TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 762

SYLVESTER JOHNSON AND STANLEY CASSIDY,
PETITIONERS,

vs.

NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR CERTIORARI FILED MAY 21, 1965

CERTIORARI GRANTED NOVEMBER 22, 1965

No. 205 Misc.

~~No. 1356 Misc.~~

Supreme Court of New Jersey

Docket No. M-16.

STATE OF NEW JERSEY

vs.

SYLVESTER JOHNSON and STANLEY CASSIDY,
Petitioners.

CRIMINAL ACTION.

ON APPEAL FROM JUDGMENTS OF THE CAMDEN COUNTY COURT, LAW DIVISION (CRIMINAL).

Joint Appendix

NORMAN HEINE,
Camden County Prosecutor,
Attorney for Respondent,
Court House,
Camden, New Jersey.

M. GENE HAEBERLE,
518 Market St.,
Camden, New Jersey,
Attorney for Petitioners.

Sat below:

R. COOPER BROWN,
J. C. C. (Temporarily Acting as Assignment Judge.)

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

TABLE OF CONTENTS OF JOINT APPENDIX

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Joint Appendix

PETITION FOR POST-CONVICTION RELIEF.

(Filed August 6, 1964.)

The petition of Sylvester Johnson and Stanley Cassidy respectfully shows:

1. That they are presently detained and imprisoned in the New Jersey State Prison at Trenton, New Jersey, by Howard Yeager, the Principal Keeper of the State Prison, by virtue of a judgment and death sentence pronounced upon them by the Superior Court for the County of Camden, on January 28, 1959, by Judge Edward V. Martino, J. S. C.

2. That they were convicted in violation of the Fifth and Fourteenth Amendments to the United States Constitution in that the court charged the jury concerning their failure to take the witness stand and testify:

> "If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts" (707a)*

This was underscored by the argument of the prosecutor, who said:

---

* 3-Volume Joint Appendix are referred to in paragraph 10 (3) hereof.

". . . where the defendants refuse to take the stand in their own defense, that from their failure to testify in their own behalf, you, the jury, may infer that they could not truthfully deny the incriminating facts that were proved against them" (632a).

This matter was exacerbated in the extreme when the prosecutor later declared:

"Ladies and Gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for the defense. Now it is crystal clear. Now they finally admit it. What was there to deny? The State has proven a clear case. The defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Who speaks for these defendants? Are the attorneys speaking for the defendants? And why shouldn't the defendants speak for themselves; when someone says that he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear for themselves. Wouldn't this have indicated some sorriness on their part? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are sorry" (680-681).

This deprived petitioners of their constitutional privilege against self-incrimination and renders their convictions and death sentences void.

3. That, during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, were never given the opportunity to seek counsel, were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively denied the assistance of counsel during the most critical stage of the criminal proceedings against them, in violation of the guarantees of the Constitutions of the State of New Jersey and the United States.

4. That petitioner Cassidy was unlawfully arrested at his home, 312 Pine Street, Camden, New Jersey, at 4:00 A. M., on January 29, 1958. Included among the arresting officers were Captain Philip Large, Lieutenant Vincent Conly, Sergeant Harry Tracy, and Detectives William O'Brien, Golden Sunket and William Large. The arresting officers took petitioner Cassidy into custody without a warrant for his arrest and in the absence of any circumstances that would permit arrest without a warrant. Thereafter, without a warrant, they searched the premises at 312 Pine Street, and subjected petitioner Cassidy to intensive interrogation. As a result, five hours later, they obtained from petitioner Cassidy a confession, which was introduced into evidence against him at his trial. The use by the prosecution of this confession, which was the product of the unlawful arrest and illegal search, renders his conviction illegal and void under the Constitutions of the State of New Jersey and the United States.

5. That petitioner Cassidy was deceived and induced to turn over a gun to the police authorities as a result of the false statement of the prosecutor that the investigating officers merely wanted to determine whether or not the gun

had been fired and the further false promise by the prosecutor that the gun would not be introduced into evidence. The gun was used as evidence by the prosecution, thereby depriving Cassidy of a fair trial, in violation of the Constitutions of the State of New Jersey and the United States.

6. That petitioners were tried with a co-defendant, Wayne Godfrey, who had made a lengthy confession explicitly involving petitioners in an armed robbery-murder, for which they were convicted; that the confession was introduced into evidence at the trial; and that the confession has been held involuntary and coerced by the United States Court of Appeals for the Third Circuit. 327 F. 2d 311. The impact of a confession upon a jury is so great that, despite instructions limiting Godfrey's confession to his case, there must necessarily have been prejudice to petitioners through the prosecution's use of a coerced confession of a co-defendant. Petitioners were thereby deprived of a fair trial, as guaranteed by the Constitution and laws of New Jersey, and the Constitution of the United States.

7. That the prosecution obtained from petitioners' confessions that were the product of the coerced confession of Wayne Godfrey, a co-defendant whose confession was held involuntary by the United States Court of Appeals for the Third Circuit. 327 F. 2d 311. Petitioners' confessions were derived by the police authorities from the coerced confession of Godfrey, who was arrested first and held for interrogation fourteen hours before petitioner Cassidy was taken into custody and twenty-seven hours before petitioner Johnson was arrested. The same interrogating officers used the information they had unlawfully extracted from Godfrey to identify, locate, and obtain the confessions of peti-

tioners, thereby depriving them of due process of law, as guaranteed by the Constitutions of the State of New Jersey and the United States.

8. That petitioners were unlawfully detained and interrogated by the police authorities in violation of New Jersey Revised Rule 3:2-3, which provides that any person arrested shall be taken before a judicial officer promptly and provides further that the judicial officer shall advise the prisoner of his constitutional rights, including the right to remain silent and the right to counsel. The prosecutor has declared, during oral argument before the Court of Appeals for the Third Circuit, in a case involving these relators, that this rule is not obeyed because the Supreme Court of New Jersey has failed to provide any sanction for violation of the rule. Important rights of citizens are thus nullified. The only sanction possible in the circumstances is to exclude the fruits of the illegal detention. Petitioners' confessions were obtained during a period while the interrogating officers were violating Revised Rule 3:2-3. The use of those confessions as evidence should therefore render their convictions void.

9. That petitioners were deprived of Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States and the laws of New Jersey by the extremely prejudicial summation of the prosecutor. In his address to the jury, the prosecutor grievously distorted the facts by asserting that the evidence proved the defendants had planned in advance to murder Edward Davis. One of his more gruesome allusions was to the frustration experienced by the defendants when their victim failed to die quickly. The prosecutor even intimated that the defendants conceded premeditating homicide.

Further, the prosecutor argued for a death sentence on patently improper grounds, namely, that the death of these defendants would deter other would-be violators; the prosecutor threatened the jury that anything less than a death sentence would place the jury's stamp of approval on murder and armed robbery and would condone killings, returning the law of the jungle to New Jersey. The entire summation was larded with what the prosecutor chose to call the "parlance of the underworld".

The tenor of the summation, its flat assertion of facts not established by evidence, and its invocation of the theory of deterrence to justify death sentences, operated to deprive petitioners of Due Process of Law in violation of the laws of New Jersey and the Constitution of the United States.

10. The history of the litigation in this case is as follows:

(1) The petitioners were tried and a judgment and death sentence placed upon them on January 28, 1959.

(2) Sylvester Johnson was represented at the trial by Elmer Bertman, Esq., of Camden and Stanley Cassidy was represented at the trial by Louis N. Caggiano, Esq. Both of these attorneys were retained by the defendants' respective families.

(3) The conviction was appealed and all three defendants were represented by E. Stevenson Fluharty, Esq., who was assigned and had represented Wayne Godfrey at the trial. 31 N. J. 489, 158 A. 2d 11 (S. Ct. N. J. No. 2839, 1960).

(4) Edward Kent, Esq., of Willingboro, New Jersey, was retained as attorney for Cassidy, Johnson and Godfrey and

obtained an order in the New Jersey Supreme Court granting a hearing on the basis of alleged newly discovered evidence. The trial court after a hearing in which the defendants were represented by Edward Kent, Esq., denied the request for a new trial, 63 N. J. Super. 16, 163 A. 2d 593.

(5) In connection with the preparation for the appeal, Stanford Shmukler, Esq. and Curtis Reitz, Esq., were retained. The New Jeresey Supreme Court affirmed the trial court: 34 N. J. 212, 168 A. 2d 1 (Feb. 6, 1961).

(6) Certiorari was denied by the United States Supreme Court: 368 U. S. 933 (1961).

(7) On October 17, 1961, M. Gene Haeberle, Esq., was substituted in place of Edward Kent, Esq., and thereafter M. Gene Haeberle, Esq., of Camden, New Jersey, in association with Curtis Reitz, Esq. and Stanford Shmukler, Esq., of Philadelphia, Pa., represented Johnson, Cassidy and Godfrey in all matters until the date hereof. From October 17, 1961, the three aforementioned attorneys (M. Gene Haeberle, Esq., Curtis Reitz, Esq., and Stanford Shmukler, Esq.) were neither assigned, retained, nor paid for their services, but they pursued the matter because they felt it was incumbent upon them as members of the bar.

(7) A motion for a new trial based on the holding of *State v. Mount,* 30 N. J. 195, 152 A. 2d 343, was made on offer of evidence and was denied by the trial court, 71 N. J. Super. 506, 177 A. 2d 312 (Law Division 1962).

(8) The action of the trial court in denying the new trial was affirmed: 37 N. J. 19, 179 A. 2d 1 (February 26, 1962).

(9) On March 7, 1962, *a Clemency Hearing and Reprieves were granted* by Richard J. Hughes, Governor of New Jersey until April 12, 1962.

(10) Certiorari was denied by the United States Supreme Court: 370 U. S. 928 (1962).

(11) On June 26, 1962, in the United States District Court, petitions for Federal Habeas Corpus were filed.

(12) On June 26, 1962, motions for permission to interview jurors and other relief were filed in the United States District Court.

(13) On July 31, 1962, there was an oral order of Judge Lane which denied petitions for Habeas Corpus, motions and other relief, on the basis that the defendants had failed to exhaust New Jersey State Court remedies.

(14) On August 15, 1962, there was filed an order of denial of all relief by Judge Lane, U. S. D. J.

(15) On August 16, 1962, petitions for Habeas Corpus and motions for permission to interview jurors were filed in the New Jersey State Court.

(16) On August 22, 1962, order denying relief was entered by Judge Martino, J. S. C. There was no published opinion.

(17) The New Jersey Supreme Court affirmed Judge Martino's action on October 1, 1962 at 38 N. J. 319, 184 A. 2d 641.

(18) On October 24, 1962, petitions for Habeas Corpus and motion for permission to interview jurors were renewed in the Federal District Court.

(19) On October 24, and October 26, 1962, Judge Lane entered orders denying the petitions for Habeas Corpus, motions and other relief.

(20) On November 29, 1962, appeals were perfected and docketed in the United States Court of Appeals for the Third Circuit.

(21) On April 24, 1963, appeals were argued in the United States Court of Appeals for the Third Circuit. A reargument was ordered and held on November 18, 1963, and on January 24, 1964, the court granted a new trial because of a coerced confession as to Wayne Godfrey, but denied new trials as to Sylvester Johnson and Stanley Cassidy. Circuit Judge Ganey dissented as to the affirmance on Stanley Cassidy believing that Stanley Cassidy's confession was coerced: 327 F. 2d 31 and 327 F. 2d 320 (January 24, 1964).

(22) Application for Certiorari was denied by the United States Supreme Court, on June 15, 1964, Mr. Justice Douglas dissented: 84 Supreme Court 1882.

11. None of the contentions advanced in this petition was raised in any of the prior proceedings. Each contention rests upon a recent development in the law or a newly established fact.

(a) The contention in Paragraph 2, claiming violation of the privilege against self-incrimination, rests upon the de-

cision of the Supreme Court of the United States in *Malloy v. Hogan,* 84 Sup. Ct. 1489, decided June 15, 1964. This case held, for the first time, that the Fifth Amendment privilege against self-incrimination is applicable through the Fourteenth Amendment to the States. And see *Stewart v. United States,* 366 U. S. 1 (1961).

(b) The contention in Paragraph 3, claiming that the petitioners were deprived of their right to counsel, rests upon the decision of the Supreme Court of the United States in *Escobedo v. Illinois,* 84 Sup. Ct. 1758, decided June 22, 1964. This case held, for the first time, that the guarantee of the right to counsel applies to the interrogation stage of a criminal proceeding. And see *Massiah v. United States,* 84 Sup. Ct. 1199, May 18, 1964.

(c) The contention in Paragraph 4, claiming that petitioner Cassidy's confession was inadmissible because it was the product of illegal arrest and detention, rests upon the decisions of the Supreme Court of the United States in *Ker v. California,* 374 U. S. 23 (1963); *Traub v. Connecticut,* 374 U. S. 493 (1963), and *Wong Sun v. United States,* 371 U. S. 471 (1963). The facts surrounding the illegality of Cassidy's arrest have never been established of record. This explains, perhaps, the denial of the petition for certiorari in which this contention was inserted. 84 Sup. Ct. 1890 (No. 1322, Misc., 1964).

(d) The contention in Paragraph 5, claiming violation of Cassidy's rights through the use of the gun fraudulently obtained from him, has not previously been raised. It was discussed, however, by the United States Court of Appeals for the Third Circuit in the prior federal habeas corpus proceeding. 327 F. 2d 311.

(e) The contentions in Paragraphs 6 and 7 derived from the determination that the confession of co-defendant Godfrey was involuntary and inadmissible. This determination made by the United States Court of Appeals for the Third Circuit, 327 F. 2d 311, came in the federal habeas corpus proceeding which terminated on June 15, 1964. 84 Sup. Ct. 1882.

(f) The contention in Paragraph 8, claiming a violation of N. J. R. R. 3:2-3, has not been raised heretofore. It is especially timely in light of determinations by other States to render inadmissible confessions taken during a period of illegal detention. E.g., *People of New York v. Donovan,* —— N. Y. N. E. 2d —— (——).

(g) The contention raised in Paragraph 9, claiming a violation of petitioners' constitutional rights by the prosecutor's summation, is raised here for the first time in the context of the Federal and State Constitutions. On Appeal from the conviction, the New Jersey Supreme Court directed that the summation question be briefed and argued; in light of the procedural situation, the State Supreme Court did not reverse on this ground. *Johnson v. State,* 31 N. J. 489, 158 A. 2d 11, 22 (1960). The failure of defense counsel to make immediate objections and to preserve the question for appeal should not bar this constitutional issue from being decided on its merits. See *Fay v. Noia,* 372 U. S. 391 (1963).

WHEREFORE, petitioners pray that they be allowed to proceed without payment of filing fees and for the assignment of counsel under Rule 3:10A-6(a); that a hearing be set to hear and determine the issues of fact that are raised;

that petitioners be authorized to employ the normal discovery devices of civil litigation to marshal the proof requisite for this hearing; and that, after a full and complete hearing on the legal and factual contentions, this Court relieve petitioners of the unlawful and unconstitutional detention, imprisonment, and sentences of death; and that the Court grant such other, further, and different relief as to the Court may deem just and proper in the circumstances, and a stay for the warrant of execution entered July 31, 1964.

STANLEY CASSIDY,
SYLVESTER JOHNSON.

APPLICATION FOR THE ASSIGNMENT OF COUNSEL.

1. I am one of the defendants in the above entitled criminal cause of action.

a. I have heretofore been given leave to file and to appeal as an indigent in the State Courts of New Jersey and in the United States Federal Courts on the basis of a verified petition setting out the facts establishing my indigency.

2. Neither myself nor my family is able to pay to retain counsel to defend me in this matter.

WHEREFORE, petitioner prays:

That this Honorable Court assign counsel to represent him on this petition for post-conviction relief and for any appeal thereof should that be necessary, without fees or costs to the petitioner.

SYLVESTER JOHNSON.

Application for the Assignment of Counsel

State of New Jersey }
County of Mercer } ss.

Sylvester Johnson, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the petitioners in the above entitled action.

2. I have read the foregoing petition and the same is true to my own knowledge.

3. This affidavit is made to inform the Court as to my status of indigency and to induce the Court to assign counsel to represent me as an indigent defendant in connection with the petition for post-conviction relief under R. R. 3:10A-1 and R. R. 3:10A-6(a).

4. In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1000 or imprisonment for not more than three years or both.

SYLVESTER JOHNSON.

Subscribed and sworn to before me, this 6th day of August, 1964.

M. GENE HAEBERLE,
Attorney at Law of the State
of New Jersey.

Application for the Assignment of Counsel

APPLICATION FOR THE ASSIGNMENT OF COUNSEL.

1. I am one of the defendants in the above entitled criminal cause of action.

a. I have heretofore been given leave to file and to appeal as an indigent in the State Courts of New Jersey and in the United States Federal Courts on the basis of a verified petition setting out the facts establishing my indigency.

2. Neither myself nor my family is able to pay to retain counsel to defend me in this matter.

WHEREFORE, petitioner prays:

That this Honorable Court assign counsel to represent him on this petition for post-conviction relief and for any appeal thereof should that be necessary, without fees or costs to the petitioner.

STANLEY CASSIDY.

State of New Jersey }
County of Mercer } ss.

Stanley Cassidy being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the petitioners in the above entitled action.

2. I have read the foregoing petition and the same is true to my own knowledge.

Order

3. This affidavit is made to inform the Court as to my status of indigency and to induce the Court to assign counsel to represent me as an indigent defendant in connection with the petition for post-conviction relief under R. R. 3:10A-1 and R. R. 3:10A-6(a).

4. In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1000 or imprisonment for not more than three years or both.

STANLEY CASSIDY.

Subscribed and sworn to before me, this 6th day of August, 1964.

M. GENE HAEBERLE,
Attorney at Law of the State
of New Jersey.

ORDER.

(Filed August 11, 1964.)

The Court having reviewed the petition of Sylvester Johnson and Stanley Cassidy for post-conviction relief, being the first application by these petitioners for relief under rule R. R. 3:10A and the Court being aware that warrants of execution were entered July 31, 1964, fixing the week beginning September 13, 1964 for the execution of each of the petitioners, and the said petitioners having requested the assignment of counsel under R. R. 3:10A-6(a), and the Court having recognized that the said petitioners have been recognized and are indigent;

Judgment

IT IS on this 11th day of August, 1964, ORDERED and ADJUDGED that M. Gene Haeberle, Esq., 518 Market Street, Camden, New Jersey, be and he hereby is assigned and appointed to represent Sylvester Johnson and Stanley Cassidy in connection with their petition for post-conviction relief and subsequent legal proceedings developing therefrom.

IT IS FURTHER ORDERED and ADJUDGED that oral argument only be held on the petition for post-conviction relief on Friday, August 14, 1964, at 9:30 A. M., in the Court House, in the City of Camden.

R. COOPER BROWN,
J. C. C.,
Temporarily Acting as Assignment Judge.

JUDGMENT.

(Filed August 17, 1964.)

This petition for post-conviction relief pursuant to R. R. 3:10A-1, et seq., having been opened to the Court by Gene Haeberle, assigned attorney for petitioners, and Norman Heine, Prosecutor of Camden County, appearing for respondent State of New Jersey, and the Court upon the State of New Jersey's motion for dismissal of the petition, having heard and considered the respective oral arguments of the parties and having made pursuant to R. R. 3:10A-1 findings of fact and conclusions of law,

Notice of Appeal

IT IS ON THIS 14th day of August, 1964, ORDERED and ADJUDGED that the respondent's motion to dismiss the petition be granted and the relief sought in the petition for post-conviction relief be denied.

IT IS FURTHER ORDERED and ADJUDGED that the petitioners prayer for a stay from the warrant of execution entered July 31, 1964, is denied.

/s/ R. COOPER BROWN,
J. C. C.,
Temporarily Acting as Assignment Judge.

NOTICE OF APPEAL.

(Filed September 11, 1964.)

To: Norman Heine, Esq., Prosecutor of Camden County.

Notice is hereby given that Sylvester Johnson and Stanley Cassidy appeal to the Supreme Court of New Jersey from all of a certain judgment entered in this matter, dated August 14, 1964, signed by the Honorable R. Cooper Brown, J. C. C., temporarily acting as assignment judge, J. S. C.

/s/ M. GENE HAEBERLE,
Attorney for Petitioners, Sylvester Johnson and Stanley Cassidy.

Dated: September 11, 1964.

Notice of Appeal

State of New Jersey }
County of Camden } ss.

Veronica E. Dalton, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am an employee in the office of M. Gene Haeberle, Esq., Attorney for Petitioners, in the above entitled cause of action.

2. On Friday, September 11, 1964, I served the within Notice of Appeal upon Norman Heine, Esq., Harry Bateman and Hon. R. Cooper Brown, by enclosing copies thereof in envelopes addressed as follows: Norman Heine, Esq., Court House, Camden, N. J.; Hon. R. Cooper Brown, Court House, Camden, N. J. and Harry Batemen, Court House, Camden, N. J. and sent the same by certified mail, return receipt requested, on which the postage was prepaid.

VERONICA E. DALTON.

Sworn and subscribed to before me, this 11th day of September, 1964.

LILLIAN S. MIGALA,
Notary Public of New Jersey.
My Commission Expires August 11, 1969.

Argument

ARGUMENT.

---

(1) August 14, 1964.

Before: R. COOPER BROWN, J. C. C.

PRESENT:

NORMAN HEINE, Esq., for the State of New Jersey.

M. GENE HAEBERLE, Esq., for the Defendants.

---

(2) MR. HAEBERLE: If it pleases the Court, this is the date fixed by order of the Court for oral argument on a petition for post conviction relief of Sylvester Johnson and Stanley Cassidy.

Approximately a half hour ago I was given a copy of the State's brief in this matter.

THE COURT: Do you wish a continuance so you can study the brief?

MR. HAEBERLE: Well, I must say, your Honor, I haven't had the opportunity to check out the citations and all these cases.

Argument

THE COURT: If you think you are being prejudiced by this, the Court will continue the matter. The Court has no desire to force you on before you have had adequate time to prepare yourself. I am sure the Prosecutor doesn't either. I don't want the record to reflect that the Court is forcing you on against your will.

MR. HAEBERLE: Well, if it please the Court, I appreciate the Court's offer, but (3) my review of these cases indicates to me that they are not current cases. They are cases of many years past, with the exception of State vs. Smith, which was decided last month by our New Jersey Supreme Court, which I have had the opportunity to review through the kindness of your Clerk. Therefore, I don't request a continuance to meet these cases. I believe that I can answer them by argument.

THE COURT: All right.

MR. HAEBERLE: In the second point of the petition, the contention is raised bringing into light the charge of the Court, as well as the summation by the Prosecutor.

The summation by the Prosecutor is quoted at some length, and I think quite clearly that what the Prosecutor attempted to do, and what he did was to deprive the petitioners of their constitutional privilege against self-incrimination. He made specific mention and reference of their failure to take the stand, and he even went to infer why they didn't take the stand.

(4) In the Prosecutor's brief, reference is made under this point to Malloy vs. Hogan, a most recent decision of the United States Supreme Court, and I think that case has been cited in the petition, is relevant, and determinative on

this point. What the Prosecutor did is condemned by Malloy vs. Hogan.

Now, the citations that the State relies upon to support its position, is that the Prosecutor had a right to make a great point of the failure of the defendants to testify, had a right to use it against them; U. S. vs. Feinberg, which is cited in 140 F. 2d 592 (2nd Cir. 1944).

These cases, and the other cases cited in Louisiana and Pennsylvania are all decisions prior to Malloy vs. Hogan, and I respectfully suggest that the U. S. Supreme Court has now spoken definitively. These cases are neither good guideposts, nor do they represent the law.

THE COURT: What do you say that the Court said in the Malloy case, what was the final conclusion?

MR. HAEBERLE: Well, as I understand (5) it, your Honor, it would not be proper for the State to make mention of the fact that a defendant did not take the stand, and also to infer from the fact that he did not take the stand that his failure was in any way indicative one way or the other of his guilt or innocence.

THE COURT: Do you think the Court went so far to say the State could no longer comment on normal human processes and the reactions by saying the defendant was accused of doing a specific act, that he could have taken the stand and denied that he did that act, the Prosecutor couldn't even comment that the jury might consider that fact? Do you say the jury cannot use normal human thinking to weigh what effect, if any, that might have that they no longer could consider that it is a normal spontaneous human reaction to deny untrue facts when you are accused of them?

Argument

MR. HAEBERLE: I think under Malloy the Prosecutor doesn't have such a right.

THE COURT: You think that the Court went that far?

(6) MR. HAEBERLE: Yes, I do. However, the facts in this case are not the same facts as your Honor poses in the question. What the Prosecutor did was not merely comment that they failed to testify in their own behalf, he went on to say that they should speak for themselves; they didn't dare say they were sorry; that they didn't get on the stand and bare their breasts and say they were sorry. "They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are sorry." That clearly calls for prejudice on the part of the jury, and to call it up in a way when the Prosecutor knows that the defendants had an absolute right to remain silent.

The question your Honor posed is not in this case. This is a very much aggravated case where the prosecution made a reference, and knowing that at this point, of course, they couldn't get on the stand, they had already (7) rested. It is not the same problem posed by the Court's question, and I think there ought not to be any doubt that Malloy vs. Hogan clearly goes so far as to condemn what happened in the trial of this case, and the Prosecutor's summation.

THE COURT: Do you interpret that decision to go so far as to prohibit the Prosecutor from saying the facts which he has proven as part of the State's case haven't even been refuted by these defendants?

Argument

MR. HAEBERLE: If your Honor please, that wasn't what he said. He went on to do more.

THE COURT: Let's take it a step at a time. You say he went further than that. He certainly started on that premise, didn't he?

MR. HAEBERLE: Yes.

THE COURT: Do you think that the decision went so far, to tell the jury I have proven so and so, and the defendants did not refute those facts, deny those facts?

MR. HAEBERLE: I think it did, your Honor. However, I think, perhaps, it is room (8) for dispute. I think that was the intent of the case to go that far. However, I think it is reasonably clear that it certainly went so far as to prohibit what the Prosecutor did under the facts of this case, when he made repeated reference to their failure to testify, and failure to even say they were sorry. I think that is much furthr than the question posed by the Court.

I would suggest too, as pointed out in the Prosecutor's brief, that there are a number of jurisdictions, New Jersey being only a minority jurisdiction, which permits this comment at all, that the majority of the jurisdictions do not permit this comment by the Prosecutor.

THE COURT: You cite some Federal cases, but isn't it true that there has been for many years a Federal statute that prohibits it, and it was for statutory reasons that it was not allowed in the Federal Courts?

MR. HAEBERLE: Or in the State Courts, your Honor.

Argument

(9) THE COURT: Well, I haven't read the statutes of the State Court decisions you refer to, but it may be those States have a statute similar to the Federal statute, but does that set up constitutional grounds?

MR. HAEBERLE: I think it does now in light of Malloy vs. Hogan. I mean even prior to Malloy vs. Hogan, according to the language cited by the Prosecutor from the New Jersey Supreme Court case, State vs. Corby, "Only in a small minority of the States may comment be made by the trial court on a defendant's abstention from denying inculpatory facts tending to establish his guilt," and so forth.

I am merely suggesting to the Court, that even prior to Malloy vs. Hogan there were only a small number of States, and New Jersey was one, which allowed this comment by the Prosecutor.

THE COURT: The question was, is that a prohibition by statute, or one of Court rule based on constitutional grounds?

MR. HAEBERLE: I couldn't answer that (10) question.

Point three in the petition deals with during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, and were never given the opportunity to seek counsel, and were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively denied the very vital assistance of counsel at that time when it was most important to them, at the times, and during the taking of these so-called confessions.

If your Honor please, this fact that they were being held incommunicado, that they wanted counsel, that their family

and friends had tried to see them when they were in jail, and that they were denied the opportunity of counsel, and denied seeing their friends is a fact supported by an affidavit. There is no counter affidavit, or counter assertion, or any proof that they were allowed counsel or they were allowed to see friends.

(11) THE COURT: Does the proof go so far as to state that the defendants requested counsel, and that the request was denied?

MR. HAEBERLE: No, your Honor. I submit that this point three is verified by the affidavit of Stanley Cassidy and Sylvester Johnson.

I know your Honor has provided only for oral argument here. However, with the full hearing, the other relief being requested, I would call some of the friends and relatives of Stanley Cassidy and Sylvester Johnson.

As to Stanley Cassidy, these people, or some of the people, relatives, friends I would call Mrs. Mildred Cassidy, the mother, Mrs. Nettie Jones, Mrs. Vivian Rhone. I would also call Mrs. Bertha Loveland, and Mrs. Charles Gaines to show the efforts that they made; that they came into City Hall; that they went to the police station; that they tried to see Stanley Cassidy, and were denied any right to talk to him, and to the officers or other officials that they spoke to, they were denied the right to (12) speak to them. That would be a point in the hearing that I would hope to show by introducing their testimony.

THE COURT: What authority do you rely on which says the denial of the right of a defendant at this stage of the proceedings, and at the stage you are talking about, the

initial area, what authority do you rely upon that says that failure to permit defendants at that time to see members of his family or his friends denies him of his constitutional rights?

MR. HAEBERLE: Coupled with the fact that Stanley Cassidy himself wanted an attorney; coupled with the fact that ——

THE COURT: Wait a minute. I thought you told me a few minutes ago the proofs do not show he wanted an attorney but was not offered.

MR. HAEBERLE: In both respects, your Honor. In paragraph number three is sworn to as true by Cassidy. In other words, I am making ——

THE COURT: Assuming for the purpose of this argument that affidavit is true. That (13) affidavit doesn't say that he wanted counsel and he was deprived the right of counsel when he requested it. Isn't that what the affidavit says?

THE PROSECUTOR: He didn't even go that far.

THE COURT: Giving it its broadest construction favorable to the defendant.

MR. HAEBERLE: Well, the Prosecutor makes the point that relying on State vs. Smith, I believe it was decided July 7, 1964, that there is no indication ——

THE COURT: I have that decision before me now.

Argument

MR. HAEBERLE: There is no indication from this petition that there was refusal of counsel or he was denied the request to see counsel. I suggest that in answer to your question—the case I rely on is Escobedo vs. Illinois, where it is very pertinent to Stanley Cassidy. Cassidy was never convicted of a crime. As a matter of fact, he was never arrested before. Escobedo was a man who had (14) many brushes with the law, and I believe a number of convictions, and, perhaps, if there should be one who would know his rights, Danny Escobedo should, but he wasn't allowed the opportunity to contact a lawyer. Here we have a man who had no prior arrests, trial, interrogation or convictions, who was brought in, being a young boy, who by the record has a dependent passive type emotional background, then put into the meat grinder of a Prosecutor's office and a string of detectives to get a confession of him. You have him snatched out of his home about 5 o'clock in the morning, then taken down here and interrogated. Then you have following that the family trying to see him, and he being deprived to see his family. You have this complete ignorance of judicial process of his own rights.

Now, I think Stanley Cassidy is clearly the type case that Escobedo was. Under all the facts in the Escobedo case, it requires that Stanley Cassidy be given a new trial.

Now as to Sylvester Johnson, I would (15) call in this matter, Mrs. Geraldine Hatcher, Mrs. Allian Johnson and Mrs. Vernie Johnson, who are also present in Court.

THE COURT: For what purpose?

MR. HAEBERLE: For the same purpose, to show the efforts made by them to talk to Sylvester Johnson, and I would also call them in reference to the action they took

in trying to obtain counsel for Sylvester Johnson, and the delay in time for various reasons that they did not get to see Sylvester Johnson, and again, Sylvester Johnson was not advised of his right to counsel.

I think, again, under Escobedo vs. Illinois, the attention had to focus on them quite clearly. The Prosecutor knew who they were going to get and where they were going to get it.

I think, again, these witnesses who are present in Court, if the Court will grant opportunity for a full hearing, would substantiate the fact that they were denied access to Sylvester Johnson, and that Sylvester (16) Johnson wanted to have counsel.

The Johnson problem in this respect is somewhat different from Stanley Cassidy. Johnson's family ultimately retained counsel, and were actively engaged in trying to retain counsel from the moment that they were apprised of Johnson's arrest by newspapers and radio, but, again, they didn't have any opportunity to see Sylvester Johnson until after the prosecution had its way and obtained the so-called confessions.

Escobedo vs. Illinois requires a new trial both for Sylvester Johnson and Stanley Cassidy.

Mention has been made of point four, about the time of arrest of Cassidy.

Now, it has never been denied, although the State has not affirmatively admitted it, that they lacked a search warrant, that they lacked an arrest warrant.

In the State's brief they make the point that it doesn't matter, because they didn't seize any evidence which they used at (17) the trial from this unlawful arrest and search of Cassidy's home.

However, I would suggest to the Court that this goes—

this re-emphasizes the applicability of the Escobedo case, because here Stanley Cassidy who had no experience with the law, the police come banging through his house at 4 o'clock in the morning, take him out, they didn't say why they were doing it, what the reason for it was, searched the whole house, then take him down to the jail. I think that type of complete denial of sanctity of the home certainly has got to have an effect on the response Stanley Cassidy makes to these questions. He has no rights, the police can break into his house, arrest him, search his whole house, take him to jail; what is he going to expect? He is going to expect that he has no rights. He is going to do whatever the prosecution or police request of him.

THE COURT: Mr. Haeberle, do you contend that the State doesn't have reason to believe that this defendant committed this (18) murder at the time they arrested him 4 o'clock in the morning?

MR. HAEBERLE: I don't know what they had reason to believe.

THE COURT: All right. Then you are not disputing the fact. If they had reason to believe he committed this murder, did they have a right to arrest him 4 o'clock in the morning without a warrant under our practice?

MR. HAEBERLE: I don't know what facts they had, your Honor.

THE COURT: All right. You don't dispute it. I am going to have to assume that they did have reason to believe that he committed a crime, and under our practice they had

a right to make an arrest, and if the search was incidental to that arrest, the search was proper and reasonable under the constitution, was it not? If there were no articles seized and used at the trial, where was the unreasonable search and seizure under the most recent decisions of the United States Supreme Court?

MR. HAEBERLE: I would suggest, your (19) Honor, that the fact that they went without a warrant was unreasonable search and seizure.

THE COURT: You are not contending, are you, if a police officer has reasonable grounds to believe that a particular defendant commits a murder, they can't arrest him, they have to go get a warrant for his arrest and allow him to escape?

MR. HAEBERLE: No, your Honor, but I have no knowledge of what the background or information that they knew or they acted upon. As a matter of fact, that is one of the points that we would like to determine, what is the information that they acted upon.

I think one of the most significant aspects of this type action was the effect that it had on Stanley Cassidy. It could only be productive of him obeying whatever the State asked of him. They can bust into his house and run through the place, I think that has an effect on a man, a man who never had any prior exposure, and has limited intelligence.

Now, under point five, reference is (20) made to a point which Judge Hastie raised in the Third Circuit opinion dealing with the fact that petitioner Cassidy was deceived and induced to turn over the gun to police authorities as a

result of the false statement of the Prosecutor. Mention was made of this by the Third Circuit, but no opinion was expressed on it one way or the other. It hadn't been presented as a point of error before this time. The petitioner now raises this point that the gun was used as evidence by the Prosecutor, and that it was obtained by a false promise, and this point five is so verified by Cassidy.

Again, this point would be one that the petitioners with a full hearing would want to develop the facts so that your Honor could make a fair determination of it based on all the facts.

Also, as a result of the Third Circuit opinion written by Judge Hastie, Godfrey was tried at the same time as Johnson, and Wayne Godfrey's confession was held to be (21) coerced, and under a writ of habeas corpus it was ordered he be tried by October 15 of this year or be released.

Of course, Godfrey's confession was utilized and made part of the record at the same time as Johnson and Cassidy's confessions. Of course, until the Third Circuit decided that Godfrey's confession was coerced, it was not possible to raise the argument in either the State or the District Court that the use of the coerced confession of Godfrey prejudicially affected the trial of the other two men.

I think this is a more significant point, that since Godfrey's confession was coerced, and the record indicates that they used Godfrey's confession in obtaining the confession from Sylvester Johnson and Stanley Cassidy, therefore, these confessions of these two men are the fruit of this poison confession or poison fruit of a poison tree, that the confessions of Johnson and Cassidy should also be invalidated, because they are based upon and obtained through the use of the confession of (22) Wayne Godfrey.

As I say, it wasn't possible to make that argument until

the Third Circuit's decision holding Godfrey's confession coerced.

THE COURT: That may be so, but what further proof could you take now that isn't already in the record, that wasn't made at the time of the trial, both the hearing before Judge Martino to determine the admissibility of that, the voluntariness of that statement, and the subsequent proof in the presence of the jury, what further proof could you take now?

MR. HAEBERLE: As to this point, as to the point of use of the confession; you could make definitely clear by interrogating both Cassidy and Johnson the fact that they were shown this confession, that they were told that Godfrey had confessed, that they had a confession, they better talk; here's what Godfrey is going to do, you better do something. They made it absolutely crystal clear so there is no shadow of any doubt that Godfrey's confession was used to obtain confessions from (23) Cassidy and Johnson.

THE COURT: Only the testimony of the defendants is what you want to take?

MR. HAEBERLE: Yes, sir and ——

THE COURT: Couldn't that be done by affidavit on a motion of this kind?

MR. HAEBERLE: Well, perhaps it could, your Honor, but would also be the calling of supporting witnesses to verify the facts from the police officials and State officials who handled the interrogation to confirm the fact that they

did so use the confession of Godfrey to obtain confessions of Cassidy and Johnson. I would suggest there is some slight tendency not to place a great deal of weight upon the unsupported testimony of Cassidy and Johnson.

THE COURT: Wasn't all of that gone into thoroughly by Judge Martino, both in a preliminary fashion to determine the voluntariness of the statements, and also subsequently in the presence of the jury? That was all gone into in great detail.

MR. HAEBERLE: If your Honor please, (24) I think a lot of water has gone under the bridge in Washington as to the validity or invalidity of confessions.

THE COURT: You say you want a further hearing to develop facts. I am asking you what further facts are there to develop that haven't already been developed? Aren't they in the record for the Court to read?

MR. HAEBERLE: No, your Honor, not as to the facts—complete recital of the facts respecting the use of Godfrey's coerced confession. There is nothing in the record—I believe there is a passing mention from one police officer about the use of a confession. I won't represent that as a clear recollection, but I think that is so.

THE COURT: Do you have any knowledge?

MR. HAEBERLE: Let him admit it and say if the State is willing to admit they used Godfrey's confession, then we won't have to go into it.

Argument

THE COURT: Do you have any knowledge or information that the confession of Godfrey (25) was so used?

MR. HAEBERLE: I have been advised by Cassidy and Johnson that it was so used.

Therefore, on that ground, paragraph number six, the confessions of Godfrey and Johnson should be thrown out and a new trial granted. That also covers part of paragraph number seven.

Now, paragraph number eight deals with our present Revised Rule 2:3-3, which requires prompt arraignment. Without any shadow of a doubt, the Prosecutor, I am sure, would admit that there was no compliance whatsoever with this rule, that these defendants were in this very building interrogated several floors above, and were not given a prompt arraignment. Of course, that was one of the factors that mitigated the Third Circuit in holding the confession of Wayne Godfrey coerced.

THE COURT: Didn't the Third Circuit pass on this arraignment? Didn't they hold that the arraignment was proper in these two cases?

MR. HAEBERLE: No. The question was, (26) your Honor—it was taken up at length by Circuit Judge Ganey with the Prosecutor about the effect of this rule in New Jersey; what happens if a person's rights are violated under this rule, and the Prosecutor frankly and correctly stated that there is no relief for violation of this rule in New Jersey. It is a rule of Court, but there is no action to cover violations of it.

THE COURT: You mean untimely arraignment?

MR. HAEBERLE: Yes. What we suggest is that the only possible sanctions would be to exclude the fruits of it, which would be the confessions.

THE COURT: Isn't it the law in New Jersey by our decisions, that if you have not properly or promptly arraigned the defendant, that you held him up unduly long in taking statements or confessions from him, if the Court believes that that rule has been violated to the extent that the defendant has been denied his constitutional rights, the Court will find that the statements or confessions are (27) involuntary, and therefore prohibit the State from using it, isn't that one of the sanctions that we impose? Isn't a further sanction one that the Courts may use on motion by the defendant, either before trial, that he was denied his constitutional rights by improper or untimely arraignment, and therefore the State even before it gets to trial has committed a fatal error, and the defendant should be discharged on a writ of habeas corpus, isn't that a possible sanction?

MR. HAEBERLE: They are all possible, but I am not aware of any kind ——

THE COURT: If the trial judge doesn't see fit to do it, don't you have a right to immediate appeal to the Supreme Court to ask them to review the failure of the trial court to do it, isn't that a sanction that is built into those rules by our Supreme Court?

MR. HAEBERLE: Well, I would say they are possibilities that could be taken on these type of violations, but I am not aware of any case that has so applied any of the fine (28) ideas and sanctions that you have suggested.

Argument

THE COURT: I am not asking whether somebody has taken advantage of that right. Isn't that right very clear, and isn't that abundantly clear in a careful reading of the many decisions of our New Jersey Supreme Court in homicide cases? It seems to me it is.

MR. HAEBERLE: I would respectfully differ.

THE COURT: They may have waived that right under the recent State vs. Smith decision, which just came down last month.

MR. HAEBERLE: I would think that State vs. Smith in some degree is in conflict Fay vs. Noia, a United States Supreme Court decision.

If your Honor please, what the petitioners are asking for is a full hearing to set forth the facts so that a decision may be reached on these points. I suggest that some of these items are indicated by the present record, others are not, are not as adequately as they should be, and can be enforced with other (29) testimony. And that further that the petitioners are requesting the right to employ normal discovery devices of civil litigation to marshal the evidence, including interrogatories. I must admit I am aware of no authority for use of such civil rights in a manner of this kind, where we are dealing with two human lives in this case, that property rights should not have a greater right of discovery and expiration than in questions of obtaining facts when we are dealing with two lives.

THE COURT: Mr. Haeberle, I want to say to you there again you are suggesting that our rules are inadequate to protect the rights of individuals, and that I don't agree with

you on. It's not even in the record that counsel ever applied to the Court for discovery rights, and the Court does have the discretion under our rules to grant discovery rights where the ends of justice require it.

Now, our rules are abundantly clear on that. I think the Prosecutor can remember, that in lieu of that he furnish the (30) information because the Court said he will give you those discovery rights, because the Court has the discretionary right to enlarge the rules where the ends of justice require. We do it regularly.

No such application was made to the Court previously; is that right?

MR. HAEBERLE: That is my understanding, your Honor.

I have a set of proposed interrogatories which I would ask the Court to grant under the relief requested in this petition, if the Court will grant the full hearing requested by the petitioners.

If your Honor please, that concludes the remarks on behalf of the petitioners.

THE COURT: All right, Prosecutor.

THE PROSECUTOR: May it please the Court, I take it that the motion this morning not only encompasses the petitioners' oral argument on their petition for this post conviction relief, but contemplates the State's motion for dismissal of the petition, because (31) it is frivolous in part, it is sham in part, and in whole does not allege any grounds for any post conviction relief. I shall deal with these matters in seriatim.

I am aware that your Honor only a few minutes ago indi-

cated that you had the opportunity of reading the most recent decision of our Supreme Court decided on July 7, 1964, in the case of State vs. Edgar Smith. I believe that this is, probably, the first, or certainly the last word by our Supreme Court on post conviction proceedings, which now finds itself in a new rule of the Court, 3:10a-1 et seq.

Now, our Courts, I think, recognized that the philosophy of these post conviction proceedings should not run haphazard, but has attempted to coordinate and correlate all these proceedings into some uniform practice that will be understandable not only to the Prosecutors, but even to the Courts themselves. They promulgated these rules and embodied a lot of the post conviction proceedings that formerly applied, such as habeas corpus and the like, (32) into this general relief known as post conviction relief.

The Supreme Court in the Smith case laid down some very important ground rules which should apply to these applications for post conviction relief.

Now, what are these ground rules? They say that there are two. One rule is that the post conviction proceedings may not be used as a substitute for appeal from a judgment of conviction, because they say that all alleged errors in a trial should be asserted in a direct review from the conviction, and therein noted that the exception to this rule might be found in the concept of fundamental fairness in the constitutional sense which denied due process.

The second rule is that an issue even of constitutional dimensions that is once decided may not be re-litigated again in this type of post conviction relief proceedings.

I mention this because I think I will have occasion to refer to it from time to time in the course of my argument, and I would hope (33) that the Court would forgive me if I appear to be repetitious in again referring to this principle or that rule.

Argument

Now, the petition of the defendants Johnson and Cassidy is another argument. I don't know whether this is the tenth or eleventh act of this whole play. I think it is important for the record to indicate the history of this case.

The murder for which the defendants were indicted took place in January of 1958. They were tried for this murder on the indictment found by the Grand Jury, and finally convicted on January 28, 1959. That is, approximately, over five and a half years ago, and thereafter was commenced a whole series of legal proceedings, appeals, maneuvers and the like, that I assume is the main purpose for this proceeding, so as to initiate another circle of proceedings that will delay the execution and judgment of this Court.

Only last June the United States Supreme Court, I think for the third time denied (34) certiorari to these two defendants who applied for review of the judgment of the Third Circuit Court of Appeals, which in effect affirmed all of the prior proceedings, and I would assume that if the State is successful in its motion this morning, or whatever the Court would decide, if it should decide adversely to the defendants that there will be another appeal to the Supreme Court, possibly another application to the United States Supreme Court for certiorari, then a renewal of the Federal ladder by way of habeas corpus again.

They seem to have no reluctance to re-warm the cold potatoes, and throw out the same arguments that have been decided adversely to them time and time again, only as I think for the purpose of delay.

I made this observation to other Courts, not because I criticize counsel's efforts for trying to litigate even on appeal questions in a case such as this. I recognize this is an important case to the defendants, but it is equally an im-

portant case to the State, (35) but I take the position that justice will best be served for everyone if there is a complete review as quickly as possible by an appellate tribunal, and if the State's highest Court is not the last word, then even to the highest Court of our land, the United States Supreme Court, and that after there has been a final determination then that should terminate the proceeding.

I think these type of cases which are allowed to drag on five years, six years, even eleven years after conviction only encourage a disrespect for the law by the general public, and I would hope to see in my lifetime some expression from a Court that will touch on this subject with a great deal more finality than has already been indicated. This has been said and alluded to by other Courts and other Judges, but I don't think that there has been a clear expression and at the same time I don't want to foreclose anyone of their opportunity to raise constitutional questions involving due process or personal liberty rights or even (36) fair play that would rise to the status of constitutional rights, but there ought to be somewhere along the line and into the proceedings, and this case, I think, is a good example of what I am talking about.

Now, in this petition, their first point is raised in paragraph two which now tries to refer to the most recent decision of the United States Supreme Court in the Malloy vs. Hogan case.

Now, I was quite interested in the colloquy between the Court and counsel for the defendants when this point was raised, and the Court asked counsel for an expression of his contention as to whether the Malloy case actually held that the Prosecutor may not in his summation comment upon the defendants' failure to take the stand, and I was quite

interested in hearing such an unequivocal answer in the affirmative by the attorney for the other side.

I read the Malloy case time and time again, and I will again refer to it during the (37) course of this argument, and still have been unable to find that even this question was even touched upon, let alone decided.

The Malloy case came to the United States Supreme Court after the partner was held in contempt because of his refusal to answer questions in a State inquiry concerning gambling and other crimes. He refused to answer, revoking his privilege against self-incrimination extending from the Fifth Amendment. The State Court judged him in contempt and committed him to prison until he was willing to answer. He applied for habeas corpus. That was denied in the State Courts. He went to the Federal Court, and thereby asserted that he had a right to refuse to answer stemming from the Fifth Amendment, and now for the first time the United States Supreme Court held that the Fifth Amendment was applicable to the States through the Fourteenth Amendment, and reversed the contempt proceeding for which Malloy was incarcerated. This didn't concern any trial or any rights of summation. This was never (38) touched on or raised in the Court. It was never raised in the facts and couldn't come into the facts because there wasn't that kind of argument, it wasn't that type of a case.

The United States Supreme Court has not as yet said—I don't disagree with the Malloy case, all I am saying is that the Supreme Court neither in Malloy or any other case has yet said that even though the Fifth Amendment would be applicable to the States, that this deprives comment by the Prosecutors or the Courts as to the inferences that the jury may draw from the failure of the defendants to take

the stand and deny any inculpatory evidence that the State produced against them.

Your Honor was quick enough to recognize that the Federal practice which prohibits comment by the prosecution and the Court stems from the statute, the Federal statute.

New Jersey also has a self-incriminating statute, or a statute, which, I should say, prohibits or affords the right of any person (39) not to give evidence which will be self-incriminating, but this statute has been construed by our Supreme Court time and time again as to not to prohibit the prosecution from commenting upon the failure of the defendants to take the stand.

This was touched on by our Supreme Court in the case of State vs. Corby decided in 1958, and has not been criticized or changed in any way by the Supreme Court or Appellate Division opinions which I have referred to in this opposition.

In Corby, our Supreme Court held that our rules which allows comment upon the defendants' failure to take the stand accords with common sense and justice, and while they recognize that the defendants cannot be compelled to testify, but they have the privilege of doing so, the Court held was for the benefit and protection of the innocent.

They went on further to explain the reason for it, that if the defendant remained silent when he should speak, he does so by his (40) own choice, and that choice of his should reasonably be subject to comment.

What they are really saying is that the defendant knows what might be said against him if he doesn't deny inculpatory evidence, and the Courts have recognized that common sense and logic would enable the jurors themselves without anything to ask themselves the question: Why hasn't the defendant taken the stand and denied what is going on?

And if the jurors could so ask the question and be logical and reasonable and apply the same kind of thinking process in that case as they would in their ordinary business affairs, come to the same conclusion, the Court would then recognize if they were unable to do so, there is no reason why the prosecution or the Court should not be able to explain to them how far they should apply this thinking process.

Even in the Federal Courts which follow the rule of no comment, by reason of the statute and the like, indicate that this privilege of against self-incrimination, like (41) any other privilege is one that can be waived.

Now, where the Courts have found that the defendants have waived their privilege, then they have no ground for complaint. So, that if that in a criminal case the defendant doesn't take the stand and the defendant's attorney should comment about his client's failure to testify, this would open up the door to the prosecution for the government to comment about it, and the Court then applied the waiver theory, and say that you have no right of complaint, because you opened the door, and the prosecution or the government has a right to respond, and even argue and negate the reasons advanced by the defendant's attorney. This has been an old practice, even though we cite cases that were decided in 1944 and 1948, and I can't help smiling, because my friend on the other side indicated these are old cases. I am inclined, maybe, to agree with him, but 20 years in the Federal System is not a long time for stare decisis with the changing world, changing events in Washington, it may very well be that (42) decisions of 20 years ago are not binding on the Courts today, but I respectfully submit, however, that until they are reversed they ought to have some persuasive weight behind them. So that as a general

rule—and I might say this without any equivocation at all, the privileges contained in the first Ten Amendments are rights that may be waived, and if they are waived, then there is no complaint about them.

Now, I would say then that Malloy hasn't gone that far, hasn't even touched on the question as to whether or not there should be any summation, and New Jersey says that you may comment about it, and even though we do have statutes, the question then would pose itself, and I am contending they did waive, but how did they waive?

Now, if your Honor please, attached to our memorandum, I produced photocopies of the transcript of the trial proceedings, at least that portion of it pertaining to the defendants' attorneys' argument.

Even though Godfrey is not involved (43) in these proceedings today, Godfrey was involved in the trial, and what might be applicable to Godfrey would make it appropriate for the prosecution to argue in his summation.

Godfrey's attorney said this, and I don't have to refresh your Honor's attention to know in this case the defendants not only did not take the stand themselves, but produced no evidence on behalf of the defense. When the State rested, the defense rested as well.

Godfrey's attorney argued ——

THE COURT: Referring to what page?

THE PROSECUTOR: I am referring to page 1728 of the original typewritten transcript. He said in his argument, that the Prosecutor said, ". . . that we might take that stand and might lie," meaning Godfrey might take the stand and might lie, then he continues, "but we haven't.

We haven't taken the witness stand in this case, we haven't lied to you.

"I told you last week why we were here. We are in this courtroom, we have been in this courtroom for the last two weeks for one (44) reason, and one reason alone, and that is because the law of New Jersey in its wisdom saw fit that where a man is charged with murder, he shall be tried by a jury, and that is where his life is at stake the jury shall make the determination as to whether he should live or die, and that is why we didn't come before you and offer any false defense, we didn't tell you anything that wasn't true." And note in the following paragraph, "What could Wayne Godfrey? Could he deny that he was involved in this conspiracy to commit robbery? As the Prosecutor has described it, could he deny those facts? There is no doubt, no doubt that he was involved, he was connected with it. No, he doesn't deny that.

"Could he come into this courtroom and deny that Edward Davis lost his life? Could he tell you that Edward Davis didn't die as a result of gunshot wounds? He couldn't say that. I didn't even want to say it."

Continuing on to page 1729, "During the course of the trial I offered to admit that (45) Edward Davis died as a result of gunshot wounds. I offered to admit many things. Why? Because they are true. What could Wayne Godfrey say if he came into this courtroom, if he took this witness stand, all he could say he is sorry, and he didn't mean to do it. What good would that do him? Would that bring Edward Davis back to life? Would that restore the life of this man? It certainly wouldn't, it couldn't.

"And is there any doubt in anyone's mind that he is sorry? Look at the man, he sits there right now, his very life is at stake."

Argument

Now, Cassidy's lawyer argued, and I am referring now to page 1751 of the original transcript, "Great mention was made, and undoubtedly will be further made by the Prosecutor to the fact that the defendant failed to take the stand, and because he did not take the stand, the witness stand, we may all assume that he did not do so because he could not deny that which is charged."

Now, here is what his lawyer said: "That is an honest statement. The action of (46) the defendant was an honest act.

"He has not taken the stand to conjure up stories and lies.

"The facts are as they are presented.

"Was not the testimony or the statement made by Stanley Cassidy at the interrogation of Chief Dube presented?

"The questions were read to you and the answers were read to you."

Now, Johnson's lawyer says, and I am quoting from page 1774 of the transcript, "That is why, members of the jury, we are here today. So, let us have it clearly understood that by law it was utterly impossible for us to plead not guilty to the charges in this case.

"I also think that I can anticipate that the Prosecutor will have much to say to you in regard to the fact that the defendant did not take the stand. And I believe that the Prosecutor will charge you—rather have the Court charge you that the failure of the defendant to take the stand from that fact, that you may infer or believe that the defendant (47) could not successfully answer the evidence or charges against him.

"Now, members of the jury, I think the Prosecutor will dwell upon that I believe he has already earlier this afternoon.

Argument

"I told you members of the jury at the beginning of this case that I had made up my mind that we were not going to present any trick defense, that we were not going to try to fool you, and that we were going to ask the State to prove their case according to law, and I think that we have done that.

"I told you that the defendants were entitled to have the charges against them proven against them according to law."

Now, this is very significant: "And, members of the jury, the reason that Sylvester Johnson did not take the stand was because I don't believe and I know that he could not successfully deny these particular charges against him. His confession certainly implicates himself.

"Members of the jury, this case was (48) lost a year ago by the defendants. This case was lost when a citizen had the alertness of mind to take down a license number and report it to the police. This case was lost from that day on."

Now, with that in mind, let's now refer to what they say was the exacerbation by the Prosecutor. Your Honor will keep in mind I am referring to those facts where it was said in the summation that the defendants were sorry. Well, we never heard, or had the benefit of hearing the defendants say they were sorry. The jury was denied that privilege. All we had was their lawyers saying they were sorry.

They also all admitted they couldn't deny the allegations or the proof by the State. So, that the Prosecutor argues, "Ladies and Gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for the defendants. Now it is crystal clear. Now they finally admit it. What was there to deny? The State has proven a clear case. The

(49) defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Who speaks for these defendants?" Who speaks for these defendants when they say they are sorry, and that is what I was alluding to. Are the defendants speaking for the defendants? Why shouldn't the defendants speak for themselves? How can the lawyers say that their clients are sorry if the client doesn't say "I am sorry." How do we know? And I am arguing to the jury that the lawyers are actually speaking for the clients when the lawyers say, "My client is sorry."

Continuing, "When someone says that he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear from themselves. Wouldn't this have indicated some sorriness on their part? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind (50) some self-serving statements snatched out of context or otherwise in the confession. They didn't dare take the stand and bare their breasts and say we are sorry."

I think this is all fair comment, and I think it was opened up by the defendants in their summations, and is the type summation and type of ground that the Courts have indicated that where their attorneys raise this kind of a contention in their argument, that the prosecution has a right to respond in argument and negate those contentions or even those inferences or arguments.

THE COURT: I understand that you are arguing then that you did nothing more than answer the arguments which were made by the various counsel for the defendants?

Argument

THE PROSECUTOR: Exactly.

Finally I would say this, and I think this is very important, if your Honor please, at least at this level, I have argued that Malloy doesn't go that far as to say that the extension of the Fifth Amendment to the States (51) precludes argument or comment by the prosecution or the Court on what inferences may be drawn from the failure of the defendants to take the stand in those instances where the defendant does not testify.

But assuming, assuming, that this is the next step until the next case that will come before the Court, and assume that the Court will say, the United States Supreme Court will say, or any Court would say that the Fifth Amendment does apply to the States, then there may not be any comment even in the absence of a governing rule or statute, but the defendant's failure to testify, assuming that will be so, and we still have that decision yet to get, I ——

THE COURT: Even when the defendant's counsel comments as in this case.

THE PROSECUTOR: Right.

THE COURT: Do you think the United States Supreme Court would go so far as to say you can't even answer the arguments?

THE PROSECUTOR: I can't conceive of that, but assuming further that the Malloy case, (52) or the next case following Malloy will interdict comment about the defendants' failure to take the stand, I would say that Malloy or that case which will so hold should have no retroactive effect. It would only have prospective effect.

Argument

Now, in no case affecting law enforcement has much impact on a State such as New Jersey, at least, and other States, which does not follow the exclusionary rule concerning evidence seized unlawfully as Mapp. Even Mapp has been held by our Courts and by the Federal Courts, and by most of the jurisdictions, not all of the jurisdictions, not to have any retroactive effect. This was again referred to in Smith decided, as I indicated before, July 7, where our Supreme Court said, "Most Courts have held that Mapp does not thus apply retroactively." Then they cite a number of Federal decisions coming out of the various Circuit Courts, many of them certiorari denied by the United States Supreme Court, and the Smith opinion also refers to the various opinions in our own State as following this holding.

(53) THE COURT: I think that ruling is quite sound and rational, otherwise the Court would be opening up Pandora's box.

THE PROSECUTOR: If Malloy would have the effect argued by my friend on the other side as condemning the Prosecutor's summation upon the failure of the defendants to testify, and if this should be applied retroactively, we would open all of the State prisons now and review every case where there was such a situation. I just couldn't conceive of the calamitous effect of that decision.

I think these were the motivating philosophies behind the Court which refused to apply Mapp retroactively. Certainly, the holdings in Mapp were grounded on the same kind of constitutional rights that we are now applying to the Fifth.

The reason for it our Supreme Court decided in the James Smith case, which I think was decided a couple of

years ago, 1962, and the Court in the Edgar Smith case refers you back to the James Smith case for the reasons for it, (54) and they are well documented and grounded.

I think I have spent enough time on this point number two, but at the same time I do this because I recognize that there was some color of argument made in this point that required attention. I don't subscribe to any part of the petitioners' argument, but unless we analyze it a little more closely, we would be prone to shy away from it.

Now, let me address myself to the next point, which is contained in their paragraph three, and that is that during the interrogation they say they were at no time advised of their rights to counsel, trying to invoke the Escobedo case.

I followed the argument advanced by the petitioners, as well as the colloquy by the Court, and I think this is highly significant. I am not too sure my friend on the other side fully answered the Court's questions and interrogation, but it struck me—I am not criticizing him in the slightest, counsel on the other side as to how he should answer and the (55) like, it may very well be he had good reasons for answering the way he did, I trust he did, he is very capable, but I think it is important to read this allegation in the language that he did because there was a point made time and time again, these allegations were verified, and therefore they seemed to have acquired some additional stature by reason of this fact. They were verified by the defendants in a general affidavit. What do the defendants say? I am reading now paragraph three, "That, during their interrogation and the taking of their confessions, petitioners were at no time advised of their right to counsel, and were never given the opportunity to seek counsel, were held incommunicado from family and friends who might have assisted in obtaining counsel, and were thus effectively de-

nied the assistance of counsel during the most critical stage of the criminal proceedings against them."

Nowhere, and I take it this petition was carefully drawn, nowhere do they say that they sought the opportunity of obtaining counsel; (56) nowhere do they say that their family and friends tried to see them and were denied access to them, because they were held incommunicado by the State law enforcement officers; this is important, because we could admit that we didn't advise them of their right to counsel, and still not come within Escobedo. This kind of a proposition was raised in Smith too.

This is the language by our Supreme Court in the Edgar Smith case: "Defendant does not say he was denied a request to seek counsel at any point prior to his confession. Rather defendant appears to say that he in fact did not see a lawyer before he confessed, a circumstance which would not invoke Escobedo."

He doesn't say in this petition that he had a lawyer and a lawyer tried to see him or contact him and advise him, which would maybe bring him within Escobedo, but he doesn't go that far.

Now, whether or not he was held incommunicado is only one of the elements.

Now, today we hear they are able to (57) produce five witnesses to testify that they tried to contact Cassidy and they tried to see him, and they were denied the right to speak to him, and that Cassidy himself wanted an attorney. Why isn't there an affidavit to say this? They had the five witnesses, they gave us five names this morning in argument. There is nothing to preclude them from giving us an affidavit so we could see for ourselves. They produced three names of witnesses for Johnson, who they now contend made efforts to talk to Johnson. When? When did

they make efforts to talk to Johnson? Johnson was brought down from Newark in the early hours of the morning. A confession was taken from him right as soon as he arrived in Camden. Did they know that he was arrested in Newark and arraigned in Newark on the charge of murder?

THE COURT: Now look! I don't want any demonstrations from the spectators. You sit quietly. I don't want any more nodding. I don't want any more talking. You sit there quietly, or I am going to ask you to leave.

(58) Proceed, Prosecutor.

THE PROSECUTOR: I make this comment because I think that this is the kind of sham defense that comes in five years, six years after the whole situation developed, and they now try to concoct a story. This has been tried time and time again. We had a motion for a new trial. We had witnesses who perjured themselves, not to mention the fact that the defendants themselves committed perjury, and this was commented on, I think, by Judge Martino who heard the testimony and the motion for new trial, and I was quite amused by the affidavit attached to this petition for the defendant who is now sitting in the death house facing execution on a murder charge, and he says, "In making this affidavit I am aware that false swearing is a misdemeanor and that the punishment for false swearing is a fine of not more than $1,000 or imprisonment for not more than three years or both."

I suppose at this point he would like to be sentenced for three years for perjury or (59) false swearing if that would delay the final execution, and I hope that the Court will certainly forgive me if I raise a smile, because I don't want

anyone to think that I don't recognize the seriousness of this whole kind of proceeding in this kind of case, but I would ask the question, with a defendant in the death house under a warrant of execution, what effect does a false swearing statute or penalty mean to him?

But to get back to my principal argument, we have no proof and no allegation even that they had counsel and counsel were denied the right to see them, or that friends of any sort wanted to see them, and they were unable to see them because they were held incommunicado. This is the real weakness of the allegation.

To go one step further, if they were held incommunicado, if they were denied the assistance of counsel, if they were denied assistance of friends; what would that denial go to? It would go to the question of voluntariness of the confessions. It wouldn't go to (60) anything else but the voluntariness of the confessions, and that has been litigated and relitigated and re-relitigated time and time again, most recently, until the Third Circuit Court of Appeals when they reviewed all these proceedings and held that the confessions of Cassidy and Johnson were not involuntary, and affirmed the convictions.

I would now refer back to the Edgar Smith case and say that one of the underlying principles of this thing is not to raise questions that should be raised on direct review, unless they were of constitutional proportion, even if they are of an inferior constitutional proposition, once they are decided may not be relitigated.

So, the Third Circuit has finally, and with certiorari denied by the United States Supreme Court, reviewed all these contentions concerning the confessions and held that the confessions were not involuntary, affirmed the convic-

tions, and for that reason point three should be passed out the window.

(61) Point four applies to the question or attacks the proposition that we got a gun from him, and in addition that we took Cassidy into custody without a warrant. Well, what difference does it make how he was arrested at this point?

Suppose there was an illegal or unlawful arrest initially. What difference does it make now after the conviction? He could have applied for habeas corpus at the time to be released from the custody of the law enforcement officers, if there was an unlawful arrest. But now, five years after the conviction, what difference does it make how he was arrested, whether we had a warrant or didn't have a warrant? It might go to the question of evidence that might be seized, but there is no contention that we seized any evidence as a result of the unlawful arrest, which was used at the trial. So, therefore, I don't see what difference it would make, what the conditions were surrounding the arrest. They would have nothing to do at this point. We contend that we had probable (62) cause to arrest without a warrant.

THE COURT: Subsequent facts, do they not adequately show ——

THE PROSECUTOR: We proved murder against them.

THE COURT: Counsel in their summations certainly indicated there was probable cause. Under our law we have no strict rules of arrest. We follow what we believe to be the common law. Where there is probable cause a warrant is not necessary. To bash in the front door is proper

in order that an arrest may be properly effected. I think that has been the law from the common law days, and it hasn't changed down to today, to my knowledge.

THE PROSECUTOR: There is no proofs that the officers broke into Cassidy's house or busted into his house. I take exception to that kind of remark, to that kind of allegation in counsel's argument, not because I think it is important, but it has been my experience in this case, that extraneous matters have crept into it and almost become law, because they went (63) unchallenged. There is no proof in this case that they busted into his house, and I don't know why counsel should take the liberty of saying that the police officers broke into the house or busted into the house, when there is no such proof. I think this is an unjustified liberty.

THE COURT: Well, assume that his argument is correct. Would it make any constitutional difference?

THE PROSECUTOR: No. It doesn't make any difference statutorily, casewise or constitutionalwise as your Honor has indicated.

THE COURT: I can only deal with constitutional questions at this point.

THE PROSECUTOR: That's right. I don't want to walk out of this courtroom, and I have noted that the press are present, to let a statement like that go unchallenged. Offhand, I don't know what the facts are, whether they knocked on the door or what, but until I am proven these facts, unless there is some allegation here, I don't

think counsel has the (64) right to charge that police busted into the house, and at the same time I want to be quick to say, if they did bust into the house in pursuit of a suspect, real suspect, in a first degree murder case who is later proved and later admitted and confessed to his guilt, that the police should be commended.

THE COURT: I know of no law in this State that is so foolish to say that a defendant has to invite police officers to arrest him.

THE PROSECUTOR: That's right.

The delay in arraignment was raised, argued and decided by the Third Circuit. It was decided adversely to the petitioners. Certiorari was denied by the United States Supreme Court, and again I argued before the Third Circuit, argued in the brief and argued orally, that the delay in arraignment only goes to the question of confession, the voluntariness of the confession.

The United States Supreme Court in the McNabb case held that the delay in arraignment did not vitiate the proceedings. The United States Supreme Court did not hold (65) that McNabb arose to constitutional proportion. They merely said, and have only said that they applied because of their supervisory power over the Federal police officers.

The New Jersey Supreme Court has recognized that the McNabb and the Mallory case do not rise to constitutional proportion, and merely stem from the supervisory powers of the United States Supreme Court over the Federal police officers and have refused to apply McNabb and Mallory in New Jersey. This was argued in the Third Circuit by the prosecution, by the State, and we cited LaPierre which at that time was the most recent case by the New Jersey Su-

preme Court, and now I would refer your Honor to a most recent case, this I didn't even cite in my own brief, it just came out, the case of State against Jackson and Ravenell decided July 31, 1964, in an opinion by a unanimous Court, Justice Jacobs speaking for the entire Court, and this is what Justice Jacobs says for our Court as late as July 31, 1964: "The defendant urges that notwithstanding any (66) factual showing of voluntariness, a confession should be excluded when obtained from a defendant illegally detained in that he has been arrested but has not been taken without unnecessary delay before a magistrate as directed by R. R. 3:2-3 (a)." Incidentally, erroneously cited in this petition, I am sure it was just a typographical error, it says 3:3-2. It should be 3:2-3. The Court again referred to the Pierce case, as well as the LaPierre case, and referring to LaPierre, Justice Jacobs said, ". . . which took cognizance of the fact that, in the exercise of its supervisory powers over the administration of criminal justice in the Federal Courts, the Supreme Court had reached an opposite result" and referring, of course, to McNabb and Mallory.

He goes on further to say, "In LaPierre, the defendant's request that New Jersey abandon its stand in favor of McNabb-Mallory was expressly rejected. That case was decided only last year and, and there being no defense of Supreme Court ruling that McNabb-Mallory has attained constitutional dimensions, (67) LaPierre will not now be departed from."

As of July 31, 1964, New Jersey recognizing the reasons for McNabb and Mallory cases still kept to the same line of decisions that they did with LaPierre.

So, I say for that reason that the lawfulness or unlawfulness of the arrest is not a question at this point.

Assuming that it was an unlawful arrest, which we do

not concede at all, because we say there was probable cause, and which makes it a lawful arrest as your Honor stated, because undue delay in violation of our rules has not been held by our Courts to invalidate the confessions, because the Third Circuit Court of Appeals has to review this situation and specifically pass upon the question. Application and certiorari were denied by the United States Supreme Court. The question has been litigated, died and should be put to rest, and following the principle as I first alluded to in the Edgar Smith case, it should not now be relitigated.

(68) The next point is raised in their paragraph five which deals with the question that Cassidy was induced to turn over a gun. This too was raised by the petitioners in their appeal to the Third Circuit, and the Circuit Court of Appeals likewise dealt with the situation, decided it, and didn't find any reason to reverse the conviction, and therefore they put it to rest, and we think that is where it should be and should not now be relitigated again.

THE COURT: I have read that record and I think the Third Circuit Court was correct, and I think what the Prosecutor told the defendants at the time the gun was found was certainly proper and didn't deprive him of any rights, and was the law of the State. It was even Federal law at the time.

THE PROSECUTOR: That's right.

Now, the next point in paragraph six raises a question that since Godfrey's conviction was reversed, not because the confession was coerced, but because the (69) confession was held to be involuntary, and I think there is nothing more than semantics here. They now say that because Godfrey's confession was used at the trial, therefore—and

this was held by the Third Circuit Court of Appeals to be a bad confession, therefore we should now reverse.

THE COURT: Does the record disclose that the Court gave to the jury the usual caution?

THE PROSECUTOR: Yes, repeated caution, that the confession only applied to the confessor, and does not apply or should not be used against any other defendant. The typical warning time and time again before the confession was read, afterward and the like. The record was replete with those admonishments and instructions and charges. But this situation was likewise raised in the Third Circuit, likewise raised in their petition for certiorari to the United States Supreme Court. They raised this very question seeking reversal of Cassidy and Johnson because the Third Circuit had reversed as to Godfrey, (70) and therefore they raised this very question which should likewise be reversal, and criticized the Third Circuit for not reversing as to Cassidy and Johnson because of Godfrey's confession.

THE COURT: Did the Court likewise tell the Court that they may find that Godfrey's confession was involuntary?

THE PROSECUTOR: In this case, we had the voir dire of the confessions out of the presence of the jury preliminarily, and the Court made the preliminary finding as to its admissibility. The State then proceeded to prove the confessions and voluntariness of them before the jury. This was an unusual situation where the defendants did not want this testimony heard by the jury, and therefore they agreed, and they stipulated with the Court and with the State, that if the Court should find preliminarily that the

confessions were admissible and voluntary, that they should be read to the jury without any proof as to the voluntariness.

THE COURT: Did the Court charge the (71) jury at the conclusion of the case that it was up to them to determine whether or not Godfrey's statement was voluntary?

THE PROSECUTOR: I don't recall at this time, because there was no proof from which the jury could find it was involuntary. They heard none.

THE COURT: I don't want to assume what Judge Martino said, but knowing him, I would be somewhat surprised if he didn't. I think it would certainly nail down the question that Godfrey's confession or alleged confession was, but the Third Circuit now says was involuntary was passed upon by the jury, and they weighed it separately and apart from the other two confessions.

THE PROSECUTOR: Well, the point that I am really making at this time is that this question was raised on the petition for reargument to the Third Circuit, raised again in the petition to the United States Supreme Court, and we raised the very question, so it was litigated, raised, litigated, decided adversely (72) to the defendants, and should be laid to rest and should not be relitigated to get in this petition following the ground rules of the Edgar Smith case, and I would further point out that this case is quite distinguishable from Ashcraft, which is relied on by the other side. In this case, all of the defendants confessed. Each of their confessions was given to the jury. This is not a case where you have two joint defendants as in Ashcraft

only one of the defendants confessed. This confession was given to the jury. When this confession was finally thrown out, the Court probably was right in saying because of this impact, how could you now hold the other defendant who had not confessed. This is a very important distinguishable fact which does not apply here.

Now, I would refer your Honor to the case that we referred to the United States Supreme Court, Malinkey vs. New York, or a similar situation as we have. They raised that same kind of question, and the United States Supreme Court has this to say, "The furthest (73) we have gone in a comparable cause from the State Court is to vacate judgment against the co-defendant who did not confess, and remand the case to the State Court for further consideration." Referring to Ashcraft, that is what they did. Here we have confessing defendants. Ashcraft doesn't apply. The United States Supreme Court held it didn't apply, but over and above, or together with the fact that the question was raised, litigated and decided by the Court and should be laid to rest.

In paragraph seven there is a statement of fact, and I sent for my ——

THE COURT: Prosecutor, I don't think you are going to finish soon, and I want to give Mr. Haeberle opportunity to answer you. Should we not now recess for a brief period for lunch?

THE PROSECUTOR: All right.

(Luncheon recess.)

Argument

(Afternoon session.)

THE PROSECUTOR: I believe before the (74) luncheon recess, if your Honor please, I had completed my argument concerning the points contained in paragraph eight, and I finally left with the point in paragraph nine, and this point the petitioners seek to criticize or challenge the Prosecutor's summation which dealt with capital punishment. This was raised for the first time, and I don't recognize any constitutional question here at all. The Proescutor's summation was gone over with a fine tooth comb by our own Supreme Court on initial appeal, and it was finally approved in the initial opinion as indicated by our Supreme Court.

The case cited by petitioners, Fay vs. Noia, to my mind has no application. That is a Federal habeas corpus case, and I don't see that it makes any point here.

Mr. Batoff calls my attention to a possible misunderstanding that I may have left with the Court concerning the Third Circuit's decision involving the gun. The issue was raised and discussed by the Third Circuit, as (75) will appear in their opinion, and they have this finally to say about it. I am reading from their opinion. "Cassidy did not assign as a basis for his motion for a new trial or as a ground for Federal habeas corpus that his admissions concerning his gun had been induced by a promise not to use this evidence against him. Thus, no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding of such inducement would entitle the prisoner to relief on constitutional grounds."

The point that I was making and want to leave with the Court is that the matter was raised, argued before the Third Circuit, and to the extent they found there was no constitutional infirmity, the matter has been decided.

Argument

I think this concludes all that we have raised and answered the petition. The other points and authorities are cited in the memorandum that we have filed with the Court.

So far as their prayers are concerned, these questions have likewise been disposed of (76) by our Supreme Courts in previous matters. We don't have any discovery devices as they now ask for.

THE COURT: Don't you agree that the rules are broad enough to permit it?

THE PROSECUTOR: The rules are broad enough to obtain whatever information they need for the purpose of trial by way of a bill of particulars and the like.

THE COURT: Even broader than that if the ends of justice might require it. I am sure your recollection will agree with mine, that procedure was patently not broad enough, and the Court thought it should be broader, and the rules gave the Court that right.

THE PROSECUTOR: That's right. Certainly they were never denied due process to find out what the factual situation actually is.

For the reasons that I argued, and as well as those that we have contained in our memorandum, I submit that the petition for post conviction relief should be dismissed, and that (77) their prayers for a stay be denied.

THE COURT: Mr. Haeberle, before you speak, I would like to pose this question to both you and the Prosecutor.

Do you not agree that now that this Court is limited to

the consideration of strictly constitutional questions which have not previously been disposed of by either our Supreme Court or the Federal Court, with the possible exception of those constitutional rights which may not have been previously available, isn't that all that I can deal with, because are not all those decisions of the Supreme Court in this case and the Federal Court in this case binding upon me, and am I not limited now to the consideration only of constitutional issues not previously raised, providing they were available to be raised at the time of those decisions?

MR. HAEBERLE: My answer will be different than the Prosecutor's, and my answer is no, I don't believe you are so bound.

THE COURT: You mean I am not bound by the opinions of our Supreme Court or the (78) decisions of the Federal Court in this case?

MR. HAEBERLE: I believe, your Honor, in Fay vs. Noia, the question is whether or not on the basis of the facts presented to the Court what the proper decision should be. The failure of counsel to make objections, or the failures of counsel in the past are not to interpose, or not pursue certain avenues, doesn't preclude this Court from deciding the issues raised now on the merits, and I further suggest that on the basis of Fay vs. Noia, the petitioners are now asking—this is the first time it has been asked for, is a hearing, full and complete hearing respecting the background that went into the taking of these confessions. That was one of the problems in dealing with the matter at the Circuit Court, the falsity of evidence dealing with this particular point. The coerced confessions and

background dealing with them, I think, specifically as to that, the petitioners now have a right to request this hearing. You are not bound by these prior items.

THE COURT: In reviewing the decisions (79) of the Supreme Court and in reviewing the decisions of the Federal Court you don't think I am bound?

MR. HAEBERLE: The Supreme Court said time and time again denial of certiorari neither is an affirmance or disaffirmance or disagreement with the record below. It doesn't stand as approval or disapproval. It merely means that the United States Supreme Court either sees no reason or no substantial Federal question.

It might be pointed out that the last denial of certiorari, Mr. Justice Jackson dissented, and again that doesn't mean there might not be others who would dissent. The denial of certiorari by the United States Supreme Court by many statements of the Justices themselves is no indication of propriety of the actions taken below. Some of these issues raised in the Third Circuit opinion, for instance in regard to Cassidy, Justice Hastie said, "Thus no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding (80) of such inducement would entitle the prisoner to relief on constitutional grounds." Justice Hastie said it wasn't properly presented, it wasn't persented to the State Court and wasn't presented to the lower District Court. A number of other items are the same way. They have never been presented to the State Court. The argument on using the coerced confession of Godfrey in obtaining confessions from Cassidy and Johnson, that argument wouldn't be made until the Third Circuit held that Godfrey's confession was coerced.

Argument

THE COURT: Don't you think that the most recent State of New Jersey vs. Edgar Smith is absolutely binding upon me?

MR. HAEBERLE: Well, I certainly say that the decisions of the Supreme Court are binding on you, but I would hesitate to interpret State vs. Smith as precluding this Court from following the mandates of the United States Supreme Court in Fay vs. Noia. I think that case is very much in point. Fay vs. Noia involves, I believe, Charlie Noia, one of three (81) defendants tried in the State Court, and some twelve years went by and Noia didn't appeal. He was convicted on trial and didn't appeal. His two co-defendants, one was name Bonino, and the other gentleman's name I don't remember, but they did appeal, and time for direct appeal by Noia had expired. Now, the other two men had gotten new trials. Noia comes in, comes to the State Court on a habeas corpus, goes up, it goes to the Federal Circuit, the Second Circuit, I believe, and they said they should grant a new trial to Noia. The State appealed, that is Fay, I believe he is the head of the prison, and the U. S. Supreme Court said no, you can't have a waiver, it has got to be an intentional right. He didn't waive anything, he hadn't abandoned anything. The point of the case, as I understand it, is that if the facts are presented, or the failure to make objections during a trial is not important, the fact is that it should be decided on the merits, and if justice requires, if there is something wrong with what happened there must be a decision on (82) the merits, and the fact that it may have been litigated somewhere else or not litigated, or he failed to preserve it by timely objections in the normal course, or he failed to make a direct appeal, it is my understanding of Fay vs. Noia that has no relevance

to the point of doing justice on the merits. That is why I say my answer, I think, would be different from the Prosecutor's. I don't think that State vs. Smith if properly interpreted can be contra to Fay vs. Noia.

THE COURT: How about the rule of Court on post conviction remedies, doesn't that limit what I can do here?

MR. HAEBERLE: Well, as I understand the new rule on post conviction remedies, the introduction says, it includes all rights formerly available and other means, and not in contravention of the constitution of New Jersey, which I suppose the last part has to do with the right of habeas corpus. I think, again, that these are matters that properly can be presented to the Court for its consideration. (83) The question is not whether these things should have been raised by some objection, whether they should have been raised on appeal, the question is whether or not what was done was fair and just. To argue or to take the other points, I think is to step further backward into the recesses of the law. I think the U. S. Supreme Court has taken a different approach and made it of constitutional dimension, and I am sure the Prosecutor will probably take the opposing side. Of course, he can speak for himself.

THE PROSECUTOR: I think the answer to the Court's question is contained not only in Rule 3:10 (a)-2 which outlines the grounds that are cognizable in a petition for post conviction relief, such as substantial denial of the defendants' rights under the Federal or State constitution, lack of jurisdiction in the Court, illegal sentence, or any ground previously available by way of habeas corpus.

I think it is further answered in the comment by the

Court in laying down the rules I referred to initially in my argument, in the (84) Smith case, which is that all alleged errors that don't rise to constitutional status must be asserted in a direct review, which is appeal, with the exception of those errors which denies fundamental fairness in a constitutional sense. The Court went even so far as to say so far as they are concerned we won't hear them again in a post conviction proceeding if they were previously raised and disposed of in a previous Court. I think your Honor is bound by the decision of the Supreme Court and the Third Circuit. I don't think there is any alternative, otherwise you would be reviewing them.

MR. HAEBERLE: To go forward on that point, particularly in reference to State vs. Smith, I think the thinking of the Court is expressed in part of the quotation which the Prosecutor has included in his brief, part of which is ". . . the sole exception being an error which denies fundamental fairness in a constitutional sense and hence denies due process of law."

I would suggest to the Court what is (85) being raised here are constitutional questions denying fundamental fairness and raising questions of due process of law. We have the denial of counsel, which is a constitutional question. Under Gideon vs. Wainwright, you have self-incrimination. Under Malloy, you have the right not to have a coerced confession. These are all constitutional rights. Therefore, I think the Court should have to decide that on the merits.

The Prosecutor in reference to paragraph two of the complaint made reference in support of his argument, and point two deals with the impropriety of the Prosecutor's summation, and also the Court's charge.

The Prosecutor bases part of the right to make the sum-

mation on the fact that Godfrey's counsel made statements which called for the response, in the Prosecutor's thinking, for the type response that he made. I think that is very significant. You will note there are two or three pages there, remarks of Godfrey's counsel. What ought to be very important is the (86) fact that this is the counsel for the man whose confession was coerced.

Now, the confession was coerced, and the Prosecutor should not be allowed to take advantage of some action done in behalf of a man whose confession was coerced by the State, and that is exactly what is being done. The Prosecutor is basing, at least, substantially in part the right to make in his summation comment about failing to take the stand based on Godfrey's counsel's summation. Since Godfrey's confession was coerced, I think, again, that is another reason why there must be a new trial for Johnson and Cassidy.

THE COURT: Mr. Haeberle, there is no contention that the defendants' counsel said anything improper to the jury in their summations, is there?

MR. HAEBERLE: No, but the point is ——

THE COURT: What you are telling me is that the Prosecutor doesn't have the right to directly meet the arguments of defense counsel at the time of their summation. Now, (87) if he can't meet those arguments, what is the purpose for him even getting up to address the jury, except to say Ladies and Gentlemen, you have heard the facts of the witnesses, you have seen the exhibits, you can take them to the jury room with you when the Court asks you to consider them, and we ask for a verdict of guilty of murder

in the first degree, and sit down. Do you mean to say he can't answer the arguments of defense counsel regardless of what issues they raise, and regardless of how ridiculous they may be?

MR. HAEBERLE: The Prosecutor has the right to sum up.

THE COURT: Doesn't he have to answer the arguments of his opponents? We are talking about matters which the Prosecutor himself raised. We are not talking about comments that the Prosecutor made without some facts in evidence or arguments before the jury. We are talking solely about what the Prosecutor did in a direct answer, using exactly the same terminology that defense counsel used, and you (88) say that is improper, which is tantamount to saying, "Prosecutor, you can't answer the man regardless of what he may have told you."

THE PROSECUTOR: May I also point out, I think it is very important in this case, the defendants through their attorneys admitted their guilt. The thrust of the defense was mercy. This is all they attempted to seek.

THE COURT: I think it is very obvious from the record.

THE PROSECUTOR: How can they contend they were hurt when they admitted they were guilty. In their arguments, all they said was don't give us the chair. How can they holler they were hurt?

THE COURT: I don't see how we could have due and proper administration of justice unless we are going to be

fair both ways. I mean, justice is a two way street. The defendants have constitutional rights, and the people of the State through the Prosecutor likewise have constitutional rights. The Court's duty is to make sure that all rights are (89) kept in proper perspective, so that justice will be duly and properly administered in accordance with the constitution.

These were set up in the constitutional provisions. They certainly were never set up so that criminals could be freed on technicalities, but merely so that we could seek the truth, to find out whether or not the defendants committed crimes or didn't. They were set up so that they could have a fair trial and fair evaluation of the facts by a jury, so the jury could bring in an honest true verdict.

MR. HAEBERLE: I think that is quite correct, with particular emphasis on the last, a fair verdict, that it would go to the jury without prejudice and passion.

THE COURT: A fair verdict implies fairness not only to the defendant, but fairness to the rest of the people in the State.

MR. HAEBERLE: That is, I guess, part of the process of justice.

THE COURT: No doubt about it. The constitution wasn't set up to benefit every (90) criminal. It was set up for the benefit of the whole society.

MR. HAEBERLE: I submit, your Honor, that the Prosecutor, even granting proper argument, even to that, he has no right to comment on the silence of the defendants. He

went way beyond that. He kept hitting away on the fact they didn't dare to talk, that they wouldn't bare their breasts, they wouldn't say they were sorry. I think that is going to the fundamental fairness of this trial, and fundamental fairness of the jurors' minds in trying to provoke prejudice.

THE COURT: The question is whether that is reasonable comment under the circumstances as they existed in this case at that particular time. That is what the Court has to decide. I don't think I can decide it now. I think it has been decided.

MR. HAEBERLE: The Prosecutor also argued for no retroactive effect for Malloy. He based his argument on the fact that Mapp hasn't been held by many Courts to be retroactive. (91) I would point out in regard to retroactivity, in Gideon vs. Wainwright there is some doubt as to retroactivity. The Third Circuit in April of this year Judge Hastie in Craig vs. Meyers and Gideon vs. Wainwright said there is retroactivity. In June the United States Supreme Court denied certiorari. The State appealed, and I do not mean to indicate by that, that since the Supreme Court denied certiorari that that is now the U. S. Supreme Court decision, but I would point out about four months before there was a memorandum decision of the U. S. Supreme Court, a two-line decision, the name and citation I can't remember, but I will be glad to look it up for the Court, in which the U. S. Supreme Court gave a reversal in light of Gideon vs. Wainwright to a conviction which arose in 1957. So, I think, at least, in the Third Circuit under Judge Hastie's opinion in Craig vs. Meyers and Gideon vs. Wainwright is absolutely retroactive.

Argument

One point we are talking about here is Escobedo vs. Illinois dealing with a right of (92) a defendant to have counsel at the pretrial stage, and I submit that if the right to have counsel assigned is of a constitutional nature it is retroactive. I submit that Escobedo in defining what the duties are of counsel is likewise retroactive, and these defendants should have had counsel.

Now, in response to the Court's question previously in line with the Prosecutor's comments, I don't understand Escobedo to require that a defendant must ask for counsel. As a matter of fact, I think a simple denial of it would bring them within the findings of Escobedo. Once the Prosecutor's attention or law enforcement's attention has centered on a certain defendant, I don't think that they have to request it, because, again, that would be saying that the person who has intelligence or a prior conviction or prior arrest knows he has a right to counsel can get one, but some young inexperienced boob like Stanley Cassidy couldn't, because he doesn't know enough to ask for it.

(93) My impression was, and I would be glad to submit to the Court affidavits from both Cassidy and Johnson on this point. I didn't feel it was necessary, because I felt Escobedo simply required a showing. A focus had come upon these two defendants and therefore at that point they were entitled to counsel. However, I will be glad to take advantage of the Prosecutor's offer to supply affidavits from the people who I mentioned but did not call, and also from Johnson and Cassidy.

THE COURT: Mr. Haeberle, I don't disagree with your theory, but there are circumstances which counsel may have, in fact, been denied a defendant, even though he specifically didn't say in plain English I want a lawyer. It

depends on the circumstances, and all the circumstances that I can gather in the case and they are already in the record in this case whether or not these defendants wanted counsel, and whether they were refused that right. There seems to be nothing in the record which would indicate that they wanted any counsel, (94) or that they were denied that right. The record seems clearly to point out they wanted to unburden themselves with this problem and tell the truth, and do it promptly, and they persisted right on down to the closing arguments of their counsel.

Now, surely there are cases where police officers might take advantage of ill-informed defendants, and by their actions in effect deprive a man of his constitutional right to counsel. The mere fact that law enforcement officers neglected to say to a defendant, look before we talk to you, you have a right to have a lawyer and don't say anything until you get a lawyer. If they took a statement without that, the statement is no good. That is not what the Court intended at all. At least, that is not my interpretation from a reading of the case.

MR. HAEBERLE: Well, I am sure that there are many factors that go into it. The State did not advise the defendants of their right to counsel. They had a right to remain (95) silent. They had a right to talk to counsel. The so-called explanation of their rights by Chief Dube to these defendants clearly omits reference to their right to have counsel, and their right to remain silent. Now, that is in the record in this case.

THE PROSECUTOR: I might bring your Honor's attention to the case of State against Scanlan which was decided in the Appellate Division July 6, 1964. This very point

again was touched on, and I think it was Judge Collester speaking for the Appellate Division said, "The defendant was not advised of his right to remain silent or warned that any statements he made may be used against him. Our Courts have uniformly held such cautionary instructions are not an essential, except in the statement of the facts that an admission of guilt is voluntary," citing the Pierce case, Cooper case.

THE COURT: Let's go to the question of voluntariness. We had in a recent murder trial, which we had to make that decision, which (96) reviewed all those decisions. It goes to the question whether or not under those circumstances it was voluntary. The Courts have said in that line of decisions time and again it is the better practice, definitely, for police officers to give full warning, because it removes the question, or further removes the question whether it is voluntary or not, but it is not an absolute essential.

MR. HAEBERLE: If your Honor please, the petitioners would be happy to supply affidavits supplying whatever facts of the matter may be respecting whether they requested, or who they talked to, or what was said, and what they did and their attempt to get counsel. I would likewise offer to submit to the Court affidavits from the named individuals that I read in the beginning and were here in Court. I would be happy to supply affidavits from them specifying the efforts that they made, who they talked to, what the date and times were. I was under the impression that the proper way to handle it was to ask for a complete hearing to (97) allow oral testimony to go in, to bring in other witnesses and allow the Court to evaluate all the testimony, rather than do it by affidavit, but I will be very happy to submit these affidavits.

THE COURT: Anything further?

MR. HAEBERLE: Well, there are one or two items, your Honor, with reference to point four, talking about the breaking into the house. It is a question of whether they had probable cause. In support of the fact that the policemen had probable cause, the Prosecutor argues the fact that an indictment was brought and trial was had and conviction obtained. I suggest that the probable cause is determined as of the time of the breaking and entering and arrest, and there is nothing in the record at the present time to indicate what the knowledge was at the time of that breaking and entering. I suggest, therefore, that is one of the reasons why the petitioner Cassidy is asking for this hearing to develop these facts.

Point five, we have already pointed (98) out that the question about the gun was not decided in the Third Circuit. It hadn't been properly raised.

THE COURT: Are you familiar with the holding of our Supreme Court in the recent Smith case, which is on page four, point one of the opinion, he said among other things, "Moreover the legality of the arrest as such has no bearing upon the validity of the conviction." Don't you think that is binding on me?

MR. HAEBERLE: I am not certain it is applicable in this case.

THE COURT: Well, if it is binding on me, I should not hold a hearing to find out facts which I am not permitted to explore, because our Courts have said it doesn't make any difference. Now, I think we must let it stand that way.

Argument

Any further arguments, gentlemen?

THE PROSECUTOR: I have nothing further.

THE COURT: Gentlemen, I want to say (99) it is this Court's opinion that we are limited here to the consideration, this being a post conviction proceeding, in the manner set forth by the Supreme Court in the case of State vs. Edgar Smith. I do not think that this Court can modify or enlarge that opinion in any way. That is the sole function of our Supreme Court. So there is no misunderstanding, this Court thoroughly agrees with the rationale and law expressed in that opinion.

Now, the Court said there at the top of page four, "Before dealing with the individual points, we should note two principles, one or the other of which disposes of most of the questions raised. One principle is that a post conviction proceeding may not be used as a substitute for an appeal from the judgment of conviction. All alleged errors inhering in a trial must be asserted in a direct review from the conviction, the sole exception being an error which denies fundamental fairness in a constitutional sense and hence denies due process of law. The second principle is that (100) an issue, even of such constitutional dimensions, once decided may not be relitigated." Now, the soundness of that holding, I think, is very apparent. The administration of justice would be a hodgepodge of uncertainty if that were not the law.

I will endeavor to deal with the points raised by the defendants in the order which they were raised, keeping in mind the Smith case.

Going to page twelve of your petition for post conviction relief, point (A), I do not believe that any constitutional

question of the type that I can consider has been raised here, nor do I believe that a situation has been brought to the attention of the Court which requires other testimony or further proofs on this point.

Point (B) with respect to the contention that this defendant was deprived of his right to counsel, I do not believe that the decisions of our Federal Courts or our State Courts, which are binding upon this Court, goes so far as to say that constitutional rights have (101) been violated under the circumstances which have been outlined by the defendants.

Point (C), the Cassidy confession now being inadmissible because of a decision of the Third Circuit Court of Appeals, and thus the Court should not consider the confessions of the other two defendants, and the Court having considered them at the trial violated the constitutional rights of the defendants Cassidy and Johnson does not raise a constitutional question, and does not, I think, even raise a legal question in the simple sense under our practice under our decisions.

Point (D), "The contention in paragraph five, claiming violation of Cassidy's rights through the use of the gun fraudulently obtained from him, has not previously been raised."

If you look at page 13 (A) of the appendix in the case of State of New Jersey vs. Wayne Godfrey, United States Supreme Court, October term, 1963, this appears, "I remember when I made my first confession I told Chief Dube that I didn't have the gun and the Prosecutor (102) came and got me and asked me did I have a gun at home at all. I said no at first because the gun did not belong to me. He said, 'Well, look, if you have a gun at home, all we want to do is check it, (to) see if it has been fired'. He said, 'We

won't use this as evidence against you if it hasn't been fired,' " which is certainly tantamount to telling the man if it has been fired we will use it in evidence against you. Now, that certainly doesn't deprive him of his rights. It is language that any child could understand. I fail to see how any constitutional right has been violated by the Prosecutor using the language as simple and as correct as that. If it has been fired, we will use it. If it hasn't been fired we won't use it. If it has been fired the Prosecutor might use it. I see no substance at all in that argument.

Point (E), again the confession of Godfrey being inadmissible, and they contend in effect that the confessions of the other two defendants were obtained by an inadmissible (103) confession and therefore should not be used improperly, used in violating his constitutional rights. The contention is not that Godfrey's confession was false, it is not that the Prosecutor used a false confession in obtaining the confessions of the other two defendants, but merely that he used a confession which was inadmissible at the time of trial, because it was not voluntarily given.

How can two defendants be tricked when the Prosecutor uses an inadmissible statement which is in fact true, and which the defendants' attorney admitted to the jury was true, because he couldn't deny it. I don't see how any constitutional rights were deprived or withheld from the defendants by use of this confession.

Point (F) refers back to paragraph eight on page six which you say, "The petitioners were unlawfully detained and interrogated by the police authorities in violation of New Jersey Revised Rule 2:3-3." In the first place, I find nothing from your argument, nothing from (104) the record which indicates that the rule was violated, but assuming your factual contention is correct, violation of our rule

does not raise to the height of a constitutional question. Therefore, this Court cannot now pass upon it.

Point (G), in which you contend that the Prosecutor's summation violated the defendants' constitutional rights. I have read the pertinent parts, not only of the Prosecutor's summation, but also defense counsel's summations, and I find nothing in the Prosecutor's summation which is not a direct answer to the questions raised by defense counsel. Whether the Prosecutor's remarks were proper or not depends on the circumstances which existed at the time they were made as to whether or not they were fair and proper comment. The Prosecutor's remarks might well have been highly improper under different circumstances, but the Prosecutor was answering directly the arguments of defense counsel which certainly he has a right to do in the discharge of his public duty. Therefore, I believe that no constitutional (105) question is presented here. There is no constitutional question raised here upon which I can act.

I think that disposes of all the points you raised with the exception of your request to take testimony and your request to propound interrogatories.

I want to say once again, that the apparent expressed opinion of defense counsel, that our rules do not apply adequate safeguards to defendants is not so. We have a very simple philosophy under our Court rules. First that we seek the truth. The rights of all litigants will be protected, that justice will be speedily and duly administered.

Now, I make the observation that those rules in the main are patterned after the Federal rules which likewise seek to do the same thing. The rules adequately contain provisions that if in the opinion of the Judge the rules do not accomplish the clear expressed purpose that justice shall

so be administered, that the Judge can expand the rules to the end (106) that justice will be done. From our practice I can assure you that throughout our State that is done every day with interrogatories properly presented at the proper time at a trial, with a clear showing to the trial Judge that the information could not properly be gained in any other manner, the information is essential to the proper defense of a defendant would certainly be authorized by the Court. These interrogatories are not proper now for the reasons which I have previously expressed, and the various points which you have raised, for the same reason, the Court will not now permit any further hearing because of constitutional grounds that were presented which would warrant this Court taking further testimony.

For the reasons which I have expressed, the application of the defendants in all respects is denied, including the application for a stay for the warrant of execution entered July 31, 1964.

MR. HAEBERLE: Your Honor, may I have the Court's permission to have the interrogatories (107) put on the record?

THE COURT: Yes, I think they should be spread upon the record.

Anything further, gentlemen?

MR. HAEBERLE: No, your Honor.

THE PROSECUTOR: That's all, your Honor.

THE COURT: Court adjourned.

(Court adjourned 3:45 P. M.)

Interrogatories

INTERROGATORIES.

To: Howard Yeager, c/o Norman Heine, Esquire, Counsel for Respondent, Camden County Court House.

You are hereby directed to make answer to the following Interrogatories:

1. Furnish the names, present addresses, (108) occupation at the time of the events and present occupation of all law enforcement or investigative officials of this or any other jurisdiction, and representatives of the District Attorney's office, including but not limited to all attorneys, detectives, policemen and investigators, who participated in the arrest of:

a. Sylvester Johnson
b. Stanley Cassidy
c. Wayne Godfrey

and those who participated in the interrogation of:

d. Sylvester Johnson
e. Stanley Cassidy
f. Wayne Godfrey.

2. Were there any warrants issued for the arrest of Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, or any warrants for the search of any premises relevant to this case? If so, attach copies of the warrants and affidavits.

3. Supply a separate narrative chronological statement of all events relating to Sylvester Johnson, Stanley Cassidy and Wayne Godfrey from the time of the arrest of each of them until each of their preliminary (109) hearings.

Interrogatories

4. When were Sylvester Johnson, Stanley Cassidy and Wayne Godfrey formally searched, booked, fingerprinted? Where?

5. When were Sylvester Johnson, Stanley Cassidy and Wayne Godfrey given preliminary hearings? Where? Who presided? Who testified? Who was present? Were notes of testimony taken? If so, attach copies.

6. Were any statements (other than those introduced at the trial of the case) taken from Sylvester Johnson, Stanley Cassidy and Wayne Godfrey? Were they recorded, transcribed, and/or summarized? If so, attach copies of summaries, transcriptions, etc.

STANFORD SHMUKLER,
905 Robinson Buillding,
42 South 15th Street,
Philadelphia 2, Pennsylvania.
CURTIS R. REITZ,
3400 Chestnut Street,
Philadelphia 4, Pennsylvania.
M. GENE HAEBERLE,
518 Market Street,
Camden 2, New Jersey.

EXCERPTS FROM JOINT APPENDIX.

(Commencing 196a-14.)

AFTERNOON SESSION.

WILLIAM O'BRIEN, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. O'Brien, by whom are you employed?
A. City of Camden.
Q. What department?
A. Department of Public Safety, Police Department.
Q. How long have you been employed by the Police Department?
A. Sixteen years.
Q. What branch of the department are you employed by?
A. I am assigned to the Detective Bureau.
Q. How long have you been in the Detective Bureau?
A. A little over eight years.
Q. Prior to that time you were on the regular police force?
A. That is correct.
Q. Were you present at the time Wayne Godfrey was arrested?
(197a) A. I was.
Q. Where and when was that?
A. On Tuesday afternoon, June 28th, approximately 1 P. M., at the Little Click Cafe, Locust and Chestnut Streets.

Q. Who was present at the time with you?

A. Detective Golden Sunket, Lieutenant Conly, Sergeant Tracey, Detective Nathan Jones, Camden City Police Department, Captain Philip Large, and Detective Bill Large, the Prosecutor's Office.

Q. Was there anyone else arrested at the time?

A. Noah Hamilton.

Q. Where were they taken?

A. They were taken immediately to the Camden City Detective Bureau.

Q. Were you present at the time the automobile was towed away?

A. No, I was not.

Q. When you arrived at the detective headquarters with Godfrey, what took place there?

A. We have two detention rooms that we use for interrogation, and they were put in separate rooms.

They were stripped of all their clothing, searched and coveralls were secured from the County Jail and they were put in these coveralls.

Q. Keep your voice up.

A. They were stripped of all their clothing, searched, and their clothing turned into identification and records room. Coveralls were secured from the County Jail and they were placed upon the two men.

MR. HEINE: You may cross-examine.

(198a) CROSS-EXAMINATION.

BY MR. FLUHARTY:

Q. Sir, did you make any report in connection with the apprehension of Mr. Godfrey or Mr. Hamilton?
A. No, I don't believe I did, sir.

MR. FLUHARTY: Nothing further.

MR. BERTMAN: Will Your Honor bear with me a moment?

THE COURT: Yes.

MR. BERTMAN: I have no questions.

MR. CAGGIANO: No questions.

GOLDEN SUNKET, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Sunket, by whom are you employed?
A. City of Camden.
Q. In what department?
A. Police Department.
Q. How long have you been employed in the Police Department?

(199a) A. Fifteen years.

Q. What branch of the Police Department do you work in?

A. The Camden Detective Bureau.

Q. How long have you been in the Detective Bureau?

A. A little over a year.

Q. Prior to that were you on the regular police force?

A. Yes, sir.

Q. Were you present at the time Wayne Godfrey was arrested?

A. I was.

Q. When and where did this arrest take place?

A. It took place at the Little Click Cafe, Locust and Chestnut Streets, on the 28th of January, on Tuesday afternoon, about 1 P. M., approximately 1 P. M.

Q. Where is Locust and Chestnut Streets located in relation to the 200 block of Kaighn Avenue?

A. Just a matter of a couple of squares away.

Q. Who was with Godfrey at the time Godfrey was arrested?

A. Noah Hamilton.

Q. Were you present at the time that Godfrey was taken to the detective headquarters?

A. I was.

Q. Did you hear Detective O'Brien testify as to what happened to Godfrey when he arrived there?

A. Yes, sir, I did.

Q. Is there anything that you want to add or take away from Mr. O'Brien's testimony?

MR. BERTMAN: I object to that type of question, if Your Honor pleases.

THE COURT: I will sustain the objection.

(200a) Q. What took place at the time when Godfrey was brought into detective headquarters?

A. Noah Hamilton and Godfrey were placed in separate rooms in the detective bureau and their clothing was taken away from them and overalls from the county, the Camden County Jail, were supplied to them for their use.

Q. When Godfrey was taken out of the Little Click Cafe, were you there when his car was towed away?

A. No, I was not. I was on the way in to the detective bureau with him, accompanying him.

Q. Were you present when the car was identified?

A. No, I was not.

MR. HEINE: You may cross-examine.

MR. FLUHARTY: No questions.

MR. CAGGIANO: No questions.

MR. BERTMAN: Will Your Honor bear with me?

THE COURT: Yes.

MR. BERTMAN: I have nothing further.

THE COURT: You may be excused, sir.

(201a) HARRY TRACY, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Tracy, by whom are you employed?
A. By the police department, City of Camden.
Q. How long have you been so employed?
A. Eighteen years.
Q. What branch of the police department do you work in?
A. Detective Bureau.
Q. How long have you been in the Detective Bureau?
A. Since 1946.
Q. Prior to that time you were on the regular police force?
A. I was.
Q. Did you have occasion to arrest Stanley Cassidy?
A. I did.
Q. When did you arrest him?
A. About 4:00 A. M. on Wednesday morning, January 29.
Q. Where was he at the time you arrested him?
A. His home, 312 Pine Street.
Q. Who was with you at the time?
A. Captain Philip Large, Bill Large from the County detectives, Lieutenant Conly, Detective O'Brien, Jones, Sunket and myself from Camden.
Q. Now, when you arrested him where did you take him?
A. To the Detective Bureau.
Q. In City Hall here?
A. That's right.

Q. What happened to him when you took him there?
(202a) A. Well, he was taken there, see if he had anything on him and questioned.

MR. HEINE: Cross-examine.

MR. FLUHARTY: No questions.

MR. CAGGIANO: No questions.

MR. BERTMAN: No questions.

(Witness excused.)

NATHANIEL JONES, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Jones, by whom are you employed?
A. City of Camden.
Q. What department?
A. Police department.
Q. How long have you been so employed?
A. Since 1944.
Q. Fourteen years?
A. Yes, sir.
Q. Or so?
A. Yes.
Q. What branch of the police department do you work in?

(203a) A. Detective Bureau.

Q. How long have you been in the Detective Bureau?

A. Since 1949.

Q. Before that you were on the regular patrol force?

A. Yes, sir.

Q. Now, did you, were you present at the time that Stanley Cassidy was arrested?

A. Yes, I was.

Q. Will you tell us when and where that took place?

A. It was on the 28th of January, 1958, at 312 Pine Street, approximately 4:00 o'clock in the morning.

Q. And after Cassidy was arrested where was he taken?

A. To the Detective Bureau, Room 515, City Hall.

Q. What happened there?

A. He was turned over to the members of the Prosecutor's staff.

MR. HEINE: Cross-examine.

MR. BERTMAN: No questions.

MR. CAGGIANO: No questions.

MR. FLUHARTY: No questions.

(Witness excused.)

(204a) VINCENT CONLY, sworn.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Mr. Conly, by whom are you employed?
A. City of Camden, Department of Public Safety.
Q. And how long have you been so employed?
A. Eighteen years.
Q. What branch of the department do you work in?
A. I am assigned to the Detective Bureau.
Q. How long have you been employed in the Detective Bureau?
A. Since approximately 1935.
Q. Prior to that time you were on the regular police force?
A. Plainclothesman and regular police force.
Q. Did you have occasion to arrest Sylvester Johnson?
A. Yes, I did.
Q. Where and when did that take place?
A. It took place Wednesday, January 29, at 732 on Hunterdon Street, Newark, New Jersey.
Q. Who accompanied you at that time?
A. Why, it was the County Detective Harry Gabor, Sergeant Tracy, Detective Jones, Dunn, O'Brien and myself.
Q. Where was Johnson taken to?
A. He was taken to the Newark Detective Bureau, later that night arraigned before the municipal judge in Newark and brought to Camden the following morning.
Q. And when you reported to Camden where was he taken to?

A. Directed to the Prosecutor's office.

(205a) Q. What time did you arrive in Camden?

A. I'd say about 5:00 o'clock in the morning, between four and five.

Q. When he was taken to the Prosecutor's office in Camden, did you remain there?

A. Yes, I did.

Q. Did you question him at that time?

A. No. I sat in on the questioning when he was questioned by Chief Dube.

MR. HEINE: You may cross-examine.

CROSS-EXAMINATION.

BY MR. BERTMAN:

Q. Mr. Conly, what time was it that you brought Johnson back from Newark?

A. Early hours of Thursday morning, between four and five o'clock in the morning, I believe, approximately.

Q. Where was it that you had apprehended him?

A. At the home of his uncle, I believe his name was Joseph Evans, 732 Hunterdon Street, Newark, New Jersey.

Q. What time was it that you had apprehended Johnson in Newark?

A. In the early evening; approximately somewheres after five o'clock, I believe.

Q. Somewhere after five o'clock?

A. Yes.

Q. From the place where you had apprehended him, where did you then go?

A. Newark Detective Bureau.

Q. How long did you stay there?

(206a) A. Well, we turned him into the authorities there and we waited until night Court.

Q. Was night Court had as a regular session, or was it a special session for this matter?

A. No, regular session.

Q. Did Sylvester Johnson appear in Court?

A. Yes, he did.

Q. Did he have representation?

A. No, he didn't; but the judge advised him of his rights.

Q. How long did you stay in Court?

A. Between a half-hour and three-quarters-of-an-hour, something like that.

Q. What time did you leave Court?

A. Maybe between ten and eleven, something like that. I'm not too sure of the time.

Q. Where did you go then?

A. We made arrangements to stay in a hotel overnight at Newark and we put him back in the city jail in Newark, and in the meantime we had received a call from Lieutenant Neill, telling us to come right back, so we left there and came right back.

Q. What time did you put him in the city jail?

A. I don't recall the exact time.

Q. What time did you leave from Newark to go to Camden?

A. Approximately two o'clock in the morning, I think.

Q. And you got back to Camden about between four and five?

A. Around that time, yes.

Q. You took him where?

A. Directly to the Prosecutor's office.

Q. When you get to the Prosecutor's office, who was present?

(207a) A. Why, Chief Dube, Lieutenant Neill, William Large and myself. Captain Phil Large had been there, but he left to go home.

Q. Was he taken up into the County jail?

A. No, he was taken directly to the Prosecutor's office.

Q. Now, you had picked him up, you say, at about five o'clock in the early evening or late afternoon before, isn't that correct?

A. That is true.

Q. When you picked him up, where was he?

A. As I said before, he was at his uncle's home, 732 Hunterdon Street.

Q. Was he up and about, or was he in bed?

A. He was sitting watching television when we went in the house.

Q. From the time that you saw him, from five o'clock that afternoon up until you brought him back from Newark, did he have any sleep at all?

A. Well, I don't know what he was doing in the jail. He probably did.

Q. Well now, you say you brought him to the jail between when, what hours?

A. Between five and six, approximately. That is when we picked him up, took him in. I next saw him again when we went into Court. He was placed back in jail and then we took him out again in the early hours of the following morning.

Q. Did he sleep on the ride back from Newark to Camden?

A. I believe he dozed off a little bit.

Q. Wasn't he questioned at all?

A. We were talking to him about the crime, yes.

Q. Talking to him?

(208a) A. We were talking to him, yes.

Q. You were questioning him, were you not?

A. Yes, at times.

Q. Sir?

A. At times.

Q. Did he doze off in-between the questions that you were asking him?

A. No, I wouldn't say.

Q. You said that he dozed off from time to time.

A. Yes, he would doze off. We wouldn't be talking to him when he was sleeping.

Q. I ask you, did he doze off between the questions? Was your questioning steady, or did you stop from time to time to permit him to doze off or to rest?

A. No. He was riding along and there was no sustained questioning or anything like that. Just a question mentioned to him once in awhile.

Q. But he did not sleep, did he?

MR. HEINE: If Your Honor please ——

A. He would take a nap once in awhile, I believe; not a matter of sleep.

Q. He would take a nap once in awhile?

A. Just doze off, yes.

Q. Now, this whole trip took less than two hours, did it not, from Newark to Camden?

A. About that.

Q. You say he would take a nap once in awhile?

A. Well, he'd be laying back with his head, his eyes closed. I assumed he was taking a nap.

Q. Well, you as a detective found it necessary to question him, did you not?

(209a) A. I talked to him. We stopped to get coffee at a Howard Johnson's on the way back and he had cuffs on him and we took him into a Howard Johnson Shop there.

MR. HEINE: Keep your voice up.

A. I stopped at the Howard Johnson and we took him into the restaurant and asked him if he wanted coffee, or anything he wanted to eat, and he ——

Q. You are not answering my question. I asked you whether you as a detective found it necessary, or considered it necessary to question him in regard to an alleged crime that had taken place?

A. I said, yes, we had.

Q. Now then, and you were performing your duty, were you not, on your way back from Newark to Camden?

A. Yes.

Q. When you got to the Prosecutor's office here, did you notice whether or not there were any accommodations for Johnson to rest or to take a nap?

A. I wouldn't know that.

Q. Sir?

A. I wouldn't know that.

Q. When did the questioning start here in the Prosecutor's office?

A. Practically immediately when we ——

Q. How long did the questioning continue, to your knowledge?

A. I don't recall the exact time that the questioning took.

Q. How long did you stay there?

A. I don't recall, but I think it was around noon or later that I left.

Q. Noon?

(210a) A. That I left the Court House, or the Prosecutor's office.

Q. That would be twelve o'clock the next day?

A. That's when I left.

Q. When you left he was still being questioned, was he not?

A. No.

Q. Had they finished with the questioning?

A. Oh, before that. I stayed around after the questioning.

Q. Sir?

A. I stayed around after the questioning.

Q. What time did they finish with the questioning?

A. I don't recall just what time it was.

Q. Were you present when the court stenographer came in?

A. Yes, I was.

Q. Can you tell us approximately what time that was?

MR. HEINE: If Your Honor please ——

A. I can't recall the exact time.

MR. HEINE: I have been a little tolerant with Mr. Bertman's questions.

MR. BERTMAN: I do not want the Prosecutor to be tolerant of anything I do. Let us have that understood.

MR. HEINE: Just a moment. But this is far beyond the scope of the direct examination. I will bring the testimony back when we are ready to prove the confessions and we can then talk about that, but this lieutenant and this

wit- (211a) ness has not been asked at all about the questioning of Johnson and the like afterwards, or how much sleep and so forth.

If he is trying to lay the groundwork for objecting to the confession, this is something else again. This is not the witness and this is not the proper time to do that. For those reasons I object to it.

THE COURT: Mr. Bertman, you will have an opportunity to explore this area which you are starting on now and, technically, it is not proper cross-examination.

MR. BERTMAN: If Your Honor please, I don't know whether he'll be brought back or not.

THE COURT: I just heard the Prosecutor say that he would, and I would think that he would have him here if he was present when the confessions were taken.

MR. BERTMAN: If Your Honor please, regardless of the time when the Prosecutor wants to introduce the confessions, the fact remains that this man was there, and I have a right to ask what happened at that time.

THE COURT: Well, the only point the Prosecutor has developed is that this defendant was turned over to Captain or Chief Dube and then he stopped. Now you are probing into what occurred after that and that has not been developed on direct examination. You will have the opportunity to explore that phase of it when the proper time comes. I do not feel it is proper cross-examination now.

MR. BERTMAN: May I have an exception. That being

Your Honor's ruling, I have no further questions (212a) at this time and I assume that this witness will be brought back later.

THE COURT: That is my assumption too.

MR. HEINE: We will bring back all of the witnesses who were present at the time the confessions were made.

THE COURT: All right. Any other questions, counsel?

MR. FLUHARTY: No questions.

WILLIAM O'BRIEN, recalled.

DIRECT EXAMINATION.

BY MR. HEINE:

Q. Detective O'Brien, were you present at the time that Sylvester Johnson was apprehended and arrested in Newark?

A. Mr. Prosecutor, I was not in the house. I was outside.

Q. You were there at the time?

A. That is correct.

Q. When was he arrested in Newark?

A. I would estimate it between five and six. It was turning dusk, almost dark.

Q. After you arrested Johnson what did you do with him?

A. We took him into New York—the Newark Detective Headquarters where they mugged and printed him.