler's request for a Bill of Particulars was, however, not made a part of the record on appeal, nor was it referred to in the instant petition.

Thus, the first indication in the record that the defense was requesting any of the lists referred to in the instant petition occurred thirty-six days after the case was moved to trial when, during the voire dire, Mr. Sabbatino, counsel for defendant Hagan, joined by petitioner, asked the trial judge to direct the prosecutor to furnish defense counsel with "a list of witnesses he expects to call"; Mr. Sabbatino's stated reason was "so that I may question the prospective jurors as to whether they know any of the witnesses" (64). Defense counsel could, however, cite no authority to support their request. The court denied the motion after the assistant district attorney stated that his reason for not consenting to provide the requested list was that "during the investigation and preparation of the trial, it has come to my attention from several of the witnesses that I interviewed, that they had been approached by members of the Black Muslims and had been threatened and told not to testify" (65-6). Defense counsel then immediately renewed their request on the ground that "we are entitled to know whether these witnesses have any ulterior motive to lie. . ." (68-9). The court again denied the motion and stressed that if during the cross-examination of any of the People's witnesses defense counsel needed more time to investigate the witness, the court would be favorably inclined to grant any necessary adjournments (69). Later

during the voire dire an identical motion was made and denied (108-9).

At the conclusion of the People's opening statement, Hagan's attorney asked for the names and addresses, together with the statements, of all persons who were present in the Audubon Ballroom or who were interviewed during the investigation of the murder; the record reflects that counsel was seeking to obtain the statements of these persons before they were called to testify. Petitioner Butler neither joined in this motion for the names, addresses or statements, nor did he except to the court's denial of the motion (180-3).*

In any event, the prosecutor, although not compelled to do so by constitutional mandate, statutory requirement or court order, on his own and in the interest of judicial economy, provided defense counsel with a list of the names and addresses of everyone who had been interviewed in connection with the case; this list was provided when the People still had twelve

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*The court did of course direct, pursuant to People v. Rosario, 9 N.Y.2d 286 (1961), the People to turn over to over to defense counsel any statements of the witnesses at the conclusion of the witness' direct testimony. The record reflects that throughout the trial the People fully complied with Rosario and, indeed, petitioner makes no claim to the contrary.

witnesses to call on its direct case and when the defense was twelve days away from beginning its direct case (1795). Not satisfied, Hagan, joined by the defendant Johnson, then demanded every statement made by any of the persons on the list, together with the Grand Jury testimony of any person who had appeared before that body. However, counsel for petitioner, after reading the list, chose not to join in the motion (1798), which the court, in any event, denied (1795-98).

At the conclusion of the People's direct case, Hagan asked that the People give to the defense any information, including all statements, which the People possessed pertaining to any persons who had not been called as witnesses, so that the defense could determine whether or not the information would be helpful to them. There was no claim by any of the defendants that the prosecution possessed any information that was exculpatory or in any way helpful to any of the defendants. Indeed, after the prosecutor stated, in reference to the persons who had not been called as witnesses, that "there is nothing in my files which would be helpful or favorable to any one of these defendants" (2606), counsel for petitioner stated that he was completely satisfied with the prosecutor's representation (2607).

Thus, the only such motion in which this petitioner joined was the motion made during the voire dire for a list of the individuals who would be called as witnesses for the People.

There is, of course, no constitutional requirement that the People provide a defendant with such lists; such requirement, if it exists at all, it has long been settled, is statutory. In Barrington v. Missouri, 205 U.S. 483 (1907), the defendant claimed that the state's attorney had deliberately refrained from endorsing the names of witnesses on the indictment and argued that he was entitled to know the names of the witnesses against him. The Supreme Court stated that "the right of the accused to the endorsement of names of witnesses does not rest on the common law, but is statutory. . ." (205 U.S. at 488); the Court found that there was no denial of fundamental fairness, due process or equal protection.

Earlier, in Thiede v. Utah Territory, 159 U.S. 510 (1895), the Court had reached the same conclusion. In Thiede, certain witnesses testified although their names had not been endorsed on the indictment or otherwise furnished to the defendant. The Supreme Court ruled that although there was a federal statute requiring that names of witnesses be provided to a defendant two days before trial, that statute applied only to the federal courts and did not control the practice of the courts of Utah (159 U.S. at 514). Recognizing that there was no constitutional question involved, the Supreme Court concluded

> In the absence of some statutory provision there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before trial. (159 U.S. at 515).

Recent cases are in accord. United States v. Persico, 425 F.2d 1375 (2nd Cir., 1970), cert. denied 400 U.S. 869 (1970) involved four trials, each of which resulted in mistrials for a variety of reasons. On the fifth trial, the government called Joseph Valachi as a witness. Valachi had not been called as a witness in any of the previous trials, and the government did not make him known at the fifth trial until it announced its intention to call him as the next witness. The Second Circuit, in affirming the conviction, cited the statutory authority of 18 U.S.C. §3432 in support of the proposition that "there is no obligation on the part of the government to inform the defense of its intention to call a witness when the indictment is for a non-capital offense." (425 F.2d at 1378). There was no indication by the Second Circuit that any constitutional issue was involved. See also, United States v. Addonizio, 451 F.2d 49, 62 (3rd Cir., 1972), cert. denied 405 U.S. 936 (1972).

Where not required by the constitution or by statute, the decision whether or not to provide the defense with the names of potential witnesses is best left "in the hands of the trial court. . ." VI Wigmore on Evidence §1850 (3rd Edition, 1940). In the case at bar, the trial court properly exercised its discretion in refusing to compel the People to turn over such lists to the defendants. The court could not have been unmindful of the earlier request made by defense counsel that

the names of the potential jurors be kept secret; petitioner's own attorney had cited the "atmosphere and the headlines" and the fact that counsel themselves had received telephone calls to justify his concern that the jurors might be susceptible "to people who may seek to subvert justice" (16-17). Shortly thereafter, the first juror selected stated that the press knew his identity and that he was concerned for his safety (Carter, 75-6). This, coupled with the prosecutor's earlier statement that several witnesses had been threatened and warned not to testify (65-6) fully warranted the court's refusal to order the prosecution to turn over the list requested.

The record, moreover, is devoid of any indication that the defendants were in any way prejudiced by the rulings of the trial judge. Indeed, even now, petitioner does not claim that he suffered any harm, nor is there any claim that anyone on any of the lists possessed information beneficial to any of the defendants.

Petitioner's contention does not give rise to any constitutional violation. The actions of the trial judge constituted an appropriate exercise of judicial discretion.

CONCLUSION

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

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
ALLEN ALPERT
Assistant District Attorneys
Of Counsel

March, 1976

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

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

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

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

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

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

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

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

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

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

Points of Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgments should be affirmed.

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

Judgments affirmed.

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

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

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

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

Stevens, J. P., Steuer, Tilzer,

titioner, v. NEW YORK STATE
tion sought to be reviewed is
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was $22,000. The subsequent
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's opinion that the $13,000 was
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the transaction thereafter was
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Kenneth Beyer is the beneficiary
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Concur — Stevens, J. P., Steuer,

OWARD JOHNSON'S INCORPORATED
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Respondent, v. NEW YORK STATE
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or reconsideration, without costs or

disbursements. On the basis of the present record it appears that Special Term acted upon facts which were not before the Authority when it made its determination. Upon the remand the Authority may consider petitioner's application *de novo*. Concur — Capozzoli, Tilzer, McGivern and McNally, JJ.; Steuer, J. P., dissents in the following memorandum: I dissent. The disposition made by Special Term was well warranted by the facts. Respondent has refused petitioner's application for a liquor license for its premises located at 47th Street and Broadway. There can be no doubt that the application was refused because of the nature of the enterprise to be carried on in the premises sought to be licensed. The petitioner conducts a dance hall on the second floor of the building. On a raised platform inside a seven-foot window, and plainly visible from the abutting sidewalk, several girls perform a so-called "Go-Go" dance. One could very well sympathize with respondent's aversion of this type of operation and accord with their refusal to further it by granting it a license. But neither the Authority nor this court in passing on its ruling can allow its views on the desirability of the operation to control. In the 17 days from August 12 to August 29, 1967, eight summonses were issued against petitioner for various violations of the Administrative Code in connection with maintaining the premises in this way, and all were dismissed. It is now no longer contended that the operation offends against any law or ordinance. While this does not make it any more palatable, it does remove the operation from the prohibited class. Respondent now concentrates its attack on a different front. Relying on the incontestable fact that these premises are located in a sensitive area and will require strict supervision if they are to remain orderly, respondent claims that the other activities of petitioner's principals will prevent them from giving the necessary attention to that supervision. In this connection respondent points to the fact that said principals are currently the owners and operators of a billiard parlor on West 79th Street. When this point was raised at Special Term, petitioner's principals promptly offered to dispose of their interest in the billiard parlor and to consent to make the issuance of the license conditional on their so doing within 90 days. Respondent refused to accept the condition, asserting its right to review the application *de novo* in the light of this change of circumstance. The majority of this court agrees with this position. It must be obvious that the respondent's position is a mere subterfuge for delay and that the reversal of Special Term countenances the subterfuge. The respondent has raised an objection. That objection has been obviated. Plainly the situation in regard to the issuance of a license is as if the objection had never existed. Yet the respondent desires to consider the application anew when it has already considered it and found no valid existing objection. If this were an exercise in futility it might be dismissed as of no moment. But it is not. Despite persistent effort, it has taken the petitioner over 10 months to reach this stage in its proceeding to review respondent's action. The respondent can anticipate with confidence that the new proceeding ordered will take at least that long to reach final disposition. By that time the resources of petitioner's principals could well be exhausted and attrition will have accomplished what assault could not. I do not believe that we should lend ourselves to this type of administration, no matter how strongly we disapprove of petitioner's project.

[13 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THOMAS HAGAN, Also Known as TALMADGE HAYER, Also Known as THOMAS HAYER, NORMAN BUTLER, Also Known as NORMAN 3X BUTLER and THOMAS JOHNSON, Also Known as THOMAS 15X JOHNSON, Appellants.— Judgments convicting defendants of murder in the first degree unanimously affirmed. Defendants' guilt was overwhelmingly established. And no contention that it was not, was advanced. One of the defendants in testimony given on the trial admitted his participation,

including shooting the deceased, in unequivocal terms. Reversal is sought on several grounds, only one of which merits any discussion. During the trial one witness refused to testify unless the courtroom was cleared of spectators and press representatives. He gave as grounds for his refusal his fear of reprisals which had been threatened against him. After considering alternatives, strenuously objected to by counsel for each of the defendants, the court acceded to the witness' request and cleared the courtroom for his testimony and that of another witness whose testimony, purely formal, was related to the testimony of the other. None of us approves the practice followed, and some members of the court believe it to have constituted error. But we are all in accord that it was not error which mandates a reversal. Even if it be assumed that the claimed error is constitutional error, it does not automatically call for reversal (*Chapman* v. *California*, 386 U. S. 18, 23–24; *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87). Here we believe that the prosecution has established beyond a reasonable doubt that the claimed error did not contribute to the verdict obtained. The period of public exclusion was less than 3% of the time taken for trial; and the testimony given was largely cumulative and it is inconceivable that a public hearing as to these witnesses would have induced potential evidence for the defense which the vastly greater publicly given testimony failed to evoke. Concur — Stevens, J. P., Eager, Steuer, Tilzer and McNally, JJ.

14 Robert B. Blaikie, Respondent, v. Borden Co. et al., Defendants, and Dairymen's League Cooperative Association, Inc., Appellant.— Order, entered on June 2, 1967, granting motion by plaintiff for leave to replead his individual cause of action and directing service of his amended complaint, unanimously reversed, on the law, with $30 costs and disbursements to appellant, the motion denied and the amended complaint dismissed. Leave to replead further is denied. Still unremedied, in our opinion, are the deficiencies which were noted in connection with the original complaint (see 27 A D 2d 804). The affidavit by plaintiff which is now included in the record falls short of meeting the requirement that "there must be some evidentiary showing that the claim can be supported" (*Cushman & Wakefield* v. *John Duvid, Inc.*, 25 A D 2d 133, 135), indeed so far short that no further attempt to replead may be countenanced. Concur — Botein, P. J., Stevens, Steuer, Capozzoli and McNally, JJ.

15 Raymond F. Veres, Respondent, v. Cunard Steamship Co., Ltd., Defendant, and John T. Clark & Son, Appellant.— Judgment unanimously reversed on the facts and the law and new trial ordered, with $50 costs and disbursements to appellant to abide the event. Plaintiff sues for injuries claimed to have been suffered when the trailer section of his tractor-trailer tilted while going around a turn and parted from the tractor. Defendant loaded the trailer and the asserted basis for liability is that improper loading caused the trailer to tilt. Plaintiff's proof is insufficient in that the claims that the trailer was improperly loaded and that the improper loading was the cause of the trailer's eccentric course rest entirely on his own conclusory averments unsupported by proof of any supporting facts. There was no proof of how the load was distributed on the trailer, nor in what way it failed to conform to proper practice, nor what effect it did or could have on the trailer's movements. Concur — Stevens, J. P., Eager, Steuer, Capozzoli and Tilzer, JJ.

16 In the Matter of Adolph R. Landsman, Appellant, v. Charles M. Schutzman, Respondent.— Order entered November 21, 1967, unanimously modified, on the law and on the facts, and in the exercise of discretion, by deleting from the fifth ordering paragraph, subdivision 3, the sum of $2,250 and substituting in lieu thereof the sum of $1,250, and, as so modified, the order is affirmed, without costs or disbursements. Considering the nature and extent of the services rendered by the guardian ad litem and the fact that the adjudica-

AB175-2M-702226(75) 346

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

RITA JENKS being duly sworn, deposes and says, that on the 30th day of MARCH, 1976, she served the within RESPONDENT'S MEMORANDUM on NORMAN BUTLER, PETITIONER

~~Attorney for~~ ~~Respondent~~ ~~Appellant~~, by enclosing a true copy thereof in a securely sealed postage paid wrapper and depositing the same in a Post-Office box regularly maintained by the United States Government at No. 100 Centre Street, in the Borough of Manhattan, City of New York, directed to said PETITIONER ~~Appellant~~ ~~Attorney~~ at NORMAN BUTLER
PRISON NUMBER 24091, BOX 149
ATTICA CORRECTIONAL FACILITY
ATTICA, NEW YORK 14011, that being the address within the State designated by him them for that purpose on the preceding papers in this action.

Sworn to before me, the 30th day of March, 1976. } Rita Jenks.

HENRY J. STEINGLASS NO. 3831277
Notary Public, State of New York
Qualified in Orange County
My Commission Expires March 30, 1976 7

DISTRICT ATTORNEY COUNTY OF NEW YORK

COPY

March 31, 1976

Judge Whitman Knapp
United States District Court
Southern District of New York
United States Courthouse
Room 3004
Foley Square
New York, New York 10007

Re: NORMAN BUTLER - Petition for a Writ of Habeas Corpus - 76 Civ. 0534

Dear Sir:

The following is respectfully brought to your attention in regard to the above-captioned petitioner's instant application for a writ of habeas corpus.

Norman Butler, in the Supreme Court of New York State, pursuant to section 440.10(1)(h) of the Criminal Procedure Law, has moved to have his judgment vacated. Butler's motion is based on Mullaney v. Wilbur, 421 U.S. 684 (1975). The People have opposed the motion, contending that Mullaney is inapplicable since Butler had not interposed an affirmative defense at trial, but rather contended that he had nothing to do with the murder of Malcolm X and was at home when the killing occurred.

DISTRICT ATTORNEY COUNTY OF NEW YORK

COPY

Judge Whitman Knapp--2--March 31, 1976

The matter has been adjourned to April 5, 1976 and has been referred to Judge Harold Rothwax for decision.

If I may be of any further assistance to you in this matter, please do not hesitate to contact me.

Sincerely,

Allen Alpert

ALLEN ALPERT
Assistant District Attorney

AA:ea.

cc: Norman Butler
Prison Number 24091
Box 149
Attica Correctional Facility
Attica, New York 14011

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE
OF NEW YORK

NORMAN BUTLER,

Petitioner,

against

HAROLD J. SMITH, SUPERINTENDENT,
ATTICA CORRECTIONAL FACILITY,

Respondent

Pro Se 76 Civ. 0534
SUPPLEMENTARY AFFIDAVIT IN
RESPONSE TO PETITIONER'S MOTION;
Order

DISTRICT ATTORNEY

155 Leonard Street
Borough of Manhattan
New York City

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

NORMAN BUTLER,

Petitioner, :

ORDER

-against-

:

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, : Pro Se 76 Civ. 0534

Respondent.

----------X

Upon the accompanying affidavit of Allen Alpert, it is hereby

ORDERED, that Volumes I, II, III, IV and V of the respondent's copy of the record on appeal, currently in the possession of Judge Whitman Knapp, be transmitted to the

Superintendent
Attica Correctional Facility
Attica, New York 14011;

and it is further

ORDERED, that said volumes be retained in the library at the Attica Correctional Facility where the petitioner shall be permitted to use them, under the supervision of the staff of said facility, in the preparation of a reply to respondent's memorandum in opposition to his petition for a writ of habeas corpus; and it is further

ORDERED, that neither petitioner nor any other inmate be permitted to remove any of said volumes from the library; and it is further

ORDERED, that at the conclusion of ten days from the date of receipt of said volumes at the Attica Correctional Facility, the Superintendent shall cause Volumes I, II, III, IV and V of the record on appeal to be returned to

Judge Whitman Knapp
United States District Court
Southern District of New York
United States Courthouse
Room 3004
Foley Square
New York, New York 10007

United States District Judge

Dated: May 10, 1976
New York, New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,	:	
Petitioner,	:	Pro Se 76 Civ. 0534
-against-		SUPPLEMENTARY AFFIDAVIT IN RESPONSE TO PETITIONER'S MOTION
HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY,	:	
Respondent.	:	

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

ALLEN ALPERT, being duly sworn, hereby deposes and says:

1. I am an Assistant District Attorney, of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, attorney for respondent herein.

2. By motion, petitioner sought on order directing that respondent provide petitioner with the record of his trial.

3. Respondent, in its initial opposition to this motion, stated that it had provided Judge Whitman Knapp with its sole copy of the record and that it anti-

cipated that it would require the record for use in future proceedings. (Respondent's Affidavit of April 19, 1976).

4. On May 4, 1976, affiant was informed by the chambers of Judge Knapp that efforts to locate copies of the record in the possession of various defense attorneys associated with petitioner's trial and appeal had been unavailing.

5. On May 4, 1976, affiant then determined that the Supreme Court of New York County, in its 17th floor library at 100 Centre Street, was in possession of Volumes I, II, III, IV, and IV of the instant trial, and that these volumes contained the minutes of the petitioner's trial and sentence.

6. In view of the foregoing, respondent now consents that Volumes I, II, III, IV and IV of respondent's copy of the record on appeal, which respondent had provided Judge Knapp, be made available to petitioner, subject to the terms and conditions of the accompanying order.

Dated:

ALLEN ALPERT
Assistant District Attorney

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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UNITED STATES COURTS

U.S.MAIL

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

Mr. Alpert

UNITED STATES DISTRICT COURT

CHAMBERS OF
WHITMAN KNAPP
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

May 10, 1976

Superintendent
Attica Correctional Facility
Attica, New York 14011

Attention: Mrs. Beitz, Head Clerk

Re: Butler v. Smith - 76 Civ. 534

RECEIVED
'76 MAY 17 A.M.
DISTRICT ATTORNEY'S OFFICE
NEW YORK COUNTY

Dear Mrs. Beitz:

The Manhattan District Attorney's Office informs us that arrangements have been made whereby the Court may transmit to your library facilities Volumes I-V of the record on appeal in People v. Hagan for use by the inmate Norman Butler, under supervision of your staff, in preparation of his reply in a habeas corpus proceeding. To that end, we are enclosing the five volumes and a copy of the Order as signed by the Court.

We would ask that you inform us by telephone (212-791-0223) when the volumes arrive and have been made available to Mr. Butler. The volumes are not to leave the library and any review of them by Mr. Butler is to take place in the library proper.

At the conclusion of ten days, please return the volumes to the Court, at the following address:

Honorable Whitman Knapp
United States District Court
Southern District of New York
U. S. Courthouse, Foley Square
Room 3004
New York, New York 10007

The Judge has asked me to thank you for your courtesy in making the above arrangements.

Very truly yours,

Carolyn Sternschein
Law Clerk to Judge Knapp

cc: Allen Alpert, Esq.
Manhattan District Attorney's Office
155 Leonard Street
New York, New York

Mr. Norman Butler
#24091
Box 149
Attica Correctional Facility
Attica, New York 14011

Affidavit

NORMAN BUTLER
24091
Box 149
Attica, New York 14011
Petitioner Pro Se

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

United States of America, ex rel. NORMAN BUTLER,	:	AFFIDAVIT OF
	:	SERVICE
Petitioner,	:	
-against-	:	
HAROLD J. SMITH, Superintendent of Attica Correctional Facility,	:	
Respondent.	:	

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

MARTIN FITZPATRICK, being duly sworn, deposes and says:

1. I am not a party in the above action.

2. That on May 26, 1976, deponent served the MOTION FOR EXTENSION OF TIME in the Pro Se 76 civ 0534 (JK) action by depositing same in the hands of the NOTARY PUBLIC under care and custody of the United States Postal Service within the State of New York.

3. That I am over 18 years of age and reside at Attica Correctional Facility.

4. That I have served a copy of the MOTION FOR EXTENSION OF time on all parties involved in this action.

Sworn to before me
this 26 day of May, 1976.

Daniel J Corp
NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 78

M Fitzpatrick

M. FitzPatrick
Box 149
Attica, New York
14011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,	:	
Petitioner,	:	Pro Se
-against-	:	76 Civ. 0534 (JK)
HAROLD J. SMITH, Superintendent, Attica Correctional Facility,	:	
Respondent.	:	ORDER

UPON reading the annexed affidavit of NORMAN BUTLER REQUESTING THAT THE TIME FOR PETITIONER TO REPLY to the petition in the above-captioned matter be extended until _____, 1976, and it appearing to the Court that this application should be granted, it is

ORDERED, THAT THE TIME FOR RESPONDENT TO REPLY TO the petition in the above-captioned matter be extended to _____, 1976.

DATED : New York, New York
March , 1976

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,	:	NOTICE OF MOTION
Petitioner,	:	Pro Se
-against-	:	76 Civ. 0534 (JK)
HAROLD J. SMITH, Superintendent, Attica Correctional Facility,	:	
Respondent.	:	

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

NOTICE is hereby given that the attached motion will come on for hearing before this Court at _____o'clock, _____ _____, 1976, under the provisions of Rule _____of the Court.

/s/ Norman Butler

Appellant Pro Se

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,	:	AFFIDAVIT IN SUPPORT
	:	OF MOTION FOR A
Petitioner,	:	EXTENSION OF TIME
-against-	:	
HAROLD J. SMITH, Superintendent, Attica Correctional Facility,	:	Pro Se
respondent.	:	76 Civ. 0534 (JK)

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

NORMAN BUTLER, being duly sworn, deposes and says;

1. That I am the Petitioner in the above action.

2. On May 26, 1976 I received a copy of the printed record on appeal from Judge Whitman Knapp.

3. The Law Library has been closed here at Attica for the last couple of days due to a "frisk" that closes the prison down and prisoners are confined to there cells.

4. That due to to limits placed on the use of this record on appeal in the Law Library during day time hours, and the time limit placed on the use of them, it will be impossible for the Petitioner to read and respond to them within the period of time given.

5. It is therefor requested that the time be extended for twenty working days from this date (May 26, 1976).

Page two (2) of the Affidavit in support of motion

6. That this petitioner prays this court grant this motion for extension of time so he can have a reasonable time to prepair the answering brief.

Sworn to before me,

this 26 day of May, 1976.

Daniel J Corp

NOTARY PUBLIC

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

Norman Butler

NORMAN BUTLER
Box 149
Attica, New York
14011

Department of Prison Services
Northeastern Regional Headquarters
Malcolm Shabazz Mosque No. 7
102 West 116th Street
New York, New York 10026

HARTFORD, CONN.
3 JUN
1976

PROCLAIM LIBERTY THROUGHOUT ALL THE LAND
USA 13c

DEFEAT
MUSCULAR DYSTROPHY
SUPPORT MDA

District Attroney, Alan Alpert
Manhattan District Office
155 Leonard Street
New York, New York

Mr. Alpert

Nation of Islam

Department of Prison Services

Northeastern Regional Headquarters

Malcolm Shabazz Mosque #7

102 West 116th Street

New York, N. Y. 10026

678-5827

May 31, 1976

The Honorable Whitman Knapp
United States Judge
Foley Square, Room B004
New York, New York 10007

Dear Sir:

I hope this letter finds you in the best of health. I am presently serving as a Certified New York State Chaplain. Also, director of Department of Prison Services.

One of the members of our congregation, one Norman X Butler, an inmate at the Attica Correctional Facility, has been granted by the courts an official review of his case.

He was notified on May 25, 1976, of his review, which gave him only ten days to prepare his case. This legal breakdown came after much petitioning and lobbying, and when we had little hope of this appeal measurably being heard. At this time, Norman X Butler does not have legal counsel, nor the funds for such representation and the prospects of obtaining such help and preparing a case in ten days is very difficult for him without legal help.

We, the Nation of Islam, are so convinced of our brothers innocence, we will provide an attorney for Brother Norman X Butler. We would like to request that Norman X Butler be given a thirty day extension to efficiently prepare his case.

Bro. Norman X Butler, who is the Muslim inmate minister and a college student on a special college program, just does not

have the time nor the expense to prepare his own file on such short notice. In the interest of justice and fair play, we humbly make this urgent plea for an extension.

Thank you for your time and patience.

Very truly yours,

Nuriddin Fāiz

Minister Nuriddin Fāiz
National Islamic East Coast
Director of Prison Services

/pjx

cc: Norman X Butler, Attica, New York
Alan Alpert, District Attorney, New York

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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U.S.MAIL

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

Mr. Alpert

UNITED STATES DISTRICT COURT

CHAMBERS OF
WHITMAN KNAPP
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

June 11, 1976

Norman Butler #24091
Box 149
Attica, New York 14011

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

Minister Nuriddin Faiz
National Islamic East Coast
Director of Prison Services
Malcolm Shabazz Mosque #7
102 West 116th Street
New York, New York 10026

Re: Butler v. Smith - 76 Civ. 534

Gentlemen:

As per the enclosed Memorandum and Order, dated June 10, 1976, petitioner has been granted a 30-day extension to file his Reply. Accordingly, his Reply must be filed with the Court no later than July 12, 1976, at which time the Record - currently in the custody of the Attica Law Library - shall be returned. This extension of time is final and no further requests for extensions will be entertained.

Very truly yours,

Carolyn Sternschein
Law Clerk to Judge Knapp

Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

76 Civ. 534

KNAPP, D.J.

Three requests on behalf of petitioner, of varying degrees of formality, are presently before the Court for an extension of time within which to submit a Reply to the Respondent's Memorandum. The details thereof are as follows:

1. On June 1, 1976, my chambers received a call from one Mustafa Muhammed, located in Chicago, requesting a 90-day extension so that the Muslim organization could retain a lawyer to represent petitioner. He was told to put his request in writing. To date we have not received any further communication from that source.

2. On June 2, 1976, we received a letter from a Minister Nuriddin Faiz, 102 West 116th Street, requesting a 30-day extension on petitioner's behalf, so that he - and a lawyer to be retained - could "efficiently prepare his case".

3. On the same day, we learned from the District Attorney's office that the petitioner himself had served a motion requesting a 20-day extension. When by June 10, 1976 the Court had still not been served with said motion, the District Attorney at our request hand delivered a copy thereof to the Court.

On the basis of the foregoing, petitioner is hereby granted a final,[1] non-extendable adjournment to July 12, 1976, by which time his Reply is due and the Record - currently in the custody of the Attica Law Library - will be returned to the Court.

SO ORDERED.

Dated: New York, New York
June 11, 1976.

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

---

[1] This is the third extension granted.

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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UNITED STATES COURTS

U.S.MAIL

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

Mr. Alpert

UNITED STATES DISTRICT COURT

CHAMBERS OF
WHITMAN KNAPP
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

June 15, 1976

Norman Butler #24091
Box 149
Attica, New York 14011

Re: Butler v. Smith - 76 Civ. 534 (WK)

Dear Mr. Butler:

As you can see from the enclosed copy of a letter addressed to the Attica Head Clerk, your transcript was returned to the Court before Judge Knapp's order giving you an additional 30 days was received by their office. Consequently, we are re-mailing the transcript to Attica. Upon its receipt and having been made available to you under the conditions originally set by the Court, the Head Clerk will call me. You will then have 30 days from that date within which to review the record. At the conclusion of the 30 days, the record will be returned to the Court. At that time, your Reply is due.

Very truly yours,

Enclosure

Carolyn Sternschein
Law Clerk to Judge Knapp

cc: Allen Alpert, Esq.

RECEIVED
JUN 16 AM 9:55
DISTRICT ATTORNEY'S OFFICE
NEW YORK COUNTY

UNITED STATES DISTRICT COURT

CHAMBERS OF
WHITMAN KNAPP
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

June 15,1976

Superintendent
Attica Correctional Facility
Attica, New York 14011

Attention: Mrs. Beitz, Head Clerk

Re: Butler v. Smith - 76 Civ. 534(WK)

Dear Mrs. Beitz:

Further to our telephone conversation of June 15, 1976 - in which I informed you that Mr. Butler's transcript had been received back in chambers and that Judge Knapp had earlier granted him a 30-day extension - we are returning the transcript to you today. We would appreciate it if you could call our office (212-791-0223) when the transcript arrives and has been made available to Mr. Butler. He will then have 30 days from that date within which to review the transcript, at the conclusion of which we would ask you to return the volumes to the Court. I again wish to apologize to you for the additional inconvenience this slip-up has occasioned.

Begging your indulgence one more time, I remain

Very truly yours,

Enclosure

Carolyn Sternschein
Law Clerk to Judge Knapp

cc: Norman Butler
Allen Alpert, Esq.

CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
U. S. COURT HOUSE - FOLEY SQUARE
NEW YORK, N. Y. 10007

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

NEW YORK, NY 1000
-PM
1 JUL
1976

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UNITED STATES COURTS

District Attorney
S.D. New York Court
155 Leonard St
NY NY 10013

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE, FOLEY Sq.
NEW YORK, N.Y. 10007

NORMAN BUTLER
BOX149
ATTICA N.Y. 14011

DATE 6/17/76

RECEIVED
JUN 22 1976
BY
DEPARTMENT OF LAW
CITY OF NEW YORK

TITLE : BUTLER -v- SMITH

DOCKET NUMBER 76 CIV 534

DECISION DATE 6/11/76

JUDGE : KNAPP

THERE IS ENCLOSED HEREWITH A COPY OF A DECISION FILED AND ENTERED IN THE ABOVE ENTITLED PROCEEDING.

YOURS TRULY
RAYMOND F. BURGHARDT
By J.BLUM
DEPUTY PRO SE CLERK

c.c.
ATTORNEY GENERAL
STATE OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent.

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JUN 11 3 50 PM '76

MEMORANDUM AND ORDER

76 Civ. 534

KNAPP, D.J.

Three requests on behalf of petitioner, of varying degrees of formality, are presently before the Court for an extension of time within which to submit a Reply to the Respondent's Memorandum. The details thereof are as follows:

1. On June 1, 1976, my chambers received a call from one Mustafa Muhammed, located in Chicago, requesting a 90-day extension so that the Muslim organization could retain a lawyer to represent petitioner. He was told to put his request in writing. To date we have not received any further communication from that source.

2. On June 2, 1976, we received a letter from a Minister Nuriddin Faiz, 102 West 116th Street, requesting a 30-day extension on petitioner's behalf, so that he - and a lawyer to be retained - could "efficiently prepare his case".

3. On the same day, we learned from the District Attorney's office that the petitioner himself had served a motion requesting a 20-day extension. When by June 10, 1976 the Court had still not been served with said motion, the District Attorney at our request hand delivered a copy thereof to the Court.

On the basis of the foregoing, petitioner is hereby granted a final, [1] non-extendable adjournment to July 12, 1976, by which time his Reply is due and the Record - currently in the custody of the Attica Law Library - will be returned to the Court.

SO ORDERED.

Dated: New York, New York
June 11, 1976.

WHITMAN KNAPP, U.S.D.J.

[1] This is the third extension granted.

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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U.S.MAIL

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

Mr. Alpert

UNITED STATES DISTRICT COURT

CHAMBERS OF
JUDGE WHITMAN KNAPP
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

June 23, 1976

RECEIVED
'76 JUN 24 AM 9:26
DISTRICT ATTORNEY'S OFFICE
NEW YORK COUNTY

Superintendent
Attica Correctional Facility
Attica, New York 14011

Attention: Mrs. Beitz, Head Clerk

Re: Butler v. Smith
76 Civ. 534 (WK)

Dear Mrs. Beitz:

Further to my letter of June 15, 1976, I am writing to confirm our telephone conversation of June 22, 1976 in which you informed me that the record had been received by you and was made available to Mr. Butler in the Law Library as of June 22nd. Consequently, the 30-day period will expire on July 21, 1976 (since, as I understand it, the library is open on Saturdays and Sundays). We would appreciate it, therefore, if you would return the volumes to us on July 22, 1976.

Thank you again for your assistance.

Very truly yours,

Carolyn Sternschein
Law Clerk to Judge Knapp

cc: Norman Butler
Allen Alpert, Esq.
Chaplain Faiz

NORMAN BUTLER #24091

BOX 149
Attica, New York
NEW YORK ~~XXXXXX~~ 14011

13

NEW YORK COUNTY

DISTRICT ATTORNEY'S OFFICE

155 LEONARD STREET

NEW YORK NEW YORK 10013

ADA Alpert

7/9/76 - Carolyn Sternschein told me not to bother to research this motion. After reading through Volume VI, she feels there is no merit to motion + that Judge Knapp will deny it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER, Petitioner, -against- HAROLD J. SMITH, Superintendent, Attica Correctional Facility, Respondent.	:	MOTION TO DISMISS WRIT OF HABEAS CORPUS WITHOUT PREJUDICE Pro Se 76 Civ. 0534 (JN)

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

NORMAN BUTLER, being duly sworn, deposes and says;

1. That he is the Petitioner in the above action.

2. On February 3rd, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York.

3. That on March 3rd, 1976 the Petitioner served an affidavit for entry of default in the above action (76 Civ. 0534 JK).

4. On March 10, 1976, the proposed order and supporting affidavit of Allen Alpert Esq. District Attorney requesting an extension of time until March 30, 1976 was put before the court.

5. An unsigned and undated order was received from the court granting the extension until March 30, 1976.

6. On April 2nd, 1976 the Petitioner received the Respondents brief.

7. On April 12, 1976 the Petitioner filed a motion to have the Respondent Allen Alpert Esq. Assistant District Attorney of New York County furnish this petitioner with the complete record including all pre-trial proceedings etc.

8. It is not known just how many pre-trial minutes there are but it is known that there are six volumes of minutes under #2099A, which was the number assigned in the Court of Appeals.

9. On May 10, 1976 a letter was received from Carolyn Sternschein, law clerk to judge Knapp stating that:

> "...whereby the court may transmit to your library facilities volumes 1-v of the record...At the conclusion of ten days, please return..."

10. It is submitted that volume six (6) is missing.

11. In a letter dated June 11, 1976 from Carolyn Sternschein Law Clerk to Judge Knapp it was stated that there would be a 30-day extension to file the reply, which would be according to the letter:

> "...This extension of time is final and no further requests for extensions will be entertained."

12. In this order dater June 11, 1976 Judge Knapp quoted and made part of the record the requests in behalf of petitioner that have been received concerning retained counsel. On June 1, 1976 Judge Knapp received a call from Mustafa Muhammed, Chicago requesting a 90 day extension so that:

> "...the Muslim organization could take over and retain a lawyer to represent petitioner."

13. The second request in the order was from Minister Nuriddin Faiz on June 2, 1976 from New York requesting a 30-day extension so:

> "...that he-and a lawyer to be retained- could 'efficiently prepare his case'..."

14. On June 15, 1976 Carolyn Sternschein Law Clerk to Judge Knapp stated that :

> "...an additional 30 days was ...(granted)..."

15. On June 23, 1976 a letter from Carolyn Sternschein Law Clerk to Judge Knapp stated the following:

> "...the 30-day period will expire on July 21, 1976... return the volumes to us on July 22, 1976..."

16. It is submitted that without the sixth volume the Petitioner cannot file the response. There is prejudice in the judges charge as he stated he would deal with the counsels and from other ruilings the Judge made throughout the trial that did prejudice the defendants.

17. In addition to the above point a letter was received from The Nation of Ialam in the West, , from Mustafa Abdullah Muhammad, Nation's Assistant Business Manager and Corporate Counsel, informing Norman Butler that they want :

> "...an opportunity to read through and study carefully the transcript of the trial , in order to familiarize ourselves with the issues..."

The letter continues on to state that the Attorneys are involved in a case at this time and that they:

> "...will give your case...full attention as soon as the ...is concluded."

It is estimated it will take some weeks to conclude the other case and therefore it is the advice of the above counsel to file this motion to dismiss without prejudice. Now that counsel has been provided for petitionar, but won't be available for weeks, it is not advisable to continue with an incomplete record , so it is prayed that this court grant the motion to dismiss without prejudice.

Sworn to before me

this 3 day of July, 1976

Daniel J Corp

NOTARY PUBLIC

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

Norman Butler

NORMAN BUTLER#24091
Box 149
Attica, New York
14011

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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Allen Alpert, Esq.
Manhattan Disrict Attorney's Office
155 Leonard Street
New York, New York 10013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NORMAN BUTLER, :

Petitioner, :

- against - : MEMORANDUM AND ORDER

HAROLD J. SMITH, Superintendent, : 76 Civ. 534
Attica Correctional Facility,

Respondent. :

- -x

KNAPP, D.J.

Petitioner, presently serving a term of life imprisonment at the Attica Correctional Facility for the murder of the Black Muslim leader Malcolm X, seeks his release on a writ of habeas corpus pursuant to 28 U.S.C. §2254. This application is based on the following claims:

(1) the exclusion of spectators and members of the press from the courtroom during the brief testimony of two of the People's witnesses violated petitioner's right to a public trial under the United States Constitution,

(2) the jury was improperly influenced by the receipt of evidence of the defendants' religious beliefs which had been introduced in order to show a motive for the murder,

(3) the Court, by rebuking counsel for one of petitioner's co-defendants in the presence of the jury, deprived petitioner of a fair trial, and

(4) the trial court's refusal to require the State to provide defendants with a list of the people who had been interviewed by the

police during the investigation of the murder, a list of the people who had testified before the grand jury, and a list of the people whom the State intended to call as witnesses at trial violated principles of fundamental fairness.

Three of the above claims (1,2 and 4) were fully briefed and argued on petitioner's direct appeal of his conviction and both the Appellate Division and the New York Court of Appeals specifically addressed the issues raised thereby, rejecting each of petitioner's objections in thorough, well-reasoned opinions. We see no reason to disturb the conclusions reached therein. The third claim - that of improper conduct on the part of the trial judge - was apparently never raised by petitioner on his direct appeal. Nevertheless, rather than dismissing said claim on the sole ground of failure to exhaust (28 U.S.C. §2254b and c), we have determined that on the merits nothing the trial judge did or said can reasonably be construed as depriving petitioner of a fair and impartial trial.

With respect to the merits of claims (1), (2) and (4), we share the reluctance - often expressed in this Circuit - of other "federal judges sitting in habeas corpus . . . to retry the case from the vantage point of their reflective wisdom". U.S. ex rel. Bruno v. Herold (2d Cir. 1969) 408 F.2d 125, 129. Of particular note in this respect is the fact that petitioner was tried and convicted ten years ago and the record we are asked to review has, of necessity, become quite cold. See U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1153, aff'd without opinion, 508 F.2d 837 (2d Cir. 1974), cert. den., 421 U.S. 920 (1975) (". . . this court

is very reluctant to second-guess the trial court's discretion on a cold record four years hence".) (emphasis added).

Before we discuss each of petitioner's claims in more detail, a brief sketch of the background facts is necessary to place these claims in their proper perspective.[1/]

Malcolm X, a prominent Black leader and important member of the Nation of Islam (commonly known as the Black Muslims), was brutally murdered on the afternoon of February 21, 1965 while addressing a meeting of his followers in the Audubon Ballroom in Manhattan. Prior thereto, he had split with the Nation of Islam in a bitter dispute, taking with him many of its members. On March 10, 1965 a New York County grand jury returned a one count indictment for Murder in the First Degree against Norman Butler (the petitioner herein), Thomas Hagan and Thomas Johnson, the three Muslims claimed to have shot Malcolm X repeatedly with pistols and a shotgun. Trial commenced on December 6, 1965 before Justice Marks and a jury and ended on March 10, 1966 with a verdict of guilty against all three defendants, each of whom were sentenced to life imprisonment. The judgments of conviction were unanimously affirmed by the Appellate Division, First Department on May 22, 1968 (People v. Hagan, Butler and Johnson, 29 A.D.2d 931) and by the Court of Appeals on April 16, 1969 (24 N.Y.2d 395). On October 27, 1969, the United States Supreme Court denied certiorari. Hayer a/k/a Hagan, et al. v. New York, 396 U.S. 886.

I. Exclusion of the Public and Press

Petitioner's primary ground of attack against his conviction

is that the temporary exclusion from the court of the public and members of the press during the testimony of two of the state's relatively minor witnesses was in violation of his Sixth Amendment right to a public trial. At one point in the presentation of the prosecution's case, an application was made to the Court on behalf of one Ronald Timberlake, who was scheduled to be the next witness, to clear the courtroom. A Mr. W. Eugene Sharpe, attorney for the witness, explained to the Court that Mr. Timberlake was "in mortal fear of testifying in an open courtroom because threats have been made on his life consistently since the incident which is at issue here at trial". Transcript, at 1273-4. Timberlake himself told the Court that he had received anonymous threatening telephone calls (Tr. 1282). Despite the fact that security measures had been taken in the courtroom since the inception of the trial, in that all spectators were searched for weapons before being admitted - a fact of which the Court reminded the witness - he remained steadfast in his refusal to testify unless the courtroom was cleared. So great was his fear of retaliation that an offer of police protection was rejected as inadequate. Nor would he agree to testify when threatened with contempt. Reluctant to accede to Timberlake's application, the Court ruled that he would have to take the witness stand, make his refusals and accept the consequences (Tr. 1278). The defendants, however, objected in concert, citing the prejudicial impact on the jury of a fearful witness' steadfast refusal to testify (Tr. 1281-7). After a short recess, the Court ordered all spectators and members of the press excluded during Timberlake's testimony (Tr. 1288). In support of his decision, he cited People v. Jelke (1954) 308 N.Y. 56,

63 for the proposition that the right to a public trial, although a basic privilege, has "never been viewed as imposing a rigid, inflexible strait jacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally further the administration of justice" (Tr. 1289). The court specifically found Timberlake sincere in his belief that testifying for the State would place him in mortal danger and concluded further that he would persist in his refusal to testify in a public courtroom, thus frustrating the adjudicatory process. Accordingly, the court concluded that the facts warranted the exercise of its inherent power to exclude (Tr. 1290-1). Somewhat later in the prosecution's case, an F.B.I. agent, John C. Sullivan, was briefly called to the stand for the purpose, inter alia, of corroborating Timberlake's earlier account of having retrieved one of the murder weapons - belonging to petitioner's co-defendant, Hagan - at the scene of the crime. In order to protect Timberlake's identity - which would of necessity be revealed in Agent Sullivan's testimony - the court again excluded the press and the public (Tr. 1768-72).

As noted by the courts in this and other Circuits, the Sixth Amendment right to a public trial is not absolute, but rather, must be balanced against other interests - such as protecting a witness from intimidation[2/] or embarrassment,[3/] maintaining the fairness and orderliness of the proceedings,[4/] or protecting trade secrets[5/] or the confidentiality of law enforcement techniques[6/] - which might justify exclusion. U.S. ex rel. Lloyd v. Vincent (2d Cir. 1975)

520 F.2d 1272, 1273-4, cert. den., U.S. . In the instant case, the record amply supports the trial court's finding as to the sincerity and depth of the witness' fear and its determination that the orderly administration of justice would be frustrated unless the courtroom was cleared. 7/ The background of and atmosphere at the trial was such that security measures had already been instituted, at least one juror had expressed fear for his personal safety when his identity had become known (Carter, Tr. 75-6) and the People's first witness, one Thomas, had been afraid to testify in the grand jury (Tr. 472). Indeed, the very nature of the state's evidence against the defendants disclosed an incredibly hostile and vicious climate of hate and revenge which set the stage for a brutal, political murder of a one-time leader now viewed as a traitor. Given such a climate, it is not at all surprising that one called to testify against those claimed to be responsible would fear for his life.

Equally significant is the relatively minimal duration of the exclusion, for as stated by the Court in U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1151, aff'd without opinion, 508 F.2d 837 (2d Cir. 1974) cert. den. 421 U.S. 920 (1975), in cases involving exclusion for the protection of a witness, it is the length of time of the exclusion, rather than the number of people excluded, that is important. Timberlake was only one of twenty-three prosecution witnesses; his entire testimony - which, as it related to petitioner, was merely cumulative of the testimony of several other witnesses - occupied 144 pages of a 4,414 page trial

record; Sullivan's testimony occupied only 21 pages; and the court-room was only closed for seven hours of a three month trial.[8/]

Moreover, petitioner has failed to show, much less suggest, how he was prejudiced by such a minimal and relatively insignificant, period of exclusion. Indeed, the Appellate Division on petitioner's direct appeal found it "inconceivable that a public hearing as to these witnesses would have induced potential evidence for the defense which the vastly greater publicly given testimony failed to evoke". People v. Hagen, et al., supra, at 932. We are constrained to agree. We also endorse as accurate the observation of the Court of Appeals that defendants were at least partially responsible for the exclusion order, in that they objected "to the only alternative open to the Judge: to swear the witness and hold him in contempt if he refused to testify". People v. Hagen, supra, at 399.

In conclusion, we note that Judge Neaher, in an unrelated case, was asked to reject the reasoning behind the New York Court of Appeals decision affirming this petitioner's conviction. He declined to do so, ruling that the exclusion of the public in petitioner's trial had been a "sensible accommodation to the rights of defendants, witnesses, and the integrity of the State's judicial process, and completely consistent with fundamental notions of due process and the generally recognized contours of the public trial right". U.S. ex rel. Smallwood v. LaValle, supra, at 1153, n. 12. Judge Neaher's decision was unanimously affirmed by our Court of Appeals. Id.,

508 F.2d 837, cert. den., 421 U.S. 920.

II. Admissibility of Evidence Concerning the Defendants' Membership in the Black Muslim Organization

Petitioner's second main claim is that the receipt into evidence of testimony concerning the defendants' membership in the Black Muslim organization, Malcolm X's break with the Muslims, and his founding of the Organization for Afro-American Unity unnecessarily inflamed the jury and tended to substitute collective culpability for a finding of individual guilt. After carefully reviewing the trial transcript, we agree with the state court's conclusion that such evidence was relevant for the specific purpose of establishing motive. People v. Hagan (1969) 24 N.Y.2d 395, 400. It was not utilized for any other purpose. In fact, a great deal of testimony of this ilk was offered by the defendants' own witnesses (e.g., Tr. at 2757-61, 2867-2871, 3028-9, 3247, 3277, 3284, 3287-9, 3291. Petitioner's guilt was not established by proof of the hostile sentiments of the Black Muslims or petitioner's membership in that group. That evidence merely provided a reason for the murder. Rather, his guilt was established by eyewitness testimony that he did in fact shoot Malcolm X. Without testimony establishing a motive, the murder would have appeared so bizarre as to call in question the accuracy of the testimony describing it. Petitioner has suggested no constitutional infirmity in the procedure followed, nor can we imagine any.

III. Trial Court's Conduct Towards Defense Counsel

Petitioner's claim that the trial judge's repeated rebuking

of defense counsel in the presence of the jury deprived him of an impartial trial was apparently never raised on his direct appeal, and thus must be dismissed for failure to exhaust 28 U.S.C. §2254(b). Were we to reach the merits, however, our decision would remain unchanged. Petitioner's contentions are stated in conclusory fashion, supported by only two citations to the record, both of which involve incidents concerning counsel other than his own. There is no allegation of any improper conduct on the judge's part with respect to his own counsel, Messrs. Williams and Chance. In any event, the two incidents referred to by petitioner reflect (1) an attempt by the judge to limit unduly long cross-examination, and (2) an attempt to curb counsel's own improper conduct. Not only did the court proceed in a cautious and restrained manner, but it was at pains to insure that none of the exchanges between it and counsel inured to the detriment of the defendants in the jury's eyes (Tr. 3638-9). Our review of the transcript reveals a long, arduous and emotion-charged trial which was remarkably free of inappropriate behavior or comment by the trial judge. Nothing he said or did can reasonably be construed as depriving petitioner of a fair and impartial trial.

IV. Failure to Disclose Witness Lists

Of the numerous motions made by defense counsel for disclosure of witness lists, only one was joined in by petitioner, the denial of which is the only issue now before us on his fourth claim. That motion was one made during the voir dire, for a list of all those individuals who would be called as witnesses for the State. There being no constitutional requirement that the prosecution provide

defendants with such a list,[9/] the sole question before us is whether the failure to disclose deprived petitioner of a fair trial. We have concluded that this question must be answered in the negative. In this regard, we note that the Court declined to order disclosure on the prosecutor's good faith representation that attempts had already been made by members of the Black Muslim organization to intimidate various potential witnesses and because the State feared that such efforts would increase in the event that witnesses' identities were disclosed; the prosecution did turn over to defense counsel any statements of a witness at the conclusion of that witness' direct testimony; in denying the defendants' motion for disclosure, the Court indicated that it would be favorably inclined to grant any requests for adjournments if during the cross-examination of any of the State's witnesses, defense counsel needed more time to investigate the witness, and the prosecutor voluntarily and in the interest of judicial economy 12 days before the State rested, provided defense counsel with a list of the names and addresses of everyone who had been interviewed in connection with the case.

For the reasons set forth above, the petition is denied and the case dismissed. Let judgment enter.

SO ORDERED.

Dated: New York, New York
July 26, 1976.

WHITMAN KNAPP

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

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

1. On April 19, 1976, and after service of respondent's brief, petitioner requested that he be furnished with the transcript of the trial record so as to prepare his Reply.

2. Efforts by my staff to locate a duplicate copy of said record with petitioner's previous attorneys were to no avail.

3. The Disrict Attorney's Office informed the Court that only one other transcript was extant, that being in the possession of the Supreme Court, New York County; however, that set only included Vols. 1-V, whereas the set lent to this Court by the D.A. included six volumes (the sixth volume being comprised of the final part of the trial court's charge, the verdict and photographic exhibits).

4. Since there was thus only one copy of Vol. VI and it appearing that nothing in the Petition made said volume relevant, we determined to forward only Vols. 1-V to Attica for petitioner's use in preparation of his Reply.

5. On May 10, 1976, Vols. I-V were forwarded to Attica, with instructions that they be returned after 10 days, the time provided for in the Rules for preparation of a Reply.

6. Three extensions of time - until July 21, 1976 - were granted to petitioner by the Court.

7. On July 13, 1976, the Court denied a motion by petitioner to dismiss his petition without prejudice. As we noted in our Memorandum and Order of that date, the purpose of said motion was to circumvent our previous denial of any further extensions of time within which to file petitioner's Reply brief, in that he expected to refile a second petition when he had more time. Specifically, he claimed that in order to adequately document a 13th hour contention that the trial judge behaved improperly towards defense counsel while charging the jury, he must have access to that part of the court's charge as was contained in Vol. VI. Since such a claim is not the proper subject of a Reply brief (not having been made heretofore) and because our reading of the charge disclosed nothing even arguably prejudicial, we denied his motion to dismiss without prejudice, citing the statutory policy against repetitious writs. (28 U.S.C. §2244).

2/ U.S. ex rel. Bruno v. Herold (2d Cir. 1969) 408 F.2d 125, cert. den., 397 U.S. 957

3/ Geise v. U.S. (9th Cir. 1958) 262 F.2d 151, cert. den., 361 U.S. 842, Melanson v. O'Brien (1st Cir. 1951) 191 F.2d 963.

4/ U.S. ex rel. Orlando v. Fay (2d Cir. 1965) 350 F.2d 967, cert. den. sub nom. Orlando v. Follette (1966) 384 U.S. 1008.

5/ Stamicarbon, N.V. v. American Cyanamid Co. (2d Cir. 1974) 506 F.2d 532.

6/ U. S. ex rel. Lloyd v. Vincent (2d Cir. 1975) 520 F.2d 1272, cert. den., U.S. , U.S. v. Bell (2d Cir.) 464 F.2d 667, cert. den., 409 U.S. 991 (1972).

7/ Petitioner contends - without citation of authority - that the trial court should have conducted a hearing, under oath, to develop more fully the reasons for Timberlake's refusal to testify in open court. Given the extent of the inquiry that was made by the court, such a hearing does not appear to be constitutionally mandated. U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1152-3, aff'd, 508 F.2d 837, cert. den., 421 U.S. 920 (1975). See also U.S. ex rel. Lloyd v. Vincent, supra, U.S. ex rel. Orlando v. Fay, supra and U.S. ex rel Bruno v. Herold, supra.

8/ As noted by the Appellate Division on the direct appeal, the period of public exclusion was less than 3% of the time taken for trial.

9/ Barrington v. Missouri (1907) 205 U.S. 483, 488, Thiede v. Utah Territory (1895) 159 U.S. 510, 514. See also U. S. v. Cannone (2d Cir. 1975) 528 F.2d 296.