UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ (Norman 3X Butler) and KHALIL ISLAM (Thomas 15X Johnson) Petitioners, -against- SUPERINTENDENTS OF OSSINING and CLINTON CORRECTIONAL FACILITIES, Respondents.	AFFIDAVIT IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS 80 Civ. 1345/1346 (TPG)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*CPL §440.10(1)(g) provides that:

> (1) At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
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> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

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

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

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

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

17. On February 15, 1978, at the oral argument on the motion to vacate the judgments, the Honorable Harold Rothwax termed Hagan's affidavit "frivolous." He stated that it was not significantly different than Hagan's trial testimony, and he adjourned the matter without date to give Mr. Kunstler time to submit a further affidavit from Hagan.

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

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

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

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

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

Butler and Johnson were obtained from the FBI in their unredacted form and were provided to Justice Rothwax. Nothing in these FBI documents supported Hagan's allegations regarding the identity of his accomplices; specifically, there was no mention or indication of, or reference to, any of the persons Hagan alleged were his accomplices.

Those FBI documents not on file in the FBI's New York office were not provided to Justice Rothwax. As we reported to the court, these documents, according to Steven Edwards, the FBI agent who coordinated the search for the documents, were on file in the FBI's headquarters in Washington, D.C., and given the volume of papers on file there, it would take a considerable period of time to obtain them. In any event, according to Agent Edwards, in all likelihood nothing in these documents would have corroborated the identity of the persons Hagan claimed were his accomplices. This was so because many of the documents were internal FBI memoranda which merely summarized the New York City Police Department's investigation into the murder, and which contained no original information developed by the FBI; others contained information developed by the FBI which paralleled information obtained by the New York City Police Department; and others referred to matters not relevant to

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

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

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

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

23. On September 6, 1978, further oral argument was had on the motion to vacate the judgments. At that time, Mr. Kunstler informed Justice Rothwax that he had located one of the persons identified by Hagan as his accomplice, and that he was making progress in his attempt to obtain a statement from this person. He requested additional time to continue to talk to this person, as well as to attempt to locate two of the other persons identified by Hagan. Over the People's objection, the court adjourned the matter to October 12, 1978.

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

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

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

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

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

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

The court observed that the question it had to resolve was whether the items submitted in support of the motion "create a probability that the original verdict in this case would have been otherwise had the jury considered any evidence therein contained..." The court concluded that Hagan's affidavits were merely "a recapitulation, although somewhat more specific, of his testimony at the original trial." In an apparent allusion to the FBI documents and to the failure of Butler and Johnson to produce statements from Hagan's

alleged accomplices, the court noted that "the information Mr. Hagan now proffers is uncorroborated by the testimony of any other witness either at present or at the time of the original trial." And, in rejecting Benjamin Goodman's affidavit, the court found that it was directly contradicted by Goodman's own testimony before the Grand Jury which indicted Butler and Johnson. The court also cited the Appellate Division's characterization of the evidence as "overhwelming" and stated that its review of the evidence showed "numerous" eyewitnesses who identified Butler and Johnson. In denying the motion to vacate the judgments, or, alternatively, for a hearing, the court concluded that "[Hagan's and Goodman's] affidavits, complete on their face, conclusively demonstrate that the offer of proof they contain is neither new nor so reliable as to create a probability of a more favorable verdict."

The court also rejected the suggestion of Butler and Johnson that the District Attorney be directed to conduct an investigation of Hagan's allegations. The court found it "unlikely that the persons whom affiant Hagan names would corroborate his allegations of their own accord." Further, said the court, any identification made thirteen years after the event would be open to serious doubt, especially since

such persons were never the object of suspicion despite thorough investigations of the murder by local, state and federal authorities.

The court concluded that it could not order the requested investigation because "the facts adduced by petitioners do not rise to the level of probable cause to believe that those named [by Hagan] were in any way connected with this crime." But, beyond the authority of the court, observed Justice Rothwax, "the district attorney has an obligation to the fair administration of public justice..." Justice Rothwax made it clear that he felt the District Attorney's Office had more than lived up to this obligation: "The court notes that the prosecutor has been forthcoming with government documents and has in no way obstructed the re-evaluation of this case. Were there reliable evidence which tended to support the conclusions that petitioners suggest, this Court is confident that the district attorney would undertake to ensure that no miscarriage of justice had occurred." As Justice Rothwax concluded, "this court being mindful of the responsibility which the discretionary nature of these motions places upon it, is convinced to a high degree of certainty that the facts which petitioners present do not suggest a miscarriage of justice in their case."

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

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

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

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

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

Allen Alpert

ALLEN ALPERT

Sworn to before me this
30th day of June, 1980

Marc Frazier Scholl

MARC FRAZIER SCHOLL
Notary Public, State of New York
No. 24-4690439
Qualified in Kings County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD ABDUL AZIZ (Norman 3X Butler) and KHALIL ISLAM (Thomas 15X Johnson), Petitioners, -against- SUPERINTENDENTS OF OSSINING and CLINTON CORRECTIONAL FACILITIES, Respondents.	80 Civ. 1345/1346 (TPG)

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

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

In order to be entitled to federal habeas corpus relief, a state prisoner must ground his request for relief on the contention that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2241(c)(3) and 2254(a). The

instant petition however, merely alleges in conclusory fashion that, "Petitioners are two black men who are presently illegally, unlawfully and unconstitutionally incarcerated in [two] New York State penitentiaries..." Petition at ¶1. There is no allegation that their custody is violative of any of their federal constitutional or statutory rights; indeed, neither the federal constitution in general or any of its specific provisions, nor federal statutory or case law, is mentioned, indicated, or referred to in any manner in the instant petition. While in the case of a pro se petitioner this failure might be overlooked as the forgivable neglect of an unschooled and inexperienced litigant unfamiliar with even the most rudimentary requirements of federal habeas corpus practice, such is certainly not the situation here. The instant petitioners are not proceeding pro se; rather, they are represented by experienced, able counsel who is undoubtedly fully conversant with the requirement that an application for a writ of habeas corpus must be grounded on a claim that petitioners' present custody is violative of their federal constitutional rights. In this circumstance, the failure to allege a federal constitutional violation is fatal to their application, and the petition for a writ of habeas corpus should therefore be dismissed.

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

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

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

2) that on the basis of the information contained in Hagan's second affidavit, the

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

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

If the instant petition is read as a claim that Hagan's affidavits constitute newly discovered evidence of petitioners' innocence, the petition must be dismissed because a habeas corpus proceeding is simply not available to inquire into this type of claim. Federal courts have jurisdiction over habeas corpus petitions only if the petition raises a question of "constitutional significance." Schaefer v. Leone, 443 F.2d 182, 184 (2nd Cir. 1971), cert. denied 404 U.S. 939 (1971). The writ will issue if the conviction upon which the petitioner is in custody was

obtained in a fundamentally unfair manner which deprived petitioner of due process of law in violation of the Fourteenth Amendment. Fay v. Noia, 372 U.S. 391 (1963). But, "... newly discovered evidence only warrants habeas corpus relief where it bears on 'the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state petitioner is not a ground for relief on federal habeas corpus.'" Mapp v. Clement 451 F. Supp. 505, 511 (S.D.N.Y., 1978), aff'd 591 F.2d 1330 (2nd Cir. 1979), cert. denied 99 S. Ct. 1428 (1979) (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)). Thus, even on the basis of an expansive interpretation of their petition - that Hagan's affidavits provide new evidence of their innocence - petitioners are not entitled to habeas corpus relief, for there is no contention that this "newly discovered evidence" indicates that petitioners' convictions were obtained in an unconstitutional manner.

Even if federal habeas corpus relief were available when new evidence is discovered which is relevent merely to the question of the petitioner's guilt, the instant petitioners are not entitled to this relief. After carefully reviewing the affidavits submitted by

petitioners and after comparing them with Hagan's testimony at the trial, Justice Rothwax concluded that, "These affidavits, complete on their face, conclusively demonstrate that the offer of proof they contain is neither new nor so reliable as to create a probability of a more favorable verdict." Petitioners have offered nothing to warrant this Court in disregarding the state court's determination. The state court's determination that Hagan's affidavits were merely a "recapitulation" of his trial testimony and that, in any event, they were not sufficiently "reliable" to have affected the verdict should be given presumptive weight by this Court.

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

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

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

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

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

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

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

From the beginning of the motion in December, 1977 to its conclusion eleven months later, Justice Rothwax repeatedly indulged petitioners in their efforts to obtain evidence that would meet the requriements of the statute. For example, at the outset, the court could have

denied the motion after receiving Hagan's first affidavit, an affidavit which the court concluded did not significantly differ from Hagan's trial testimony, and which the court termed "frivolous." Instead, however, the court adjourned the motion without date, thus affording petitioners whatever time they felt they needed to produce additional support for their motion. Similarly, months later, when Mr. Kunstler reported that he needed additional time to talk to the persons Hagan said were his accomplices, the court gave him an additional five weeks. There is, moreover, nothing to indicate that petitioners would not have been afforded even more time if they had requested it. In fact, the proceedings drew to a close not because of the impatience of the court to decide the matter (an inclination which would, in any event, have been fully warranted), but because petitioners abandoned their attempts to obtain the information for which they had requested that the motion be adjourned. Although Mr. Kunstler had requested additional time to talk further with one of Hagan's alleged accomplices (who had already denied to petitoners' representative any involvement in the murder of Malcolm X) and to attempt to locate and talk to the other alleged accomplices, he admitted that he had

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

Moreover, the abandonment by petitioners of the attempt to obtain statements from Hagan's alleged accomplices meant that Hagan's affidavit was (as Justice Rothwax observed in his opinion denying the motion, a mere "recapitulation, although somewhat more specific, of his testimony at the original trial") as the court further noted, "uncorroborated by the testimony of any other witness either at present or at the time of the original trial." Recognizing the weakness of their position,

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

based as it was solely on Hagan's affidavit, petitoners attempted to have the People gather evidence corroborative of Hagan's allegations. (Mr. Kunstler insisted, for example, that the District Attorney's Office is "better at getting confessions" than he is). But, as the court correctly noted in its opinion, it was petitioners' burden, not the People's, to bring forth evidence in support of their motion. The insistence of the court that petitioners satisfy this burden in order to be entitled to the relief they sought under the statute, and its refusal to shift this burden to the People, in no way deprived petitioners of due process of law.

* * *

In sum, the application for a writ of habeas corpus is totally without merit. There is no claim of a denial of petitioners' federal constitutional rights, nor do petitioners assert the reasons that their custody is supposedly constitutionally invalid. Further, a claim merely that newly discovered evidence indicates that petitoners are innocent does not, by itself, raise a constitutional issue cognizable in a federal habeas corpus proceeding. In any event, Hagan's affidavits do not

constitute "new" evidence nor are they sufficiently reliable to render a different verdict probable. The petitioners were not entitled to have the District Attorney's Office conduct an investigation in corroboration of Hagan's allegations, for the burden to allege sufficient new evidence was petitioners'. Moreover, the manner in which the state court denied the motion to vacate the judgments did not deny petitioners due process of law.

CONCLUSION

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

Respectfully submitted,

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

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys
Of Counsel

July 2, 1980

Exhibit "A"

SUPREME COURT OF THE STATE OF NEW YORK
PART 30

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- MUHAMMAD ABDUL AZIZ (Norman 3X Butler), and KHALIL ISLAM (Thomas 15X Johnson), Defendants-Movants.	:	AFFIRMATION IN OPPOSITION TO MOTION TO VACATE JUDGMENTS INDICTMENT NUMBER 871/65

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

ALLEN ALPERT, an attorney duly admitted to practice law before the courts of this State, hereby affirms under penalty of perjury that:

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

2. I am familiar with the prior papers and proceedings had herein, and submit this affirmation, together with the accompanying affidavit of Detective Gene Roberts and memorandum of law which are attached hereto and made a part hereof, in opposition to defendants' motion to vacate their judgments of conviction pursuant to Criminal Procedure Law § 440.10.

3. In the afternoon of February 21, 1965, inside the Audubon Ballroom in Manhattan, Malcolm X was murdered by three men who shot him repeatedly with a shotgun and two pistols.

4. On March 10, 1965, a New York County Grand Jury returned a one count indictment against Norman 3X Butler, Thomas Hagan and Thomas 15X Johnson, charging them with Murder in the First Degree for the murder of Malcolm X. Indictment No. 871/65.

5. 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.

6. On May 22, 1968, the Appellate Division, First Department, unanimously affirmed the judgments of conviction (29 A.D.2d 931 [1st Dept., 1968]).

7. On April 16, 1969, the Court of Appeals unanimously affirmed the judgments (24 N.Y.2d 395 [1969]).

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

9. The transcript of the proceedings at the trial of Butler, Hagan and Johnson is incorporated by reference herein and made a part of this affirmation.

WHEREFORE, based on the foregoing, and on the accompanying affidavit of Detective Gene Roberts which is attached hereto and made a part hereof, and for the reasons set forth in the accompanying memorandum of law, it is respectfully requested that the motion be denied.

Dated: New York, New York
January 18, 1978

ALLEN ALPERT

*On July 26, 1976, Butler's petition for a Writ of Habeas Corpus was denied by Judge Whitman Knapp. 416 F. Supp. 1151, S.D.N.Y. On May 26, 1977, the United States Court of Appeals for the Second Circuit denied Butler a certificate of probable cause, thereby precluding further appeal.

On July 1, 1976, Butler moved to vacate his judgment of conviction on a ground other than those raised in the instant motion. On July 12, 1976, Judge Robert Haft denied the motion, and on September 9, 1976, the Appellate Division, First Department, denied Butler leave to appeal.

SUPREME COURT OF THE STATE OF NEW YORK
PART 30

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

AFFIDAVIT

MUHAMMAD ABDUL AZIZ (Norman 3X Butler),

and

KHALIL ISLAM (Thomas 15X Johnson),

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

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

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

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

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

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

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

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

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

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

Dated: New York, New York
January 12, 1978

GENE ROBERTS

HENRY J. STEINGLASS NO. 3831277
Notary Public, State of New York
Qualified in Orange County
My Commission Expires March 30, 1978

SUPREME COURT OF THE STATE OF NEW YORK
PART 30

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

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

INDICTMENT NUMBER
871/65

MEMORANDUM IN OPPOSITION TO MOTION TO VACATE JUDGMENTS

PRELIMINARY STATEMENT AND HISTORY OF THE CASE

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, Butler, Hagan and Johnson were charged by indictment with Murder in the First Degree for the murder of Malcolm X. New York County Indictment Number 871/65.

On March 10, 1966, Butler, Hagan and Johnson were each found guilty after trial by jury (Marks, J., presiding) of Murder in the First Degree. On April 14, 1966, they were each sentenced to life imprisonment. Their convictions were unanimously affirmed by the Appellate Division, First Department, 29 A.D. 2d 931 (1st Dept. 1968), and by the Court of Appeals, 24 N.Y. 2d 395 (1969).* The United States Supreme Court denied certiorari, 396 U.S. 886 (1969).

On December 5, 1977, Butler and Johnson moved, pursuant to Criminal Procedure Law §440.10 (1)(g), to vacate their judgments of conviction. Their motion is predicated on the affidavit of Thomas Hagan, dated November 30, 1977. In his affidavit, Hagan states that neither Butler nor Johnson had anything to do with the murder of Malcolm X, but that he, Hagan, along with four men he identifies as Brothers Lee, Ben, Willie X and Willbour, planned and committed the murder. Butler and Johnson contend that the information contained in Hagan's affidavit constitutes "newly discovered evidence" and that, had the jury been aware of this information, it probably would have rendered a verdict more

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

favorable to them.

On December 8, 1977, Butler and Johnson filed a supplemental notice of motion in which they moved, pursuant to Criminal Procedure Law §440.10 (1)(b),(f),(g) and (h) to vacate their judgments of conviction on the ground that the People did not inform the defendants, either before or during the trial, that one of the persons photographed with Malcolm X within moments of the shooting was in fact an undercover police officer named Gene Roberts. Butler and Johnson contend that the witholding of this "vital information" "violates every principle of fair play as well as all of the decisional law in this area" and "is such a denial of due process of law that it is difficult to think of a more heinous one." Affidavits of Mr. Kunstler, December 8, 1977, ¶ 4, and December 19, 1977, ¶ 16.

In consequence, Butler and Johnson request that the indictment against them be dismissed, or, in the alternative that a new trial be granted or that an evidentiary hearing be held. As the following discussion demonstrates, however, their contentions are without merit and do not satisfy the statutory requirements. Their motion should therefore be denied.

POINT I

HAGAN'S AFFIDAVIT DOES NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE. THE INFORMATION CONTAINED IN THE AFFIDAVIT IS, IN SUBSTANCE, NO DIFFERENT FROM HAGAN'S TESTIMONY AT THE TRIAL. THE ONLY RELEVANT ADDITIONAL INFORMATION IN THE AFFIDAVIT, I.E., HAGAN'S IDENTIFICATION OF HIS ALLEGED ACCOMPLICES AS "BROTHERS LEE, BEN, WILLIE X AND WILLBOUR," IS NOT OF SUCH CHARACTER AS TO CREATE A PROBABILITY THAT, HAD IT BEEN TESTIFIED TO AT TRIAL, THE VERDICT WOULD HAVE BEEN MORE FAVORABLE TO BUTLER OR JOHNSON.

Introduction

Criminal Procedure Law §440.10 (1)(g) provides that a court may vacate a judgment of conviction if new evidence, which is discovered after the entry of the judgment, is of such character as to render it probable that, had the evidence been presented at the trial, the verdict would have been more favorable to the defendant. Butler and Johnson contend that Hagan's affidavit satisfies this statutory requirement and entitles them to have their judgments vacated. As the following discussion demonstrates, however, Butler and Johnson are wrong.

A. The Information Contained in Hagan's Affidavit is Essentially the Same as Hagan's Testimony at the Trial.

In his affidavit, Hagan alleges that Butler and Johnson had nothing to do with the murder of Malcolm X. Hagan states that he and four people he identifies as Brothers Lee, Ben, Willie X and Willbour planned and committed the murder. Hagan's affidavit is very little more than a mere repetition of the testimony he gave at trial.

At trial, Hagan, testifying in his own behalf, denied that he was involved in any manner in the murder of Malcolm X (Hagan: 2675-2754).* He declared that he had not seen Butler or Johnson in the Audubon Ballroom in the afternoon of Febraury 21, 1965, the day of the murder (Hagan: 2690,2752-3), and insisted that it was not until sometime after his own arrest that he, for the first time in his life, saw Butler or Johnson (Hagan: 2690, 2751-2).

Subsequently, Hagan was called as a defense witness by Butler (Hagan: 3135-42). Hagan testified that he had had a conversation with Butler and Johnson that very day in the detention cell adjacent to the courtroom (Hagan: 3144, 3147-9). He said that he had told his co-defendants that he knew they had nothing to do with the murder of Malcolm X because he himself took part in the slaying, and that he intended to exculpate them because they were completely innocent (Hagan: 3145, 3149). Hagan said that he was testifying of his own free will because, "I just want to tell the truth, that's all" (Hagan: 3143). He admitted that the testimony he had previously given at the trial was a lie (Hagan: 3163-4, 3171).

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*Parenthetical page and name references are to the minutes of the testimony at trial.

Hagan then testified that Butler and Johnson had nothing to do with the murder of Malcolm X (Hagan: 3146), and that prior to February 21, 1965 he did not know and had never seen either Butler or Johnson (Hagan: 3147). According to Hagan, a man, whose name he refused to divulge, approached him in early February, 1965, and offered him money to kill Malcolm X (Hagan: 3152, 3154, 3161). This man was not a Black Muslim, and did not say why he wanted Malcolm killed (Hagan: 3162). Hagan refused to say how much money he had been offered, and claimed that he never actually received any money; but, he insisted that money was his motive for killing Malcolm X (Hagan: 3154, 3161, 3239).

Hagan testified that, besides himself, three other persons were involved in the slaying (Hagan: 3175-6, 3236-7).* Although Hagan testified that he knew the identities of the people involved with him in the plot, he refused to divulge them (Hagan: 3145, 3151-2, 3155, 3157, 3219). Neither he nor these other people, Hagan stated, were Black Muslims (Hagan: 3155, 3169).

Hagan said that the plan, which he and the others had rehearsed, called for two men with pistols to sit in the first row of the ballroom and a man with a shotgun to sit in the fourth row. A fourth man, sitting

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*Earlier in his testimony on behalf of Butler, Hagan had stated that, besides himself, four other people were involved in the murder (Hagan: 3155). In his affidavit, he also puts the number of persons involved at four, in addition to himself.

in the rear, was to start a disturbance by shouting, "Get your hand out of my pocket"; this action was intended to draw the stage guards away from Malcolm and towards the area of the disturbance, and was the cue for the man with the shotgun and then the two men with the pistols to open fire on Malcolm (Hagan: 3156, 3178). A crude "smoke bomb", consisting of pieces of film placed inside a man's sock, which Hagan admitted preparing, was to be ignited as a further diversionary tactic by the man who shouted that his pocket was being picked (Hagan: 3176-8). The scheme, Hagan said, worked as they had anticipated it would (Hagan: 3160-1).

Hagan admitted that he was one of the two men sitting in the first row (Hagan: 3156), that he had a .45 calibre automatic pistol (People's Exhibit 3), and that he shot Malcolm X with that gun (Hagan: 3150-1, 3157, 3161). But, Hagan denied that he was the person who had stood up in the audience before the shooting and shouted at the person sitting next to him, who the People's witnesses had identified as Butler, "Get your hand out of my pocket" (Hagan: 3151). He admitted, however, that the person whose job it was to cause the diversionary disturbance was "about my size, height and complexion" and looked "more or less" like him (Hagan: 3174-5, 3237).

Hagan also admitted that the person sitting next to him had a German Luger automatic pistol, and that that person also shot Malcolm X (Hagan: 3157, 3233, 3235). Hagan refused to reveal the identity of the person with the

German Luger, but he testified that it was not Butler (Hagan: 3157). He did say, however, that he and this person had, by pre-arrangement, met at a bus terminal in New York on the day of the murder and arrived together at the Audubon Ballroom at approximately 2:00 p.m. (Hagan: 3156, 3233). Hagan likewise refused to reveal the name of the man with the shotgun, but he stated that Johnson was not this person (Hagan: 3159). While refusing to reveal the name of the man who wielded the shotgun, Hagan did, however, give a physical description of that man. Hagan explained that he was doing so only because the People's witnesses had already given an accurate description of the person with the shotgun (Hagan: 3157, 3174).

Thus, almost all of the information contained in Hagan's affidavit had been presented to the jury by Hagan when he testified at the trial: Hagan's trial testimony fully exonerated Butler and Johnson of any involvement in the murder of Malcolm X; Hagan implicated himself in the murder; and, Hagan provided the jury with a great many details pertaining to the planning and execution of the assassination. The only relevant difference between Hagan's trial testimony and his affidavit (aside from several inconsistencies and contradictions), is that, whereas at trial Hagan was unwilling to identify any of the people he claimed were his confederates, he has now, some twelve years after the trial, "identified" them by the first names he says he knew them by and is, according to

Mr. Kunstler's affidavit of December 5, 1977, para. 10, willing to reveal their "names and last known addresses."*

The revelation by Hagan of the names of the people he claims were his confederates in the murder of Malcolm X does not transform the statements in his affidavit from mere repetition of his trial testimony into newly discovered evidence of a kind which would probably have resulted in a more favorable verdict to Butler or Johnson. The essence of Hagan's testimony at trial, given substance by reference to considerable detail, was that Butler and Johnson were not involved in the murder of Malcolm X, and that he, Hagan, knew this because he, together with other people whose identity he knew, were the ones who planned and carried out the murder. This too, is the essence of Hagan's affidavit. Hagan's belated willingness to pronounce the names of the persons he says planned and committed the murder of Malcolm X is nothing more than a supplemental detail to the evidence he had already given at the trial.

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*Notably, although Butler and Johnson have filed a total of eight affidavits in support of this aspect of their motion, there is no further identification of Hagan's alleged accomplices other than Hagan's vague, initial reference to them as "Brothers Lee, Ben, Willie X and Willbour." Moreover, even if these persons had been identified with specificity, Butler and Johnson would still not prevail. This is so because, in the context of this case, mere identification by Hagan of his alleged confederates is simply not evidence of a character which would probably result in a verdict more favorable to Butler or Johnson. See Point IB, infra.

B. Even if Hagan's Affidavit is Not Simply a Restatement of His Trial Testimony, the Additional Information Contained in the Affidavit Would Not, When Compared with the Overwhelming Evidence of Butler's and Johnson's Guilt Adduced at the Trial, Have Rendered Probable a Verdict More Favorable to Butler or Johnson.

Assuming that the information contained in Hagan's affidavit, specifically including his identification of his criminal companions as "Brothers Lee, Ben, Willie X and Willbour", is more than a mere repetition of the testimony he gave at trial, it is not, when compared with the evidence of Butler's and Johnson's guilt, "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable" to Butler or Johnson. CPL § 440.10 (1)(g). See also, People v. Crimmins, 38 N.Y. 2d 407, 412 (1975).

In the case at bar, the evidence against Butler and Johnson was overwhelming. Indeed, on their direct appeals, the defendants did not contest the sufficiency or strength of the evidence against them. The Appellate Division found that their guilt had been "overwhelmingly established", People v. Hagan, et al, supra, 29 A.D. 2d at 931, and the Court of Appeals characterized the People's

proof as "abundant", People v. Hagan, et al, supra, 24 N.Y. 2d at 397. These characterizations were fully justified.

Several witnesses identified Butler and Hagan as the people who created the diversionary "pocket-picking" incident which was designed to, and did, draw Malcolm X's bodyguards away from him. JASPER DAVIS testified that he was sitting towards the front of the auditorium in the third seat from the aisle waiting for Malcolm's speech to begin when a man he identified as Butler sat down next to him and talked with him for a few minutes. Then another man arrived and sat in the aisle seat next to Butler. Several minutes later, as Malcolm began to speak, this other man jumped up and said to Butler, "Take your hand out of my pocket" (Davis: 1093-1100). CARY THOMAS testified that Butler and Hagan, each of whom he had seen on prior occasions in a Muslim Mosque in Manhattan, were sitting directly in front of him when, just as Malcolm began to speak, Hagan stood up and asked Butler, "Man, what are you doing with your hand in my pocket?" (Thomas: 235-8). FREI WILLIAMS testified that, two or three rows behind, him two men, one of whom he identified as Butler, got into an argument when one accused the other of trying to pick his pocket (Williams: 1513-6).

Similarly, several witnesses testified that as the attention of the crowd was drawn to this disturbance, Johnson fired a sawed-off shotgun at Malcolm X from the front of the auditorium near the stage. Cary Thomas testified that he heard the blast of a shotgun coming from near the stage. Thomas looked toward the stage, and saw a man facing the stage standing just under where Malcolm had been. The man then turned and faced the audience, and Thomas saw that he was holding a sawed-off shotgun in his hand. Thomas identified this man, who he had seen several times in the Muslim's Manhattan Mosque, as the defendant Thomas 15X Johnson (Thomas: 239-42). Fred Williams testified that as Malcolm tried to quell the disturbance, he heard a shotgun blast from the front near the stage, and immediately shoved his wife to the floor and protectively bent over her. When he looked up, after hearing another shotgun blast and some pistol shots, he saw a man, whom he identified as Johnson, twelve to fourteen feet away, facing the audience and holding a sawed-off shotgun in his hand (Williams: 1517-22). And VERNAL TEMPLE testified that when he arrived at the Audubon Ballroom at 11:00 A.M. on the morning of the murder, he saw Thomas 15X Johnson, a man whom he had previously seen at a Muslim Mosque in Chicago, already inside the ballroom (Temple: 662-5,799).

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

After firing repeatedly at Malcolm X, Butler and Hagan turned and fled toward the rear exit, observed by Temple and De Pina (Temple 681-4; De Pina: 816-22), and chased by GEORGE WHITNEY, JOHN DAVIS, RONALD TIMBERLAKE, and Blackwell (Whitney: 955-8, 961-2; Davis: 1230-5; Timberlake: 1310-7; Blackwell: 1622-5). As Blackwell chased Butler and Hagan, he ran into Thomas 15X Johnson who turned and ran into the ladies' lounge (Blackwell: 1625-8).

In the face of such devastating and conclusive proof of guilt, any evidence sufficient to give rise to a "probability, as opposed to speculative possibility", People v. Crimmins, supra, 38 N.Y 2d at 418, that the jury's verdict would have been more favorable to the defendants had the jury received the evidence, must be extraordinarily important to the rendition of the verdict and compellingly persuasive of the defendants' innocence. In the posture of this case, Hagan's testimony as to the identities of his alleged confederates was neither of these.

The crucial aspect of Hagan's testimony was not that certain named people killed Malcolm X, but that Butler and Johnson had nothing at all to do with the murder of Malcolm X. This aspect of his testimony was set forth by Hagan for the jury's consideration. See Point IA, supra. It was undoubtedly evaluated by the jury in the context of all the other evidence in the case, and was rejected by the jury as not worth belief.

Nor would Hagan's identification of the persons he said acted with him to murder Malcolm X have been likely to render his exculpation of Butler and Johnson more believable. At trial, Hagan repeatedly professed that his only purpose in testifying as he did was to exonerate two men, Butler and Johnson, who he knew to be innocent. He was not concerned with bringing to justice those who were responsible for the murder of Malcolm X, but he could not

sit idley by, he explained, while two innocent people were wrongly convicted. He felt compelled to tell "the truth" about the murder; and if, in exonerating Butler and Johnson, he necessarily implicated himself, then so be it. Hagan thus presented himself to the jury as an heroic figure, a martyr willing to "take the weight" in order to clear the names of two people wrongly accused. It would have been out of character, and therefore less believable to a jury, for a person casting himself in such a role to inculpate others, to sacrifice one group for the benefit of another. Hagan's refusal to identify the others who he said acted with him was entirely consistent with the image he sought to convey to the jury. Identification of the others would have been jarring and discordant. While it might have added some small degree of specificity to his testimony, it would have made him, and his testimony, highly suspect in the eyes of the jury.

In sum, Hagan's affidavit is identical, in its important respects, to the testimony he had given at the trial. His affidavit does little more than repeat that testimony. Hagan's identification of his alleged accomplices as "Brothers Lee, Ben, Willie X and Willbour" is only a minor supplement to his trial testimony - testimony heard, considered and rejected by the jury. There is no probability, especially when viewed against the overwhelming evidence of Butler's and Johnson's guilt, that if these "identifications" had been before the jury, the jury's verdict would have been more favorable to Butler or Johnson.

POINT II

BUTLER AND JOHNSON ARE NOT ENTITLED TO HAVE THEIR JUDGMENTS VACATED BECAUSE THEY WERE NOT TOLD THAT ONE OF THE PERSONS PRESENT WHEN MALCOLM X WAS MURDERED WAS AN UNDERCOVER POLICE OFFICER.

Butler and Johnson also contend that their judgments should be vacated, pursuant to Criminal Procedure Law §440.10 (1) (b), (f), (g), and (h), because they had not been informed that one of the persons present in the Audubon Ballroom when Malcolm X was murdered was an undercover police officer, Detective (then Patrolman) Gene Roberts.*

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*In pertinent part, §440.10 provides:

> (1) At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that ...
>
> (b) The judgment was procured by duress, misrepresentation or fraud on the part of... a prosecutor or a person acting for or in behalf of ... a prosecutor; or ...
>
> (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or
>
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

They contend, generally, that "to hide from the defendants the identity of an eyewitness who was an undercover police agent violates every principle of fair play as well as all of the decisional law in this area." Mr. Kunstler's affidavit of December 8, 1977. Butler and Johnson claim, primarily, that if Detective Roberts had testified at the trial he "would have added substance to the defense theory that the murder of Malcolm X was brought about or instigated by the New York City Police Department and other law enforcement agencies...", and that Roberts "could have exculpated" them. Mr. Kunstler's affidavit of December 19, 1977, para. 9.

As the trial record irrefutably shows, however, the prosecutor, although not compelled to do so by constitutional mandate, statutory requirement or court order, on his own provided defense counsel with a list in alphabetical order of the names and addresses of everyone who had been present in the Audubon Ballroom when Malcolm X was murdered and who had been interviewed in connection with the investigation of the case. This list was provided when the People still had twelve witnessess to call on its direct case and when the defense was twelve days away from beginning its case (1795). Included in this list was the name "Roberts, Gene" and the address "3983 Barnes Pl., Bx." (4266-70). It is thus simply not correct to argue that the People had hidden Gene Roberts from the defendants.* Nor were the People under any obligation to inform

*Furthermore, that Gene Roberts had been an undercover police officer in Malcolm X's organization and that he had been
(continued on next page)

the defense that Gene Roberts was an undercover police officer. Butler and Johnson point to no authority - and, indeed, there is none - which requires the People to provide the defense with any witness who does not possess exculpatory evidence. And, as the discussion which follows demonstrates, Detective Roberts' testimony would not have exculpated Butler or Johnson.

Moreover, in support of their contentions that Detective Roberts would have helped them to establish their defense and that he could have exculpated them, Butler and Johnson set forth little more than conjecture and supposition. For example, they have concluded that one o more police agencies brought about or instigated Malcolm X's murder. Their conclusion is based only on Police Officer GILBERT HENRY'S testimony at the trial that at the time of the murder he was present in a room near the Audubon Ballroom and had with him a walkie-talkie with which he was to communicate in the event of trouble with another police officer stationed at the nearby Columbia University-Presbyterian Medical

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*(from previous page)
present when Malcolm X was murdered, first became public knowledge approximately seven years ago when Roberts testified at the trial of People v. Shakur, et.al., the so-called "Panther 21" case. New York County Indictment Number 1848 1/2/69. Butler and Johnson contend that this information constitutes "newly discovered evidence". However, nowhere do they allege anything in satisfaction of their statutory burden to move with due diligence after the discovery of what they contend to be new evidence.

Center; on Detective Roberts' testimony given at a subsequent, unrelated trial, that fewer police officers were present in and around the Audubon Ballroom on the day of the murder than were usually present when Malcolm X spoke; and on the Final Report of United States Senate Select Committee to Study Govermental Operations with Respect to Intelligence Activities which reported on the efforts of the Federal Bureau of Investigation to cause disruption within certain groups, including the Nation of Islam. Assuming the truth of these factors, they do not, either separately or in confluence, warrant or compel the conclusion that any law enforcement agency was involved in any way in Malcolm X's assassination. In fact, there is not a scintilla of evidence to support the incredible contention that the New York City Police Department or any other law enforcement agency brought about, instigated or was otherwise involved in the murder of Malcolm X.*

*Indeed, the contention that one or more law enforcement agencies were involved in Malcolm X's murder is inconsistant with the statements of Hagan, relied on by Butler and Johnson at trial and in the instant motion, that Hagan and "Brothers Lee, Ben, Willie X and Willbour" planned and carried out the murder. Even if one were to cast away logic and common sense and to conclude from the fantasy postulated by Butler and Johnson that various law enforcement agencies were somehow inclupated as the instigators or passive observers of Malcolm X's murder, Butler and Johnson would still not be exonerated. The involvement of law enforcement agencies in such a role is not inconsistent with the involvement of Butler and Johnson as the actual murderers of Malcolm X, nor does it lessen their complicity nor diminish their criminal responsibility.

Nor, would the testimony of Detective Roberts have added substance to this contention. As the accompanying affidavit of Detective Roberts makes clear, the detective was not involved in the murder of Malcolm X and was not aware that anyone had planned any action against Malcolm X. And, as he further states in his affidavit, Detective Roberts does not have any knowledge, belief or suspicion, or any reason to have such belief or suspicion, that the New York City Police Department or any other law enforcement agency was involved in any manner in the murder of Malcolm X.

Equally untenable is the contention that Detective Roberts could have exculpated Butler and Johnson had he testified at the trial. Butler and Johnson allude to "sharp variances" between the testimony they say Roberts would have given had he been called to testify and the testimony of witnesses who did testify for the People. Mr. Kunstler's affidavit of December 19, 1977, para. 9. They cite as their primary example the testimony of Detective Roberts at the trial of People v. Shakur, et. al, that as Malcolm X began to speak there was a disturbance "near the front of the auditorium" in which one person hollered to another, "Get your hand out of my pocket." Mr. Kunstler, in his affidavit of December 19, 1977, para. 11, quotes Cary Thomas, one of the People's witnesses at the instant trial, as testifying that this disturbance occurred "in the rear" of the auditorium. He argues that this "enormous disparity", had it been known to the jury, would probably have resulted in a verdict more favorable to Butler and Johnson.

In fact, there was no such disparity between what Detective Roberts would have testified to and what Cary Thomas did testify to. Movants' argument is based on a misleading interpretation of Cary Thomas' testimony. Thomas testified that the disturbance occurred "10 to 15 rows from the stage" (Thomas: 384). In an auditorium which was approximately 180 feet long from the front of the stage to the rear wall (see Trial Transcript pp. 4224-5, People's Exhibit 1, Diagram), Thomas' testimony was entirely consistent with Detective Roberts' that the disturbance took place "near the front" of the auditorium. Moreover, Thomas never testified that the disturbance took place "in the rear". The words "in the rear" were contained in a question posed to Thomas on cross-examination and designed to elicit not where the disturbance took place, but how many people stood up from the audience when the disturbance began.*

In any event, Detective Roberts would not have exculpated Butler or Johnson if he had testified at the trial. As he states in his affidavit, Detective Roberts is not in possession of any information, nor does he have any reason to believe or suspect, that Butler or Johnson did not kill Malcolm X.

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* The relevant exchange is as follows:

Q. There came a time when Malcolm X stood up on the platform, is that correct?

A. Yes.

Q. And just prior to that or at that time did two men stand up in the rear and start some colloquy or fight?

A. One man stood up.

Q. One man stood up?

A. Yes. (Thomas: 386).

Nothing in their moving papers supports movants' contentions that the prosecutor engaged in any misrepresentation or fraud, or that, if he did, their convictions were brought about by such misconduct; or that improper or prejudicial conduct, not appearing on the record, occurred; or that, if it did, reversal of the judgments of conviction would consequently be "required" on appeal. Likewise, nothing supports the contention that Detective Roberts possesses "newly discovered evidence" which, if the jury had heard it, would probably have resulted in a more favorable verdict; or that the failure to inform the defense of the identity of Detective Roberts violated any of their federal or state constitutional rights. Indeed, the evidence is all to the contrary. None of Butler's or Johnson's rights, constitutional, statutory or decisional law, were violated. Had Detective Roberts testified, he would not have provided any evidence of such character as to render it probable that the verdict would have been more favorable to Butler or Johnson.

Statement of Case

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

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

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

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

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

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

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

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

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

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

Points of Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgments should be affirmed.

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

Judgments affirmed.

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

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

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

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

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 David, 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-

SUPREME COURT OF THE

STATE OF NEW YORK

PART 30

THE PEOPLE OF THE STATE
OF NEW YORK,
Respondent,

against

MUHAMMAD ABDUL AZIZ
(Norman 3X Butler).

and

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

Indictment Number 871/65

AFFIRMATION,
AFFIDAVIT, and
MEMORANDUM OF LAW

Form 39-10M-703326(72) 346

District Attorney
County of New York
155 Leonard Street
New York, New York

212-732-7300

9-78
see 9-d 9/C,

Exhibit "B"

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 35

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

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SUPPLEMENTARY MEMORANDUM
IN OPPOSITION TO MOTION TO
VACATE JUDGMENTS

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

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 35

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

SUPPLEMENTARY MEMORANDUM IN OPPOSITION TO MOTION TO VACATE JUDGMENTS

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Butler and Johnson have not shown, however, that the description by Hagan of his alleged accomplices in the manner stated in his February 25, 1978 affidavit is evidence "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to [them]" CPL Section 440.10(1)(g). Indeed, the indications are all to the contrary.

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

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

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

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

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

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

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

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

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

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

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

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

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

X X X

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

CONCLUSION

The motion should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
County of New York
55 Leonard Street
New York, New York 10013
(212) 732-7300

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys
of Counsel

April, 1978

Exhibit "C"

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

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- MUHAMMAD ABDUL AZIZ (Norman 3X Butler), and KHALIL ISLAM (Thomas 15X Johnson), Defendants-Movants.	SUPPLEMENTARY AFFIRMATION IN OPPOSITION TO MOTION TO VACATE JUDGMENTS Indictment Number 871/65

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

ALLEN ALPERT, an attorney duly admitted to practice law before the courts of this State, hereby affirms under penalty of perjury that:

1. This affirmation, and the accompanying affidavit of Judge Herbert Stern and the memorandum of law which are attached hereto and made a part hereof, are submitted in opposition to defendants' motion to vacate their judgments of conviction pursuant to Criminal Procedure Law §440.10. These papers are submitted in conjunction with respondent's original response, filed on February 9, 1978, and with respondent's first supplemental response, filed in April, 1978.

2. I have personally examined the District Attorney's Office case file in the above-captioned matter.

3. I have obtained from the District Attorney's Office case file the testimony in the above-captioned matter given by Benjamin Goodman in the Grand Jury on April 5, 1965. A copy of Mr. Goodman's testimony in the Grand Jury is attached hereto as Appendix "1" and made a part hereof.

4. The District Attorney's Office case file contains nothing which supports any of the defendant's allegations or contentions. Specifically, there is no mention or indication of, or reference to, any of the persons identified by Hagan in his affidavits as having been his accomplices in the murder of Malcolm X. There is also nothing which indicates that Reuben Francis possessed any information exculpatory of Butler or Johnson, or that the People kept Francis' availability to testify hidden from the defense. Nor is there anything in the file which in any way corroborates the allegations made by Benjamin Goodman in his affidavit of May 14, 1978; indeed, as evidenced by the accompanying affidavit of Judge Herbert Stern and by Benjamin Goodman's Grand Jury testimony,the information in the file refutes Goodman's allegations. Likewise, nothing in the file gives any support to the contention that any law enforcement or governmental agency was involved in the murder of Malcolm X.

5. The District Attorney's Office case file contains no papers of any kind from the Federal Bureau of Investigation.

6. The only indication I found in the District Attorney's Office case file of any contact between the FBI and the New York City Police Department or New York County District Attorney's Office is contained in a New York City Police Department Supplementary Complaint Report dated March 15, 1965. This report refers to a list of Organization of Afro-American Unity members which the police received from the FBI and which the police showed to a potential witness in order to have the witness indicate which persons were present in the Audubon Ballroom when Malcolm X was murdered. Upon request, this report will be made available to the Court.

7. In order to obtain unredacted copies of the FBI documents submitted by Mr. Kunstler in support of the instant motion, I have spoken with FBI Agent Steven Edwards.

8. Mr. Edwards has provided me with unredacted copies of those FBI documents which, Mr. Edwards informs me, are on file in the New York office of the FBI. These documents correspond to the documents labeled by Mr. Kuntsler as pages 11-24, 34, 35, 40, 43-48, 50, 51 and to the documents dated August 25, 1965 and October 21, 1965, both of which are attached to Mr. Kunstler's affidavit of April 29, 1978.

9. There is nothing in any of these unredacted FBI documents which in any way supports any of the defendants' contentions or allegations. Specifically, there is no mention or indication of the name of, or reference to, any of the persons identified by Hagan in his affidavits as having been

his accomplices in the murder of Malcolm X. These unredacted FBI documents are attached as Appendix "2" to the affidavit being filed with the Court, and are being made available to the Court for its examination.

10. I am informed by Mr. Edwards that the FBI documents he has not provided me with in their unredacted form are not on file in the New York office of the FBI. Mr. Edwards informs me that these documents are on file at the FBI's headquarters in Washington, D.C., but that because of the volume of papers on file at FBI headquarters it would take a considerable period of time to obtain them.

11. There appears to be nothing in any of these redacted documents which corroborates the allegations in Hagan's affidavits, or which is otherwise supportive of the instant motion. Many of these redacted documents are, Mr. Edwards informs me, internal FBI memoranda which merely summarize and chronicle the New York City Police Department's investigation into the murder, and which contain no original information developed by the FBI. Others of these documents contain information developed by the FBI which paralleled information obtained by the New York City Police Department.

Still others refer to matters not material to the instant motion. However, if this Court should find unredacted copies of these documents necessary or useful to the determination of this motion, I will attempt to obtain them as soon as possible and make them available to the Court.

WHEREFORE, based on the foregoing responses submitted by the People, and on the accompanying affidavit of Judge Herbert Stern, and for the reasons set forth in the accompanying memorandum, it is respectfully requested that the motion be denied.

Dated: New York, New York
July 14, 1978

Allen Alpert

ALLEN ALPERT

Appendix "1"

B E N J A M I N G O O D M A N, called as a witness, having first been affirmed, testified as follows:

BY MR. STERN:

Q What is your name, sir?

A Benjamin Goodman.

Q And where do you live Mr. Goodman?

A 1022 Longfellow Avenue.

Q And what do you do for a living?

A I work for the Inner State Church Center as a file clerk.

Q And will you try to keep your voice up and your speech distinct so that everybody can hear you?

A Yes, sir.

MR. FOREMAN: Mr. Goodman, do you want to take your coat off.

WITNESS: Thanks.

BY MR. STERN:

Q Now, Mr. Goodman, you were formerly a member of Mosque #7; is that correct?

A Yes, sir.

Q Did you join there in about 1958; is that correct?

A Yes, sir.

Q And after you joined, did there come a time that you became an official in the Mosque?

A Yes, sir.

Q And what position did you hold?

A Assistant Minister.

Q And who was the minister at the time that you were assistant?

A Brother Malcolm.

(Continued on next page)

BY MR. STERN:

Q What are the duties of a minister and an assistant minister?

A Well, I think it's mainly the duties of an assistant minister -- well, what my duty was, more or less to expound the religion of Islam, which is all that an assistant minister is supposed to do, because they have departments for everything else. And a minister's duty is actually, as far as I can see, is, you know, the welfare of the particular mosque that he is over.

Q In other words, he is in complete charge of the mosque?

A Yes, sir, he's supposed to be.

Q The mosque is under his control?

A Jurisdiction.

Q Jurisdiction?

A Right.

Q But as the assistant minister you say you are only concerned with religious matters?

A Yes, sir.

Q And you would teach the religion to the

membership; is that right?

A Right.

Q Did you use certain literature to teach the religion?

A We used the Bible and the Koran.

Q Did you use certain lessons?

A Yes, sir.

Q And there are two lessions, is that right, Lesson Number 1 and Lession Number 2?

A There are two lessions.

Q How many lessons are there?

A I think it's four.

Q Four lessons?

A I think it is. Five.

Q What are they called?

A We have student enrollment, Lesson Number 1, Lesson Number 2, Lesson C-1, and the problem book.

Q Now, was it required of the membership in their religious teaching that they memorize the lessons?

A Yes, sir.

Q Verbatim; is that right?

A Yes, sir.

Q And you were one of the people responsible for teaching those lessons; is that correct?

A No, sir. We had classes set up for the lessons and mostly what we taught from the rostrum was the religion from the Bible, from the Koran, the Prophets and what have you. There are special classes that they have to, you know, to recite the lessons.

Q Who conducts those special classes?

A Well, it rotates. You know, they have different people sometimes conducting them.

Q As an assistant minister you would sometimes conduct them; is that right?

A I have, yes.

Q Now, did there also come a time when you yourself became a minister?

A No, sir, an assistant minister.

Q Did there come a time when branch mosques were opened up in Long Island and one in Brooklyn?

A Right.

Q Did you have any special duties in reference

to these branch mosques?

A Oh, yes. I was an assistant minister in Long Island and also in Brooklyn.

Q Who was your superior?

A Minister Malcolm.

Q He was your superior in -- he was a minister --

A He was a minister over all of it.

Q But you were in effect a minister of the mosque in Brooklyn and also the mosque in Long Island?

A Oh, no. No. I was an assistant in Brooklyn and xx assistant in Long Island.

Q Who was your superior in Brooklyn or Long Island?

A Minister Malcolm.

Q If He wasn't in Long Island and you were, who would be the minister in charge of the mosque?

A Repeat that again?

Q If Brother Minister Malsolm were not present in Brooklyn and somebody had a spiritual problem, whom would they go to?

A Oh, well, you see, there were about, I guess maybe five or six assistant ministers that rotated from mosque to mosque. Number 7 in Long Island and also in Brooklyn. It wasn't just myself.

Q Isn't it a fact that while you were assigned to Brooklyn and Long Island, even though you were under the general authority of Malcolm, still you were responsible for the conduct of those mosques; isn't that correct?

A Spiritual conduct, yes.

Q Were you paid a salary during that time?

A Yes, sir.

Q How much were you paid?

A For about four months. When I was in Brooklyn. I received $75 a week.

Q As a minister or assistant minister, but operating or practicing in Brooklyn, in addition to spiritual lessons, would you have any other duties?

A Well, I was supposed to more or less keep the Muslims in -- giving them an understanding of as far as selling the papers, as far as, you know, keeping the donations,

you know, up as much as possible.

Q In other words, you were responsible for the complete administration of the mosque?

A Oh, no, no, no. No. I was not responsible for the complete administration.

Q Well, the membership in Brooklyn, when you were there as assistant minister, would sell newspapers; is that right?

A Right.

Q They would also make weekly donations?

A Those that could afford it, yes.

Q How much would they be expected to give?

A I think it was something like thirteen or fifteen dollars.

Q A week?

A Yes, sir.

Q In addition, they were expected to sell 150 newspapers every two weeks?

A I am not sure if it was 150, as I told you about. Somewhere in that neighborhood. I thought it was a hundred.

Q And during Saviors Day they were expected to give $125; is that right?

A $100.

Q Excuse me?

A $100.

Q During that time it was $100?

A Yes, sir. See, I don't -- like I say, I been out since last year. Maybe some things has happened that I don't know about. But at that time it was $100.

Q Well, while you were in Brooklyn and while you were in Long Island, acting in the capacity that you have described, whom would they give their donations to?

A To the secretarial department. In other words --

Q Didn't you just state that you were responsible for donations?

A I didn't say I was responsible for donations. I say I was supposed to more or less explain to them the importance of keeping up their donations or selling newspapers. But they had a special department, the secretairal department, that, you know, that take up

the donations, that they give it to.

Q In reference to a run meeting, for instance, after the meeting which you would conduct, you would call for donations; is that right?

A Well, see, this is public donations. This is like in a church where you take up a collection.

Q Thatis inaddition to the dues, I understand that.

A Right.

Q If you would take a collection up in the church, or the temple, rather, and you collect all the money together, is that right, who would collect the money?

A It wasn't any particular people. As far as public donations, you know, is concerned; but as far as personal, you know, weekly donations, it was a special department for that.

Q Take the case of a typical brother. Let us say he giave public donation of one dollar. Let us take that dollar and follow it. Where does it go?

A It goes to the secretarial department.

Q How does it get there?

A Well, whenever the people take -- a public donation, whenever they take the money up it goes to the secretarial department, they count it.

Q Did you have a secretarial department in Brooklyn and Long Island?

A All mosques have secretarial departments.

Q Who was your secretary while you were in Brooklyn?

A Brother Masio (phonetic) was the secretary over that particular -- you know, over all the --

Q How would the money come to Brother Mason?

A Well, we would take it into -- for instance, if I go in the next day, I would take it over, you know, to Manhattan.

Q The same with the proceeds from newspaper sales, they would eventually go to Mason, too?

A Well, all of it goes together.

Q As the minister or the assistant minister in one of these mosques, you would take the money over to Masio, wouldn't you?

A Or leave it at the news office, or whatever.

Q In other words, you would transmit the money to --

A To Manhattan.

Q To Manhattan Mosque Number 7; is that right?

A Yes, sir.

Q Now, did there come a time when you were relieved of your duties as an assistant minister in charge of these mosques?

A No, sir, I quit.

Q You quit?

A Right.

Q When was that?

A Sometime -- I think somewhere around -- around April or May. Of last year.

Q Of 1964?

A Yes, sir. The early part of 1964.

Q That would be approximately four months after Malcolm X had been suspended; is that right?

A Something like that. Something like that.

Q Now, during this period of time were all

the ministers and assistant ministers instructed to speak about Malsolm X at mosque meetings?

A I don't know if they all were. If they redeive any special instructions to speak about him. But many of them were doing it.

Q What were they saying?

A Well, I mean, you know, for instance, in the Koran there is chapters on the hypocrite, and more or less like, you know, defamation ofcharacter, you know, that Mohammed taught him what he knew and things of that nature.

Q It was taught in every mosque that Malcolm X was a ~~xx~~ hypocrite?

A I didn't go to every mosque.

Q It was taught in Mosque Number 7 that Malcolm X was a ~~xx~~ hypocrite; is that right?

A Yes, sir, it was taught. And also in the newspapers.

Q And were you asked to teach that, too?

A That he was a hypocrite? Not directly. You know. But by not doing it, evidently, I guess, you know, maybe they figured out I sympathized with him.

Q Why did you leave?

A Because I just -- I wasn't going, you know, stand up on the rostrum and ~~xxxxx~~ talk about another brother, you know, anyone.

Q Did somebody suggest to you that you should?

A Not directly.

Q Well who did indirectly?

A Well, just the general atmosphere of everyone else. For instance, if three gentlemen begin to talk about Khrushchev is a communist and the fourth one said nothing, well, automatically they would say he sympatnizes with Khrushchev. So I lost my spirit to, you know, to continue like that. I just quit.

Q In other words, everybody that you knew about was speaking against Malcolm X from the podium and because you didn't want to do so --

A Not everybody. Not everybody. But most of them that I heard did.

Q Whom did you hear?

A Well, sir, I prefer not to call ~~xxxxx~~ people's names. The ministers -- most of the ministers.

Q Just name their names.

A I don't particularly want to sit here and name, you know, ~~xxxxx~~ people who said this or people who said that. But most of the ministers that -- Minister James.

Q James 3X?

A Yes, sir. You know --

Q Captain --

A Minister Louis.

Q Captain Joseph?

A Joseph would talk. I mean most of them.

Q What would they say?

A Well, you know, that the messenger taught him what he knew and that -- that he was wrong in talking against the messenger. You know, that Mr. Mohammed told him not to say anything, you know, and he continually talked. Or said his -- certain things put in the newspapers. Like his picture. Things like that that they talked about.

Q Did they say he was a ~~xx~~ hypocrite?

A Well, the way they were talking, you know, significance, you know, that he was a hypocrite. For instance, if you

go against Islam or Mr. Mohammed, then you are considered a hypocrite.

Q Were you also considered a devil for that?

A Who, me?

Q If you go against the nation of Islam and Elijah Mohammed, are you considered to be a devil?

A I never heard of anyong being considered to be a devil for that.

Q Have you heard the expression?

A I heard the expression of devil.

Q Who is a devil?

A You mean who we are taught the devil is?

Q Yes.

A The white man.

Q And is there and specific -- withdrawn. When you heard these men calling Malcolm X a hypocrite, did they also make reference to any part of the Koran?

A I don't exactly quote verses. I think most of the 9th chapter deals with it. I think it's called the immunity. Most of that deals with a hypocrite.

Q And they would refer to that chapter when they talked about it; is that correct?

A Well, sometimes I think they would refer to it. I think that has more in it concerning hypocrites than any other chapter. Except chapter 4 has something in it too.

Q Directing your attention to -- I withdraw that. There came a time after you left that you joined Malcolm X's Moslem Mosque, Incorporated; is that right?

A Yes, sir.

Q And your position there was also assistant minister; is that right?

A Well, I used to help him. I don't know if you would say assistant minister, but I used to teach for him. And along with others. Because he wanted to more or less expound Islam the way it's being taught in the other parts of the world.

Q Now, directing your attention to Sunday, February 21, 1965, did there come a time that day when you went to the Audubon Ballroom?

A Yes, sir.

Q What time did you go there?

A I think I got there about 2:30; somewhere in the neighborhood of 2:30. I think. I think so anyway. I wouldn't say right on the dot of 2:30, but somewhere in that neighborhood.

Q You could be off by about forty-five minutes?

A Oh, no, I couldn't; because I left home was after two o'clock and I caught a cab over.

Q When you got to the ballroom, did you know that you were going to speak?

A No, sir.

Q And when were you informed that you were to speak?

A Well, when I got in someone told me, I think they were from the OAU, one of the members, told me that Brother Minister wanted to see me. So I went directly in the back where he was.

Q He was backstage; is that right?

A Yes, sir. And he was very nervous. And I found out because it was Dr. Galamison was supposed to come and he didn't get there. So, the shiek, this man from Mecca, he came back and Brother Minister became more nervous

and ran all of us out. So we went out and sat down. Then I think Sister Sarah came and got me.

Q You were designated to speak; is that right?

A Yes, sir. She told me that I was to open up.

Q That was because Dr. Milton Galamison, who was supposed to speak before Malcolm X, had cancelled; is that right?

A Yes, sir, he had learned that he had said he wasn't coming.

Q And then you got up and gave the opening remarks; is that right?

A Well, Sister Sarah, she was going to give me her notes and -- but I also carried notes, in case somebody else --

Q In case you had to make a public speech?

A In case I had to open up. As a matter of fact, as assistant ministers we always did that. I asked him, "How long do you want me to talk?" He said about a half hour, which is very unusual for someone, you know, to open up for a half an hour. And he said because he didn't have the charter for the OAU and the people were expecting it. So I told him I would open up in such a way where

when he come on the people would be ready to accept him, telling them that he didn't have time to get this charter together.

Q You did speak; is that right?

A Oh, yes, sir.

Q And there came a time while you were speaking that Malcolm X came on the stage; is that right?

A Yes, sir.

Q And after you saw him on the stage you concluded your remarks; is that right?

A Well, when I saw him sitting behind me and I heard him say, "Make it plain" -- that's what he say when he wanted to come on, "Make it plain." So then I introduced him.

Q What did you do after you introduced him?

A Well, I was going to sit down hwere he just got up from in the chair and he stopped me. He told me to go in the back and tell them to let him know the minute that Raff (phonetic) Cooper comes in. And so I went in, you know, in the room there, and --

Q You went backstage?

A Yes, sir.

Q Who was backstage when you were there?

A Brother James and Sister Sarah. If there was anybody else, I don't remember.

Q What happened after you were backstage?

A Well, I guess about fifteen seconds we heard this -- you know, some kind of disturbance, a lot of people were, you know, it sound like they were excited about something. And then -- a few seconds later we heard these noises go off. First it sounded like cap pistols or a string of firecrackers shooting off from a distance. And then I guess, I say five, six seconds later, a sound went off in front, which made me know then that they were, you know, was guns shooting. So at that moment I hit the floor. And I guess it was all over in about maybe thirty seconds. There was a lot of shots were fired.

Q You didn't see who was firing because you were backstage; is that right?

A Well, I was on the floor.

Q You were behind the stage; is that right?

You were in a room; is that right?

A Yes.

Q Which was separate from the ballroom?

A Separate from the exposed part of the stage. You know.

Q In other words, you were in an enclosed area from which you could not see out; is that right?

A Right.

Q So you did not see anybody firing; is that right?

A Right.

Q Now, you gave a speech for about half an hour; is that correct?

A I don't know if it was a half hour. Because I didn't time it.

Q It was about a half an hour? Well, you spoke for some time?

A Yes, sir.

Q When you speak, Mr. Goodman, when you speak do you look at the audience or doyou look above the audience?

A Well, you know, you take in the whole audience.

Q Do you actually look at the people as they sit there or do you project out?

A Well, when I speak I mostly look, you know, look out, to try to weigh the audience, you know; if they are going to sleep you have to change whatever you are saying. If they, you know, if they in one mood you have to more or less say something else. You more or less weigh the whole audience.

Q Do you recall that on March 30th you came to my office and spoke to me?

A Yes, sir.

Q Does it refresh your recollection if I remind you that at that time you told me that when you speak you look over the heads of the crowd? Did you tell me that?

A I don't remember that.

Q You didn't tell me that?

A I don't know. I say I don't remember if I told you that.

Q When you speak do you look over the heads of the crowd?

A I don't understand what you mean by look over their heads.

Q You knew that Johnson and Butler from Mosque Number 7; is that right?

A Yes, when I was there I knew them.

Q Now, you stood up in front of the audience for a period time speaking; is that right?

A Yes, sir.

Q Do you know whether or not Butler and Johnson were in the audience as you spoke?

A No, sir.

Q You do not know if they were there or if they were not there?

A No, I don't.

Q You didn't see them there; is that correct?

A I didn't see them, no. It's difficult for me to -- I mean, I can't see them being there like that and know --

Q Just a minute.

A Yes.

Q Were you looking at the faces of the audience

as you spoke?

A Not any particular people, sir. I guess -- have you ever spoken to a large audience, you just don't pock out a person, you know, you take in the whole audience because you have a message for the audience, not just a particular person. So I wasn't looking for anyone. I was more or less there to open up so Brother Minister could tell the people that he didn't have the charter. Not to see who was there.

Q So you do not know whether or not either man was there; is that correct?

A No, sir, I can't say that they weren't nor could I say that they were, because I didn't see them.

Q All right. Mr. Goodman, in reference to the lessons that you taught in Mosque Number 7, I specifically direct your attention to Lesson Number 1, Question and Answer Number 10. Do you know that lesson?

A Yes, sir.

Q Would you repeat it?

A I don't know if I can repeat all of it but I will do the best I can. It says, "Why does Mohammed and any

Muslim murder the devil? What is the duty of each Muslim in regard to four devils? What reward does a Muslim receive by bringing and presenting four devils at one time?" That's the question. And the answer is -- gosh. You see, I have been away from this stuff so long it's difficult to remember.

Q Just a minute.

(Mr. Stern steps out of grand jury room and returns.)

Q Okay, you can continue.

A Anyway, it's part of it is because they know -- they know, he is a snake and if he be allowed to live he will sting somebody else.

Q Would this refresh your recollection? "Answer: Because he is 100% wicked"?

A Wicked, right. Right.

Q And?

A Go ahead, a little more.

Q And the --

A The rules of Islam.

Q The laws of Islam --

A The laws of Islam.

Q His ways and --

A Are like the -- the grass and --

Q What does that portion mean so far?

A In one way when we were taught this particular lesson was that four devils represented four vices. For instance, like smoking, drinking, narcotics, and -- smoking, drinking, narcotics, some other vice. And which mean that these were vices that were -- they were evil vices. And if you stopped all of them, then you supposed to get a free trip to Mecca, which one of us ever really received. Because I stopped smoking, stopped drinking and stopped everything else I was doing that was wrong and I never received any, you know, any trip.

Q Didn't you just testify a few minutes ago that the devil was the white man?

A Oh, yes. But see, this thing -- see, you have, for instance, you have spiritual interpretations of lessons and then you have ~~xx~~ other interpretations of lessons. In Lesson Number 2 it also says that a devil is any -- is any live germ grafted from original is devil. So it

has more than just one meaning.

Q Now, the first portion of the answer says in reference to why you should murder the devil, because he is 100% wicked?

A Right.

Q And will not keep and obey the laws of Islam.

A Right.

Q Who does the "he" refer to there?

A I don't know. I mean, I'm telling you how we were taught the lessons. And plus if I am not mistaken, I think the ~~xxxxxx~~ lessons was written somewhere back in the thirties.

Q These are the lessons that you learned verbatim, aren't they?

A They still were written sometime back in the thirties, if I am not mistaken, around 1934.

Q Then the answer continues, "His ways and actions are like a snake of the grafted type." Who does the "he" refer to there?

A You can refer to an evil as "he". This is the way --

this particular question was interpreted to us. It wasn't interpreted to us any other way except that. If I am not mistaken, I think the other day when this man, this other police officer was telling me, that we had to get four white hairs to go to Mecca. Now, this is what I was told in your office, this is nothing but an outright lie. And --

Q Mr. Goodman, please.

A Yes, sir. Okay.

Q The sentence that is, "His ways and actions are like a snake of the grafted type." Directing your attention to the other lessons in reference to how the white man came into being, how were you taught or how was it taught in the nation of Islam that the white species of the human race came into being?

A Oh, that a scientist, a black scientist by the name of Yacoop (phonetic) gathered together a certain amount of people and that he caused so much disturbances in the east that he was exiled to an island in Baylon (phonetic) where he set up a system of birth control, and through this system of allowing only -- only allowing the lighter

one -- not allowing two coal black people to marry, but allowing a lighter one and darker one or lighter ones to marry, that though this system of birth control that this particular race of people called Caucasions came into being.

Q Aren't you taught or isn't it in the lesson that this method of birth was a graft?

A Yes.

Q Now, once again referring to Question Number 10, "Answer: His ways and actions are like a snake of the grafted type."

A Yes.

Q What does that refer to?

A Sir, I can only tell you what was taught to us. Now I don't know the true meanings of these lessons. As a matter of fact, I don't know anyone who really knows the true meanings of these lessons. Now they were taught that this particular lesson refers to four vices, which we all had to quit.

Q The next sentence, the answer, "So Mohammed learned that he could not reform the devils, so they had

to be murdered."

A Oh, you bring something else to my attention. In learing about this Mohammed we were taught that Mohammed Ben Abdullah 400 years ago when he was trying to convert the people to Islan, and that he was called back into -- he tried to convert whites tc Islan, especially -- I think he sent letters to the Roman emperor and some Roman general, and he was told that he could not convert these people, that they would not obey Islam, and from that moment is when the Muslims decide to kill them. Now, this --

Q In other words, the devils referred to there are the ones to the -- refer to these Caucasians, the whites; is that right?

A The whites, yes.

Q So we are not talking any more about vices, we are talking about a group of people; is that right?

A Yes, sir.

Q So when it says here, "So Mohammed learned that he could not reform the devils, so they had to be murdered," you are talking about a group of people?

You are not talking about vices?

A In the Mohammed that existed 1400 years ago.

Q This is the third sentence in the answer. It comes after, "Because he is 100% wicked and will not keep and obey the laws of Islam. His ways and actions are like a snake of the grated type. So Mohammed learned that he could not reform the devils, so they had to be murdered." In other words, all this refers to Caucasians?

A I wouldn't say that. Because as far as we were -- it was interpreted to us that the four devils in that lesson meant the four vices. And that particular lesson meant four vices that we all had to stop doing in order to become a Muslim.

(continued on next page)

BY MR. STERN:

Q Now, the next sentance, the fourth sentance in the answer says, "All Moslems will murder the devil because they know he is a snake and also if he be allowed to live, he would sting someone else."

Q What did the devils refer to there?

A I don't know.

Q Then the next sentance is, "Each Moslem is required to bring four devils, and by bringing and presenting four at one time his reward is a button to wear on the lapel of his coat, also a free transportation to the Holy City Mecca to see Brother Mohammed."

A Yes.

Q What do the deviles refer to there?

A The four devils, as I said before, we were taught referred to four vices that you would have to quit in order to be a Muslim.

Q Is it your testimony that within this one uestion and answer the devil sometimes seems to mean caucasions and sometimes --

A See, in teaching the life of Muhammad -- Mohammed,

this -- this particular phase of Mohammed's life was brought into -- into the teaching, but as far as getting it from the lesson, in saying that this refers to this and this refers to that, I -- I don't -- we -- it wasn't explained to us in that manner. The four devils to us meant the four vices in which we all happened to stop doing to be a Muslim, you can't smoke, you can't drink, you can't gamble, or you can't carry on any vices.

Q Now, are you familiar with question number 10 and its answer in lesson number one, beginning was the meaning of the -- the question begins: "What is the meaning of the F.O.I.?"

A Right, Fruit of Islam.

Q And what is the answer?

A The name given to the Military training of men who belong to Islam and North America. I don't know, there might be something else.

Q Andare you familiar with the 13th question which is: "What is the meaningof lieutenant and captain?"

A What is the meaning of lieut and capt?

Q What does that mean?

A Lieutanant and captain.

Q What is the answer?

A God -- sir, you know since I have been in this computer systerm course, a lot of this stuff you talking about now has left my mind.

Q Is the answer --

A I have been away from it for quite sometime.

Q Is the answer: "Captain and Lieutenant. The duty of the captain is to give orders to the lieutenant --"

A And the lieutenant to train private soldiers.

Q "-- teach the soldiers and also train them."

A Also train them.

Q In other words, as a member of the Nation of Islam it would be the duty of the members to follow the orders of the officers, is that correct?

A Oh, yes.

Q And they are formed into a military body for military training; is that correct?

A Well ---

Q Into squads.

A You say military training explains it a little bit because wenever trained with guns, we never traine with bayonets, we never trained --

Q Mr. Goodman, you are the assistant minister, the word military training appears in the word military while you were --

A Yes.

Q What does that mean?

A I'll explain to you what it was about, wetook exercises, we were taught discipline, we were taught how to fast, three days a month.

Q Is that military training?

A Of course it's discipline. But as far as anything outside of that, when you say military, you know, right away I think about -- you know, guns and you knofe, knives and all that. We -- it was nothing like that ever took place.

Q What sort of exercises did you take?

A Regular exercises, just like --

Q Karate, judo?

A We practiced judo.

Q I see.

A As a matter of fact they have many schools for judo and karate.

Q Now, you say that the devils in question ten and its answer refers to the vices; is thatright?

A The four -- we were taught about the four devilms was four viees.

Q Except of course for the third sentance which refers to the caucasians; is that right?

A In the life of Mohammed we were taught that Mohammed was called back to Mecca and told that he could not refrom these people.

Q Now, in lesson num ber two, which deals with how the devil came into being, that lesson is solely and exclusively -- when it mentions devil, concerned with the death, birth and formation of caucasians; is that right?

A Not solely and exclusively.

Q No? We're in that leason is -- that the devel taught as being just a vice and not a man?

A Well, sir, I don't know how your -- broad your understanding is of those lessons, but if you notice

in the Bible men are spoken of as trees, and so that, you know, this pargicular version means a tree, it -- I mean it has a spirtual meaning andit has a physical, and you apply the physical to the spiritual. So, in -- if you read further in that lesson you will also see that a devil is any live germ traveling from original. Any time something becomes other then the nature, in which it was created in itself is called devil.

Q You are referring to question 33?

A I dont know exactly.

Q Lesson 2?

A I don't know which question.

Q "Answer, the devil a grafted man which is made weak or weakend or any grafted life germ from levil, is devil."

A That's right, any life germ anything that had life in it.

Q Well, does a life have vice in it?

A Vice itself has no life in it, but once -- once -- you are obtained -- that vice, then that vice becomes a part of you therefore it has life. You and the life and the vice is synonemous.

Q Well, lesson -- question number 33 and

lesson 2 defining devil comes after all the other questions; isn't that right?

A Sir, you know, like I said, I have been away from those lessons so long I don't know all those lessons. I haven't studied them in a long time.

Q Question 33 is the 33rd question; is that right?

A Yes.

Q Now, that comes after the question and answerh which describes how the devil was made and by whom; isn't that correct? And describing how the caucasians was grafted from the original people; isn't that right?

A Number two?

Q Yes. Question 33 and answer -- answer comes after all that on explanation.

A What is 33?

Q That is what is the devil?

A Is that 33? Yes, yes, I think so, I think so.

Q So that by the time you reached question 33 and its answer there isn't much doubt as to what a devli is, is there?

A No.

Q No, right.

MR. STERN: Are there any questions from the grand jury?

Thank you very much, Mr. Goodman.

(Witness excused.)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 35

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

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

HERBERT STERN, being duly sworn, hereby deposes and says:

1. I am presently a Judge of the United States District Court for the District of New Jersey.

2. From February 20, 1962 through September 24, 1965, I was an Assistant District Attorney in the New York County District Attorney's Office.

3. On April 6, 1964, I was appointed to the Homicide Bureau of the New York County District Attorney's Office.

4. From February 21, 1965, when Malcolm X was murdered, until September 24, 1965, when I resigned from the District Attorney's Office, I was in charge of the New York County

District Attorney's investigation of the murder of Malcolm X and of the presentation of the evidence to the Grand Jury.

5. This affidavit is submitted in response to the affidavit of Benjamin Goodman, dated May 14, 1978.

6. On March 30, 1965, I interviewed Benjamin Goodman in my office. As Mr. Goodman spoke to me, I took notes of what he said. Before preparing this affidavit I reviewed a copy of my notes of my March 30, 1965 interview of Benjamin Goodman. A copy of these notes is attached hereto as Appendix "A" and made a part hereof.

7. During our March 30, 1965 conversation, Mr. Goodman told me that he knew Butler and Johnson from the Nation of Islam's Mosque #7 in Manhattan.

8. Mr. Goodman also told me that he did not witness the actual shooting of Malcolm X in the Audubon Ballroom since he, Goodman, had left the Audubon Ballroom and had entered another room by the time the shooting began.

9. I did not tell Mr. Goodman that I knew he had previously said that he had witnessed the shooting. I had, and to the present still have, no knowledge that Mr. Goodman had ever said that he had witnessed the shooting. In fact, as the New York City Police Department Supplementary Complaint Reports dated February 27, 1965 and March 26, 1965 indicate, Mr. Goodman had previously told the police that he had not witnessed the shooting of Malcolm X. These Supplementary Complaint Reports are

attached hereto as Appendix "B" and made a part hereof.

10. Mr. Goodman did not tell me that he knew that Butler and Johnson were not present in the Audubon Ballroom when Malcolm X was murdered. Nor did Mr. Goodman tell me that he did not notice Butler and Johnson in the ballroom, and that he would have noticed them had they been there.

11. Rather, Mr. Goodman told me that during his introductory speech to the audience, he "look[ed] over [the] heads of [the] crowd." See Appendix "A".

12. The import of Mr. Goodman's statement to me was that he did not know, one way or the other, whether or not Butler or Johnson were present in the ballroom.

13. Mr. Goodman's statement to me was in accord with information I had previously received from Detective Ferdinand Cavallaro of the New York City Police Department. This information was that Goodman had told the police that "when he speaks he doesn't look at audience, but looks over their heads. So he doesn't know who was in the audience." See my memorandum to Files, a copy of which is attached hereto as Appendix "C" and made a part hereof.

14. Mr. Goodman's March 30, 1965 statements to me indicating that he knew Butler and Johnson, but did not know whether or not they were in the ballroom, and that he did

not witness the shooting, were also in accord with his testimony to the Grand Jury on April 5, 1965.

15. Mr. Goodman's statement to me was neither exculpatory nor inculpatory of Butler or Johnson. Mr. Goodman simply provided no information as to whether or not Butler or Johnson were present in the ballroom or took part in the murder of Malcolm X.

16. There was no reason for me to, and I did not, become angry with Mr. Goodman, threaten him in any manner, or attempt to get him to alter his statement to me in any way.

HERBERT STERN

DENNIS KING WEBSTER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 4/15/79

SWORN AND SUBSCRIBED BEFORE ME
THIS 12th DAY OF July 1978

Dennis K. Webster

Sworn to before me
this 12th day of July, 1978.

Appendix "A"

3/30/65

Benjamin Augustus Goodman
1022 Longfellow Ave, Bronx
DA9-9418
Interchurch Center, 475 Riv. Side
also Council for Clinical Training
Age 32
used to live at 1008 University Ave.

Joined Mosque #7 in 1958.
Left in Early Summer of 1964.

Feb 21, 1965 -
Goodman asked by
Sarah Mitchell to open the
speaking. Told after he got
to Ballroom. Arrived

Shooting ~~in~~ Moving to
front.

Knew Butler & Johnson
from Mosque - Ben Benj.
looks over heads of Crowd.

7C was established around 1963.

7B, L.I. Mosque set up first.

Benjamin became an Asst Minister to Malcolm in Mosque # 7 in 1961

Appendix "B"

D.D. 5 (REV. 8-62)

SUPPLEMENTARY COMPLAINT REPORT (DO NOT FOLD THIS REPORT)

U.F. 61 File No.

Complainant's Surname	First Name	Telephone No.
People		

Complainant's Address — Apt. No.

6. Date and Time Reported on U.F. 61	14*	15*	19. Pct.	22. U.F. 61 No.
Feb.21,1965 3:10PM A.M. P.M.			34th	985
11. Day, Date and Time of Occurrence	**16***	**17***	**27. Pct. Post**	**30. C.C.D. No.**
Sun.Feb.21,1965 3:10PM A.M. P.M.				20015

36. P.D. Code	39. Amt. Code Larceny Only	40*	41*	42. Pct. of Arrest	45. Arrest Nos.

FOLLOWING QUESTIONS PERTAIN TO THIS COMPLAINT REPORT	Answer Yes	Answer No
Was this complaint previously cleared by an arrest?		
If yes, is this an additional arrest?		
Were identified persons wanted previously reported?		
Was any stolen property previously reported?		
Was this stolen property previously reported?		
Was any property recovered previously reported?		
Was this recovered property previously reported?		
Was complainant advised of action taken?		

NUMBER OF ARRESTS	Male	Female
Adults		
Juveniles		

ARRESTS MADE BY:
- Uniformed Force ☐
- Detective Div. ☐
- Other Peace Off. ☐
- Civilian ☐

If an alarm is transmitted enter the following information:

Alarm Number	Date and Time Transmitted

50. TYPE OF PROPERTY	51. Value of Property Stolen	57. Value of Stolen Property Recovered
1. Autos Stolen or Recovered Locally		
2. Autos Recovered by Other Auth's.		
3. Autos Recovered F. O. A.		
THIS REPORT CONCERNS: (Check One) 4. Currency		
5. Jewelry		
6. Furs		
Lost Property ☐ 7. Clothing		
8. Firearms		
Stolen Property ☐ 9. Miscellaneous		

Crime or Offense as Classified on U.F. 61: Homicide(GOM) — Det. Sqd. Ser.: 1022

Crime or Offense Changed to — Status of Case: 2-1

Copy of this report forwarded to Corr. Bur. for Communication. YES ☐ NO ☐

Signature of C.O. of Investigating Officer: Sgt. T. Cusmano 6DS

Rank — Name — Command

Report of Investigating Officer: (LIST ALL LOST OR STOLEN PROPERTY ON REVERSE SIDE) Date of This Report: 2-27-65

Subject: INTERVIEW OF BENJAMIN GOODMAN AT 34TH SQUAD

1. On Feb.26,1965,at 6:30PM,one Benjamin Goodman(2X)M-N-3S,of 1022 Longfellow Ave.Bx,NY.Cr.Fl.(D.9-9418)Was interviewed and stated that he was the first speaker at the Audubon Ballroom on 2-21-65. The opening speaker was scheduled to be Rev. Galamison,and when he didnot appear,Malcolm became very unset. Malcolm entered the stage through the dressing room located on the right side of the stage and sat down behind Goodman,who had taken over the opening address due to Galamison's absence. When Goodman noticed Malcolm,he introduced him and left stage,leaving Malcolm alone on the stage. Goodman went to dressing room along side stage(Rt.) where James (67..) and Sister Sarah were. He was only in this room a few moment,when the shooting began.He come to the doorway,looking onto the stage after the shooting in time to see Malcolm falling to the floor.
Further stated that he didnot see who the perpertrators were or there shots came from.

Case Active....

*Entries by S.R.B. only

Investigating Officer's Name (Typed): Thomas T. Cusmano
Rank: Ptl. Shield No. 10245 Command: 34th

Investigating Officer's Signature:

D.D. 5 (Rev. 2-61)

SUPPLEMENTARY COMPLAINT REPORT (DO NOT FOLD THIS REPORT)

Complainant's Surname	First Name	Telephone No.
PEOPLE		

Complainant's Address — Apt. No.

MALCOLM "X" HOMICIDE

6. Date and Time Reported on U.F. 61	A.M. P.M.	14*		19. Pct.	22. U.F. 61 No.
~~February~~ 21 1965 ~~3:10PM~~		16*	17*	27. 34 Post	30. 593 No.
Sunday 2/21/65 3:10PM					26815

36. P.D. Code	39. Amt. Code Larceny Only	40*	41*	42. Pct. of Arrest	45. Arrest Nos.

FOLLOWING QUESTIONS PERTAIN TO THIS COMPLAINT REPORT	Answer Yes	No
Was this complaint previously cleared by an arrest?		
If yes, is this an additional arrest?		
Were identified persons wanted previously reported?		
Was any stolen property previously reported?		
Was this stolen property previously reported?		
Was any property recovered previously reported?		
Was this recovered property previously reported?		
Was complainant advised of action taken?		

NUMBER OF ARRESTS	Male	Female
Adults		
Juveniles		

ARRESTS MADE BY: Uniformed Force ☐ Detective Div. ☐ Other Peace Off. ☐ Civilian ☐

If an alarm is transmitted enter the following information:

Alarm Number	Date and Time Transmitted

50. TYPE OF PROPERTY	51. Value of Property Stolen	57. Value of Stolen Property Recovered
1. Autos Stolen or Recovered Locally		
2. Autos Recovered by Other Auth's.		
3. Autos Recovered F. O. A.		
THIS REPORT CONCERNS: (CHECK ONE) 4. Currency		
5. Jewelry		
6. Furs		
Lost Property ☐ 7. Clothing		
8. Firearms		
Stolen Property ☐ 9. Miscellaneous		

Crime or Offense as Classified on U.F. 61: Homicide/Gun — Det. Sqd. Sec.

Crime or Offense Changed to — Sqd. Case: ~~1022~~ Active

Copy of this report forwarded to Corr. Bur. for Communication. YES ☐ NO ☐

Signature of C.O. of Investigating Officer: Sgt. F. Clemente 608 (Rank / Name / Command)

Report of Investigating Officer: (LIST ALL LOST OR STOLEN PROPERTY ON REVERSE SIDE) — Date of This Report: ~~March 26, 1965~~

Subject: REINTERVIEW OF BENJAMIN 2X ~~XXXX~~ GOODMAN

1. Goodman At 11:15PM March 25th 1965 the undersigned reinterviewed one Benjamin 2X XXXXX at Manhattan North Detective Offices regarding the above case. Subject was born in Suffolk, Virginia on July 14, 1932 (32 years) he resides at 1022 Longfellow Avenue, with his wife whom he married earlier this month. he is employed as a file clerk at the Inter Church Center at 475 Riverside Ave., New York City and earns $66 per week

2. Former member of Mosque #7, joined in 1959 and defected in favor of Malcolm X in late 1964. States he was arrested for Policy, Narcotics and earlier this year was arrested in Boston for disturbing the Peace with 7 other brothers.

3. Was the first speaker on the rostrom at the Audubon Ballroom the day Malcolm was murdered. While Malcolm spoke he states he was in the dressing room to the right of the stage with Sisiter Sarah Mitchell and James 67X Shabazz Harden. States that during the shooting that the door to the dressing room was closed.

4. Investigation proceeding, Case active

CASE ACTIVE

*Entries by S.R.B. only	Investigating Officer's Name (Typed)	Investigating Officer's Signature
	patrick j. sweeney	
	Rank DET Shield No. 2092 Command 34SQD	

Appendix "C"

To Files

Jean + Sam

I and my friend Rev Malcolm X Salaam was supposed to speak in the Ballroom Before Malcolm X on 2-21-65, But arrived at a late moment. Benjamin Brodman under a last minute replacement

police informs me (Det Cavallero) that Brodman was interviewed at Station house several days after accurance, and he stated that when he speaks he doesn't look at audience, but looks over their heads. So he doesn't know who was in the audience.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 35

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

SUPPLEMENTARY MEMORANDUM IN OPPOSITION TO MOTION TO VACATE JUDGMENTS

INTRODUCTION

Butler and Johnson have moved, through various papers submitted on twelve separate dates from approximately December 6, 1977 to approximately May 24, 1978, to vacate the judgements convicting them of the murder of Malcolm X. Their motion is made pursuant to Criminal Procedure Law §440.10 and appears to be based on four basic allegations: 1) that Benjamin Goodman provided

information which would have exculpated them, but that this information was suppressed and never made available to the defense; 2) that the People were aware of the availability of Reuben Francis as a possible witness but never informed the defense of his availability; 3) that the People wrongfully withheld from the defense that "Brother Jean" was in fact Detective Gene Roberts, an undercover police officer who, defendants claim, could have exculpated them and who, they claim, could have testified to the involvement of law enforcement authorities in the murder of Malcolm X; and, 4) that Hagan's actual accomplices in the murder were not Butler and Johnson, but four other men, and that certain Federal Bureau of Investigation documents support this contention.

With the exception of the allegation concerning Benjamin Goodman, which Butler and Johnson raised for the first time on May 24, 1978, aspects of the defendants' allegations were responded to in two affidavits and a memorandum filed on February 9, 1978 and in a supplemental memorandum filed in April, 1978. These documents are incorporated by reference herein. The instant memorandum is in response to the allegations concerning Benjamin

Goodman, in further response to the allegations concerning Reuben Francis, and in further response to Hagan's affidavits and the FBI documents which were submited in support of Hagan's affidavits.*

Benjamin Goodman never said that Butler and Johnson were not in the Audubon Ballroom when Malcolm X was murdered. Rather, Goodman said only that he did not know whether or not they were there.

In an affidavit sworn to on May 14, 1978, Benjamin Goodman states that Butler and Johnson, both of whom he knew well for several years, were not in the Audubon Ballroom when Malcolm X was murdered. Goodman was the man who first spoke to the audience and then introduced Malcolm. In his affidavit, Goodman claims that "one of [his] functions was to provide security for Malcolm's person", that he therefore "did observe the faces of all the [four to five hundred] people in the

*Butler and Johnson have not submitted any additional material concerning Detective Gene Roberts. This memorandum will therefore not deal specificially with that aspect of defendants' motion. In response to the allegation concerning Detective Roberts, the People respectfully refer the Court's attention to the papers filed by the People on February 9, 1978 and in April, 1978.

in the crowd", and that, because of the animosity between the Nation of Islam to which Butler and Johnson belonged and the Organization of Afro-American Unity which Malcolm founded and to which Goodman belonged, had Butler or Johnson been in the audience, Goodman "would have been sure to notice [them]".

Goodman further states that on at least four occasions in 1965 he was questioned variously by New York City police officers, FBI agents, and Assistant District Attorney Herbert Stern, and that he told each of them that Butler and Johnson had not been in the Audubon Ballroom on the day of the murder. Goodman said that Stern (the only person whose name Goodman could specificially remember) became angry with him, threatened him, and attempted to get him to change his statement.

However, by the time he wrote his affidavit on behalf of Butler and Johnson some thirteen years after they were charged with the murder of Malcolm X, Goodman had apparently forgotten either that he had testified in the Grand Jury or what his testimony in the Grand Jury had been. Benjamin Goodman's testimony in the Grand Jury on April 5, 1965 emphatically establishes the falsity of his affidavit.

Goodman specificially testified in the Grand Jury that he was not looking for any particular person in

the audience and that he did not know, one way or the other, if Butler or Johnson were present in the ballroom:

Q You knew that Johnson and Butler from Mosque Number 7; is that right?

A Yes, when I was there I knew them.

Q Now, you stood up in front of the audience for a period time speaking; is that right?

A Yes, sir.

Q Do you know whether or not Butler and Johnson were in the audience as you spoke?

A No, sir.

Q You do not know if they were there or if they were not there?

A No, I don't.

Q You didn't see them there; is that correct?

A I didn't see them, no. It's difficult for me to -- I mean, I can't see them being there like that and know --

Q Just a minute.

A Yes.

Q Were you looking at the faces of the audience as you spoke?

A Not any particular people, sir. I guess -- have you ever spoken to a large audience, you just don't pick out a person, you know, you take in the whole audience because you have a message for the audience, not just a particular person. So I wasn't looking for anyone. I was more or less there to open up so Brother Minister could tell the people that he didn't have the charter. Not to see who was there.

Q So you do not know whether or not either man was there; is that correct?

A No, sir, I can't say that they weren't nor could I say that they were, because I didn't see them. Goodman's Grand Jury Testimony at 481-2.

In the face of Goodman's testimony in the Grand Jury, and coupled with the affidavit of Judge Stern and the attachments thereto, Goodman's affidavit should be summarily rejected by this court.

Shortly after Reuben Francis surrendered to the FBI, the People informed the defense that Francis was incarcerated in the Tombs, and requested that the court make Francis available to the defense should the defense desire to talk to Francis.

Throughout the course of this motion, Mr. Kunstler has repeatedly referred to Reuben Francis as a "key witness" At no time, however, have movants indicated why they consider Francis a "key witness"; nor have they even alleged that Francis' testimony would have been of any help to them at all.

Mr. Kunstler has also commented that, "it is passing strange, indeed, that Francis' availability was not made known to the defense", and has charged that

"none of the living trial counsel [presumably William C. Chance and Joseph P. Pinckney] for any of these defendants . . . were ever told a thing about this man [Francis] being available, being around to testify" after he surrendered to the FBI on February 2, 1966.* Mr. Kunstler's affidavit of February 11, 1978, and oral argument on February 15, 1978 at p. 13; see also, Mr. Kunstler's affidavits of January 19, 1978, April 18, 1978 and April 29, 1978.

The allegation that the People kept Francis hidden from and unavailable to the defense after Francis had surrendered to the FBI reveals an unawareness or disregard of the transcript of the trial of Butler and Johnson. On February 9, 1966, one week after Francis surrendered to the FBI, Detective Ferdinand Cavallaro testified on cross-examination that he last saw Francis on February 2, 1966 in the District Attorney's office. Cavallaro testified that two detectives had brought Francis to the office of Assistant District Attorney Vincent Dermody, the prosecutor in the instant case, and that he, Cavallaro, had arrested Francis there (Cavallaro: 1881-2).

---

* Reuben Francis was one of Malcolm X's bodyguards. He shot Hagan in the leg as Hagan fled from the ballroom. Francis was charged with Assault in the First Degree and related crimes. He jumped bail in May, 1965 and surrendered to the FBI on February 2, 1966. On April 19, 1966, Francis pleaded guilty to Possession of a Weapon as a Misdemeanor. See p. 10 of the People's Supplementary Memorandum, filed in April, 1978.

On February, 18, 1966, Cavallaro was re-called for further cross-examination. On re-direct examination, Cavallaro then testified that he had arrested Francis on February 2, 1966 on the warrant which had been issued for Francis' failure to appear in court, and that Francis was currently confined in the Tombs on $25,000 bail (Cavallaro: 25-96-7).

The prosecutor then told the Court, in the presence of defense counsel, that Francis was in fact presently confined in the Tombs but that because he was under indictment for shooting Hagan, the People had decided not to call him as a witness. Mr. Dermody informed the Court that he had no material or information from Francis which would be favorable or helpful to any of the defendants, and he offered to let the Court examine his file on Reuben Francis. And if, the prosecutor told the court, defense counsel "are desirous of talking to him, I would ask the Court to give them the fullest cooperation,to make him available." The Court replied that if any defense counsel wanted to talk to Francis, "I shall make him available to them at any time they desire" (2602-8).

Clearly, as an examination of the existing record would have revealed, there is no merit to the contention that the People kept Reuben Francis hidden from the defense.

The FBI material submitted in support of the motion does not support Hagan's allegations concerning the identities of the men Hagan claims were his accomplices in the murder of Malcolm X.

Movants have filed a number of redacted FBI memoranda and other FBI documents which they claim support Hagan's assertion that his accomplices in the murder of Malcolm X were four men from Paterson and Newark, New Jersey named "Benjamin Thomas or Thompson", "Lee or Leon Davis", "William X", and "Wilbur or Kinky". Hagan's affidavits of November 30, 1977 and February 25, 1978.

The unredacted FBI documents which the People received from the FBI and which are being made available to the Court show no support for the allegations contained in Hagan's affidavits. None of the persons named in these FBI documents as possible suspects bore the names provided by Hagan in his affidavits.

Nor is there any likelihood that the remaining FBI documents which are in their redacted form would provide any information to corroborate the allegations contained in Hagan's affidavits. These documents are, in the main, internal FBI memoranda which merely summarize the status of the investigtion into the murder and, as such, contain no raw data of their own. Certainly, there is nothing in those portions of the documents which are readable that in any way corroborates Hagan's allegations concerning the identities of the men he says

participated with him in the murder of Malcolm X.* Indeed, in some of these documents, Butler and Johnson are identified as having been present at the Audubon Ballroom and Butler is identified as having participated in the murder of Malcolm X.

Similarly, the District Attorney's Office case file contains nothing whch supports Hagan's allegations concerning the identities of the men he claims were his accomplices in the murder of Malcolm X.

After the passing of many months and the submission of a great many papers, Hagan's affidavits remain nothing more than what they started out as -- a frivolous attempt, unsupported by anything else, to cast doubt on the accuracy of the jury's determination that the overwhelming evidence against Bulter and Johnson proved them guilty of the murder of Malcolm X.

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*The FBI document dated March 25, 1965 (page 38 as labeled by Mr. Kunstler) which states that the shotgun-wielder was allegedly a lieutenant in the Newark Temple of the Nation of Islam should be read in conjunction with the unredacted FBI reports dated April 13 and 21, 1965 (pages 48 and 50 by Mr. Kunstler) which established that this person was not any of the ones named by Hagan in his affidavits.

CONCLUSION

THE MOTION SHOULD BE DENIED.

Respectfully submitted,

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

ROBERT M. PITLER
ALLEN ALPERT
Assistant District Attorneys,
Of Counsel

July, 1978

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

THE PEOPLE OF THE STATE
OF NEW YORK,
Respondent,

against

MUHAMMAD ABDUL AZIZ
(Norman 3X Butler),

and

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

Supplementary Affirmation,
Affidavit, and
Supplementary Memorandum
Ind. No. 871/65

DISTRICT ATTORNEY

155 Leonard Street
Borough of Manhattan
New York City

Exhibit "D"

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 LEONARD STREET
NEW YORK, N. Y. 10013
(212) XXXXX
553-9000

ROBERT M. MORGENTHAU
DISTRICT ATTORNEY

NEIGHBORHOOD COMPLAINT OFFICES:
HARLEM BRANCH
55 WEST 125 STREET
NEW YORK, N.Y. 10027
(212) 831-8661
WEST SIDE BRANCH
2112 BROADWAY
NEW YORK, N.Y. 10023
(212) 595-0760

October 6, 1978

Honorable Harold Rothwax
Supreme Court of the
State of New York
County of New York
100 Centre Street
New York, New York 10013

Re: People v. Butler and Johnson
Ind. No. 871/65

Honorable Sir:

This letter is in response to the affidavit of Mr. Kunstler dated September 12, 1978.

When the above-captioned case was last on the calendar on September 6, 1978, Mr. Kunstler stated to your Honor that he was making progress in his efforts to obtain a statement from one of the men he contends murdered Malcolm X. He requested additional time to continue talking to this person in order to obtain a statement from him, as well as to contact and talk to two other individuals who, he contends, also murdered Malcolm X. Over the People's objection, your Honor granted Mr. Kunstler an adjournment to October 12, 1978.

Mr. Kunstler's affidavit indicates, however, that he has done nothing to attempt to obtain these statements. Indeed, in a telephone conversation with me on September 18, 1978 Mr. Kunstler told me that he has not spoken with any of these three men since our last court appearance on September 6, 1978, and that he does not intend to speak to them.

Mr. Kunstler admits in his affidavit that it is "highly unlikely" that these men who, he says, are of the Islamic religion, will talk to Islamic ministers. He therefore requests that the People interrogate them since, as he said to me, we are better at getting confessions than he is and he feels uncomfortable asking someone to confess to a crime. The suggestion that any of these

Honorable Harold Rothwax
Supreme Court of the
State of New York

men, after being apprised of their Miranda rights, will confess their "guilt" some thirteen years after the fact to the very persons who would then presumably prosecute them for murder is absurd. Moreover, it improperly shifts to the People the burden on the defendants to set forth sworn allegations of facts in support of their motion.

Mr. Kunstler's affidavit is, in effect, an admission that, despite this Court's repeatedly demonstrated willingness to provide him with whatever time he felt necessary, he cannot produce any independent evidence in support of Hagan's affidavit - an affidavit which this Court has termed "frivolous." The time has now come for this Court to call an end to the submission of additional papers on this motion. The time has finally come for this Court to deny the motion.

Respectfully submitted,

Allen Alpert

Allen Alpert
Assistant District Attorney

cc: Mr. William Kunstler
853 Broadway
New York, New York 10003

AA:mm

Exhibit "E"

Mr. Alpert

RECEIVED
'78 OCT 31 AM 9:54
DISTRICT ATTORNEY'S OFFICE

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

212-674-3304

DOROTHY THORNE-BUTLER
LEGAL ASSISTANT

October 29, 1978

Hon. Harold Rothwax
Justice of the Supreme Court
100 Centre Street
New York, N.Y. 10013

Re: People v. Butler et ano.
Ind. No. 871/65

Dear Justice Rothwax:

I am in receipt of Mr. Alpert's letter of October 6, 1978, to you which, in effect, claims that the District Attorney has no obligation to do any investigation whatsoever of the information obtained by the defense and turned over to him some time ago, particularly that dealing with the full names and locations of at least two of the men named by Mr. Hagan as his accomplices in the assassination of Malcolm X.

My clients are relatively helpless to exploit the information which our investigation has turned up with respect to the names and addresses referred to above. But the District Attorney is in a position to do so. Naturally, I do not expect the suspects in question to confess to any police officers, or anyone else for that matter, but there are many other techniques that can be employed. For example, Mr. Hagan could be brought to a line-up or show-up involving them; interviews as to alibis could be conducted; persons present at the Audubon Ballroom on the day of the murder could view the suspects; their fingerprints could be compared to any that may have been obtained that day; the relationship between any of them and the Blue Cadillac could be explored, and so on.

Concededly, this is an unusual case. It is rare that one participant in a crime names and identifies others than his co-defendants as his sole accomplices and furnishes the wealth of information that appears in Mr. Hagan's second affidavit which, I am certain, the Court has never referred to as "frivolous." Mr. Hagan has maintained from the trial to this date that my clients did not participate in the crime with him and has, after much soul-searching, given every descriptive detail he can recall as to those who did. Surely, there is some responsibility on the part of the People, given the facts of this case, to take some affirmative action so as to rectify to a degree what may have been a horrendous miscarriage of justice which has cost two men the better part of thirteen years of their lives.

Defendants have done the detective work that has resulted

in a wealth of information concerning the crime. It would seem that, in the interest if justice if nothing else, this Court should direct that the People continue the matter and conduct the same type of investigation that would certainly have taken place if the facts provided the defense had been avaialble thirteen years ago.

I feel most strongly that what has already been presented by defendants mandates, if not a new trial at this juncture, at least an evidentiary hearing so that testimony can be produced from Mr. Hagan. Mr. Goodman and others which would, I am sure, meet the statutory standard for the granting of a new trial under §440.10, Criminal Procedure Law. However, I am certain that, with what the Court has now, that standard has been fully met and that, had Mr. Hagan testified at the original trial as he has in his second affidavit, there might well have been different verdicts insofar as these defendants were concerned.

We are dealing here with a very complex case about which considerable doubt has remained over all the years. There is a deep and solemn responsibility on all concerned - the defense, the state and the Court - to work together toward the end that, only by virtue of joint effort will justice be truly done.

Respectfully yours,

William M. Kunstler

wmk.dtb
cc. Mr. Alpert

Exhibit "F"

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 LEONARD STREET
NEW YORK, N. Y. 10013
(212) 732-7300
553-9000

ROBERT M. MORGENTHAU
DISTRICT ATTORNEY

NEIGHBORHOOD COMPLAINT OFFICES:
HARLEM BRANCH
55 WEST 125 STREET
NEW YORK, N.Y. 10027
(212) 831-8661
WEST SIDE BRANCH
2112 BROADWAY
NEW YORK, N.Y. 10023
(212) 595-0760

December 6, 1978

Clerk's Office
New York Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: People v. Muhammad Abdul Aziz,
(Norman 3X Butler)
and
Khalil Islam (Thomas 15X Johnson)
Indictment Number 871/65

Application for Certificate
Granting Leave to Appeal

Dear Sirs:

This Office has been informed of an application for a certificate granting leave to appeal from an order of the Supreme Court, New York County (ROTHWAX,J.), dated November 1, 1978, which denied the motion of the defendants to vacate the judgments convicting them of the murder of Malcolm X and sentencing them to life imprisonment. This response is submitted pursuant to Rule 600.8(d)(4) of the rules of this Court.

On December 1, 1978, I received from Mr. William Kunstler, attorney for the defendants, copies of his motion requesting leave to appeal and of his affidavit in support of the motion. Included with the instant motion papers were copies of the decision of the court below and of the twenty-one affidavits submitted in support of the motion by eight different persons on fifteen separate dates during the eleven months the motion was pending. Mr. Kunstler did not, however, provide this Court with copies of the People's responses to his motion. I am therefore enclosing with this letter a copy of the People's responses in the court below to Mr. Kunstler's motion to vacate the judgment. (It should be noted that Appendix "2" of

the People's response dated July, 1978 has not been included. Appendix "2" comprises unredacted copies of certain Federal Bureau of Investigation documents which were submitted only to the court below. If this Court should desire to review these documents, they will, of course, be made available to the Court).

Respondent opposes the application. The papers now before this Court include the response by the District Attorney covering the matters raised in the papers submitted by the applicant in the court below and the opinion of the Justice who denied the motion. The application for a certificate granting leave to appeal contains no new allegations.

Sincerely,

Allen Alpert

Allen Alpert
Assistant District Attorney

cc: Mr. William Kunstler
853 Broadway
New York, New York 10003

Enc.
AA/mm

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF PAROLE

1450 WESTERN AVENUE

ALBANY, NEW YORK 12203

Mr J. Miller

EDWARD R. HAMMOCK
CHAIRMAN

EDWARD ELWIN
EXECUTIVE DIRECTOR

RECEIVED
1981 SEP 25 AM 9 18
DISTRICT ATTORNEY
NEW YORK COUNTY

September 21, 1981

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

Re: Thomas Johnson
66 A 56 IIS # 433679 Z

Dear Mr. Morgenthau:

A request for commutation of sentence has been received in the case of the above named inmate who is presently incarcerated in a New York State Correctional Facility. This request will be reviewed shortly.

The Governor's Counsel would like to have included in the information provided any comments or recommendations you may wish to make concerning the use of executive clemency in this case.

In addition, please advise if you are aware of any current appeals or other actions pending concerning the case noted above and, if so, provide what details you have.

The following data is provided for your identification of this individual:

County of Indictment:	New York
Indictment No.:	871/65
Convicted Of:	Murder 1°
By:	Verdict
Date of Conviction:	3/11/66
Sentence:	Life (modified by law to 20-0/Life)
Date of Sentence:	4/14/66
Sentencing Judge:	Hon. Charles Marks

Thank you for your cooperation in this matter.

Yours truly,

LEO S. LEVY
Director
Executive Clemency Bureau

LSL:dc

WH