What I want to say now is just as the day is coming to a close, so is this trial.

This is the last opportunity that I, on behalf of the State, will have to talk to you.

We are engaged in a very serious business, and have been for the past two weeks.

For you the serious business will not have been over, but it will commence in real earnestness tomorrow, when this case is (1813) left with you for determination.

This is important. This is serious, not only to the State, and believe me, it is most important to the State, but I acknowledge that it is important to the defendants also.

The importance of the case warrants that we submit to a little personal inconvenience, recognizing that the hour is way past the hour of the ordinary adjournment for a trial day in our Courts.

I do not know any of you personally. To the best of my recollection, I have never seen, or even heard of any of you jurors prior to the commencement of this trial, but you have impressed me no end with your earnestness, your zeal, your thirst to do everything that you possibly can to properly decide the important issues that will be presented to you for determination.

Again, you have the thanks of the State, the thanks of the County, and you are to be commended.

(1814) I mentioned before when I spoke to you earlier, that I was presenting the argument on the State's behalf, the defendants would argue, and then I would close.

I am about to engage in the closing argument of this whole trial.

The only thing left will be the charge of the Court as to the law.

I thought that I had a pretty good memory, and while

there were a lot of kudos thrown at the Prosecutor as to his duty, and how fair he has been, I was quite amused on the other hand to hear that I had stated that the defendants had the effrontery to enter a plea of not guilty.

One attorney said that I had stated that the defendants had the audacity to enter a plea of not guilty.

I can excuse a lot of misstatements about the evidence, and I do not want to comment about that now, but I do want to comment about misstatements or misquotations about what I said.

(1815) Last Friday, when we opened this case, I made a statement after I presented the State's position of what I intended to prove, and as to my theory of the case. I thought that I had recollected it pretty well, but in order to be sure, I sent for the stenographic transcript of what I had stated, as recorded by these stenographers, who are the official Court Stenographers here to make up the official record of every word that is uttered here in this court room.

I said this, and lest I be misquoted again, or lest you may get away with a different impression, this is what I said: "I don't know what defense the defendants can offer to this. I have not the faintest idea what explanation they can now make. Under the law I may not inquire from them. All I know is they have pleaded not guilty."

That is the sum of what I said to you on that day.

It is true that I have no right to demand that the defendants tell me what (1816) their defense is going to be.

They entered a plea of not guilty. I made no comment about that. That is all I knew, and I would have hoped that when they did present their openings last Friday, following mine, that they would have indicated, not only to you, but to me, for the first time, what their defense could have been.

They also stated, and this is important, because a lot has been stated about these confessions, and you did receive instructions yesterday on many occasions from the Court that the confessions that were read to you, the confessions by each one of the defendants, the confessions of Cassidy, the confessions of Godfrey, and the confession of Johnson, were only to be considered as evidence against the confessor, and not to be used against any other defendants mentioned therein.

You have the right to consider all of the confessions, or any part of the con- (1817) fessions. This is a fact. These confessions, as I indicated earlier today, these confessions themselves, stem from interrogation at the time when the Police and the County Detectives were still searching for the solution to this killing.

They had plenty of opportunity to make their own self-serving declarations, and is there any question that in the first instance Cassidy lied?

He lied about going to work that morning with Godfrey. He was no more down at the docks with Godfrey than either you or I were.

Is there any question that Godfrey lied before he knew what the facts were, when he went so far as to say that he drove his wife to work that morning, when the truth of the matter was that she had worked that night, when he went to get her with Noah Hamilton.

(1818) These self-serving declarations—you can pick up a line here. They weren't giving them the worst of it. But this is beside the point, ladies and gentlemen. The point is that the State's case doesn't depend on these confessions. Haven't we proved by other witnesses every part of this confession? Didn't we hear it from Noah Hamilton? Didn't we hear it from Walker? Didn't we hear it from Brimm?

Didn't we hear it from Ognissanti, the first citizen who spotted the car when he was waiting for the red light? Didn't we hear it from the chemist and from the toxicologist, and didn't we hear it from the ballistic man and didn't we hear it from the fingerprint expert, and didn't we hear it from Noah Hamilton? Didn't we prove a case without the confessions?

I say we submitted a case that would support any verdict of first degree murder without the confessions. These confessions were merely the bow to dress up the knot that tied this whole package together.

Ladies and gentlemen, now I hear, and now I understand why they said nothing last Friday (1819) when they opened, why these attorneys didn't make any claim for a defense. Now it is crystal clear. Now they finally admit. What was there to deny? The State had 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 or he is sorry or 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.

(1820) Therefore, you have a right, and intelligently so

and logically so, to say the reason they didn't take the stand is because they could not truthfully deny the incriminating evidence proved against them, and the Court, I trust, will charge you the law on this situation.

They talk about the Bible. This I expect. I expect there would be quotations uttered by the attorneys about passages from the Bible. This is not out of the usual. This is not out of character, but they don't quote that passage from the Bible which says: Who shall shed man's blood, by man shall his blood be shed. This is in the early part of the Old Testament, as early as in Chapter 9 of Genesis.

What else do they tell us? They tell us that nobody intended a killing, that they only intended a robbery, and even though the Prosecutor has stated that premeditation is not a part of this case, you keep it in mind. Well, ladies and gentlemen, premeditation, as I explained to you on many occasions, is not a part of this crime. It was not necessary. We (1821) could have rested on the attempted robbery, and this we chose to do, and this is the claim we make and this is the case we are presenting to you, that this was a killing in the course of an attempted robbery and for this the law clearly says: Shall be murder in the first degree.

We do not have to prove premeditation. But, wasn't there premeditation? Wasn't there an intention to take life? Didn't Godfrey intend to take life? Was he only a robber and not a killer as someone has suggested? Then why did Godfrey start to assemble the arsenal? If he didn't have murder in his heart, why was it necessary for him to go out and get a gun for the conspiracy?

No denial of this, is there? This is Godfrey's handiwork, his contribution to the conspiracy that he conceived in his illicit mind.

Is this the act of only a robber? If they had robbery only in their hearts, if larceny was only in their hearts, why was it necessary for both of them to take two armed weapons, both of them? These weren't held by Godfrey in the car (1822) when they went in, unarmed. These were possessed by the strongarm guys, the killers, and both were loaded. Is this the act of only a robber? If they only wanted to wrestle with Davis, and if they only wanted to rob him, why didn't they take a toy gun, a make-believe gun? Why didn't they take an empty gun and scare him? Then, if it failed, they would have been held for attempted robbery. But there wouldn't have been murder.

Did they start out premeditating about robbery? Let me leave this with you for a second. They walked into the Davis store. They walked out. What were they talking about when they sat in the Godfrey car before they entered the second time when they decided to go back and finish the job? Was that premeditation?

Godfrey, the ringleader, the conniving fingerman, the man who put the finger on this, planned it for a long time.

Cassidy, this lamb, he knew it for several days, because he obtained the Brimm gun. He helped to assemble the arsenal. What did they now do? Each jockies for his own position, because (1823) among thieves they have got larceny against each other, each one trying to get out in case anything breaks. Let's get into a favored position. Godfrey stands outside in the car so that if anything happens he is not in it, he says. As long as Johnson is shooting at Davis, Cassidy is willing to stand by and let it happen.

Well, what would have happened if another customer had come in and Johnson's gun had been empty? What would have Cassidy done then? Or if on their way out they had bumped into the policeman? What would have happened

then? Didn't they have murder in their hearts then? All of this is now conceded by the defendants. They say all of these facts, the State's theory, is now conceded to be the truth. We admit it. They all now would like to plead guilty to first degree murder, and I suppose the question is, are you now going to deny them the opportunity of being found guilty of first degree murder.

The penalty for first degree murder is death. This is not your doing. This is proscribed by law. You have a right to change the (1824) law by recommending life imprisonment, but when do you have that right? Is it just a blank right that you have? You have heard this time and time again, that the penalty for first degree murder shall be death unless the jury, upon the consideration of all the evidence, recommends life imprisonment. I want to emphasize: Consideration of all the evidence, not the consideration of the milarky of the attorneys, not the consideration of some hypothetical situation, but a consideration of all the evidence. And now when the defendants say everything the State said they were going to do and did and proved against us, what evidence do you have which will warrant you in recommending life imprisonment? Absolutely none.

(1825) Now, ladies and gentlemen, this has been touched upon by one or more of the attorneys for the defendants who say not every first-degree murder case merits the chair, the death penalty. This I concede. This I concede.

I will tell you some examples of first-degree murder that may not warrant the death penalty. These you will find are where the original circumstances are innocent and a death or killing occurs, then you say, well, this was beyond anybody's contemplation. The original circumstances were innocent.

Suppose, even in this case, had they entered Davis' store,

and suppose there was a tussle, and Davis had slipped and fell on one of the cartons and bumped his head against the table, or a carton, and died? I could understand someone saying this was never intended beyond anybody's comprehension. This would be first-degree murder, this might warrant.

(1826) Suppose the irate husband discovers a disloyal wife, goes out and seizes a weapon and engages in a tussle with the paramour? This might be first-degree murder, but this might, on the other hand merit a recommendation or consideration by you for recommendation.

These are innocent situations that develop beyond what anybody expects.

But, when from the moment this was conceived in the cunning, despicable mind of Godfrey, when he went out to assemble the arsenal, joined by the slick Cassidy, who assembled the other half, was there anything innocent about this original purpose? The purpose was lust, robbery, murder, if necessary.

Now, how can anybody in their right mind now say death wasn't intended? We only intended to rob. Wouldn't this be, wouldn't this be some state of affairs if the law, if you would countenance this kind of a defense, where three defendants agreed that they conspired to commit a robbery, armed themselves, (1827) attempted the robbery with armed guns, killed the proprietor, and now come in and say, "We didn't intend to kill him, we only intended to rob."

This is what you are expected to condone, and I have heard it from all of the defendants that they think that you are an intelligent jury. Well, do they mean that? And if they do mean it, do they think that you believe that and will accept that as a defense? I think this is insulting your

intelligence. Maybe if there were twelve other jurors, this could happen, as I heard one of the attorneys argue, but this is not the jury that I see in front of me. If the defendants are entitled to get away with this kind of a lame excuse, then you are putting a stamp of approval on armed robbery and you are putting your stamp of approval on murder resulting from armed robbery. It is as simple as that.

I hate to think what would happen to our community and your community if you (1828) condone this type of a situation and accept this as a reason for recommending life imprisonment.

What about the safety and the security of the decent, the law-abiding, the God-fearing people? What about the safety and the security of storekeepers in your community and mine? What can they look forward to if the most intelligent jury of Camden County says, "This receives our approval and condonation?"

Ladies and gentlemen, some theories were advanced as to why this killing took place. I don't know why this killing took place. I don't believe that you know why this killing took place. I may have said this earlier, I don't know, but my answer to that is that we don't know because you and I don't think the way these criminals think. We are not trained to think their way. They set themselves up different standards of conduct, different guides for living. I hate to think that they (1829) believe that they have a right to rob and kill, knowing that the most highly respectable and intelligent struck jury of Camden County won't have the courage to discharge their responsibility according to their oaths to mete out the punishment in accordance with the law. I don't believe that you will fail in your courage.

This killer, Johnson, he didn't panic. He pulled the trig-

ger five times. Davis, that poor soul, was shot from the groin up to his nose. You remember Dr. Riegert saying he must have been on the floor in order for the bullet to have gone through his body at the angle. Well, is this the man that panicked? He emptied his gun into the defenseless body of a poor, decent toy storekeeper, Edward Davis by name. And, do you know what shocks me, and must have shocked you, that I heard in this court room, that because Edward Davis was a robust individual, that this now works to their benefit, that if he did make a strug- (1830) gle to defend his own money, his own earnings, that he accumulated by the sweat of his own brow, this goes to their credit, because if he was a puny man, and had merely turned over his money, this wouldn't have happened.

Well, this is what you ladies and gentlemen can expect if this becomes a law. That some hood, or hoodlum, can poke a gun into you, or into your husband, and if he isn't a robust man, or doesn't have the courage to resist, and if anything happens, this makes it okay for the defendants.

Where is the reasoning? Doesn't this shock your conscience to have even somebody suggest this? Isn't your intelligence insulted, if this is going to become the law?

All I have heard here, all I have heard is, "Ignore the evidence, because we have pleaded to this thing. We are wholly complete, we concede it is true, we don't resist it, but ignore it anyway and give us (1831) mercy."

Not mercy that the defendants themselves have asked for, but mercy that their lawyers asked for.

Now, talking about mercy, and I think someone mentioned this about "Look at these defendants, aren't they sorry?"

Well, you have had an opportunity of inspecting them and observing them for two weeks, some of you. All of you,

at least, for the last week. I haven't had too much opportunity to observe them, because for the most part my back was toward them, but I did have ample opportunity on a number of occasions, and it struck me, and I am sure that it struck you, that they were so callously indifferent ——

MR. BERTMAN: If Your Honor pleases, I don't want to interrupt, and I don't think this is proper argument. It is not evidential, and I don't think it is proper argument.

THE COURT: I will allow it.

MR. BERTMAN: I am sorry, excuse me.

(1832) MR. HEINE: That they were so callously indifferent to all that went on. My only observation as to the way they felt about this trial is that this was an opportunity to have a dress parade.

I did notice that each one of them changed a suit each day. Well, maybe they are fashion models, maybe they are the slick boys, big-time stuff, maybe they are; maybe they can dress in Ivy League suits, fancy shirts, high-priced ties, look the smart boy, visit the night clubs, drink, know the records, maybe they are. On whose money? On the Edward Davises' money.

These are the boys that are sorry? To hang around the taprooms and night clubs?

Is there any denial that Cassidy, on this Friday night, went gallavantin' around to his Philadelphia night club with his girl friend? Is she the one who is going to suffer if something happens to him, this Mollock girl?

What are we talking about? There (1833) were times

when I didn't think I was in the right court room. I didn't recognize these defendants.

(1834) Do you know why they can take this attitude?

They can sit here because they have trained themselves to have an indifference to law and decency.

They don't believe, they don't subscribe to our way of living, and if you ladies and gentlemen of the jury, if you decent, respectable people put your stamp of approval on it, if you condone these killings, if you condone these armed robberies to enable these boys to lead the slick lives that they do, if you condone it by recommending prison terms, may the Lord above help all of us.

We will be returning the law of the jungle, talking about the law that they want, we shall be returning the law that the man who is the quickest on the draw, he will be the kingpin.

I suppose the man who has the most notches in his gun, he will be the fellow who will be respected in the neighborhood.

Well, I don't want that law and I don't (1835) want that manner of living, and I don't believe, looking at you ladies and gentlemen, that you subscribe to this kind of lawlessness.

Each one has said, each one has said, that the State is asking to take three lives for the one. This is what it amounts to. We are asking too much, and mind you, ladies and gentlemen, when I talk about the State, I am not talking about some artificial person, some corporation.

The State is made up of its citizens, citizens like you, like you, like you and I, all of us put together. We make up the State, and the State is here. You are here asking for justice.

Three lives for one. What difference does that make?

I am not asking you on behalf of the State to weigh three lives against one.

This is not being weighed on a scale of numbers.

We are not even talking about quality, but let me say this:

We are asking that they be measured on (1836) the scale of justice.

This is the scale that they ought to be weighed on, not a numerical scale.

Talking about a scale, would not the body and soul of one, Edward Davis, this decent, law-abiding, God-fearing man outweigh the three hoodlums that planned to rob and even to murder?

I would not trade all three of them or any multiple of three of them for a one Edward Davis.

However, do not put it on that basis.

Aside from that, do you think they would have stopped with one Edward Davis as I did mention before if they had to kill in order to escape or to get rid of a customer that interfered with this robbery?

The community was fortunate—most fortunate that no one else came across their path.

These are the reasons, these are the reasons that I say the State is fair in asking for the death penalty for all three of them.

They were all in this together and mind (1837) you, you must have observed that they stuck through this all together too.

They all intended to share equally in the loot.

They lost, and they ought to share equally in the punishment.

(1838) I heard it expressed and you were asked: Would you consider any mitigating or extenuating circumstances?

I heard this argued time and time again: Would you consider extenuating or mitigating circumstances in their favor?

This is an insult to your intelligence. Small, feeble puffs of smoke were blown up from time to time. They can never congeal into even a light smoke screen. There is not one single extenuating or mitigating fact of any kind, no circumstance that would justify you in exercising a discretion to make a recommendation.

Death for murder in the first degree has been the law of this State even before it was a state, ever since we were a colony, even when we were a branch of the England from whom we draw our common law. The punishment for murder in the first degree was death.

This, the law proscribes, not you. And we, the State, you and I, all of us, all decent citizens, all citizens of the State, through our legislature, have never seen fit to change the law. If there is any one we can feel (1839) sorry for, ladies and gentlemen, let us start to feel sorry for Edward Davis. Let us give that poor soul a sorrowful thought, that unfortunate human being who was wiped off of this world by three hoodlums before he reached his allotted time on this earth: Fifty-five years of age, in the prime of his life, snuffed out by three hoodlums.

Talk about fairness, talk about giving him a fair trial? Don't you think the State gave him a fair trial? They were right in demanding the State prove everything against them, and weren't you impressed with the thoroughness with which the law enforcement officers investigated and prepared this case for trial, with the thoroughness, how each dot and tiddle fell into its own place, how each little piece of evidence, no matter how insignificant, a piece of card-

board, a piece of paper, identify the bullets, identify every chain, everybody who handled them reported in.

Do you know why I paraded these witnesses here for you to hear? Lest I be criticized: What happened? This would be the first thing that they (1840) would hurl at me. This is why we insisted on proving it. I didn't want them to agree to it. I wanted to prove to your satisfaction that they were entitled to receive the death penalty.

I do not subscribe to the practice that might exist in other countries, where life is snuffed out at some trial like that because you opposed the Government. This is not my way of thinking. The State does not ask that. The State was ready to prove, did prove, every last bit of it. It was not because I rejected the offer of the attorneys time and time again who were willing to agree.

I did not want to be remiss in my duty of proving that they were entitled to be proven against. No advantage was sought from them. We gave them a two-week trial. How much time did they give Edward Davis? We gave them the benefit of every doubt, but what doubt did they give Edward Davis, and aren't they the ones now to come in and say "We didn't give it to Edward Davis, but we ought to get it from you." This is a machination that works in the mind of a criminal.

(1841) Ladies and gentlemen, punishment for crime is not all together retribution. The State does not say, because one life was taken, therefore another life must be taken. No, we don't come in on that basis. There are two reasons for punishment. You may have heard this time and time again, but let us get it clear here, because you are now concerned with it. There are two reasons for punishment, the first, punishment to the offender of the

law and the second, a deterrent against others from breaking the law.

This is your opportunity, ladies and gentlemen, to flash a warning light to all of the hoodlums in and about Camden County and the State of New Jersey and to anyone else who dares to repeat this similar offense, that we will not tolerate it. We do not like this kind of business in our community or anywhere else. This is your opportunity, ladies and gentlemen, to shout out in a call that will be heard unmistakably all around that death awaits the criminal who kills in the course of crime. This is your opportunity, ladies and gentlemen, to say that we decent people stand for (1842) law and order. Is this important? Edward Davis had a right to earn a livelihood in his toy store. Would anyone deny him that right? He had a right to expect that he would never be molested by anyone. He had a right to live and I respectfully urge you that this is your opportunity to announce by your verdict that the remaining Edward Davises in Camden County can continue to expect those rights.

This is the decision that you are faced with. What about the other Edward Davises? This was murder, admitted murder in the first degree. This crime was shocking, bold, brazen and an unnecessary taking of life. This, and for the other reasons, merits that you give them the full measure of punishment. Do not compromise.

Please do not compromise. These defendants are guilty of murder in the first degree. They tell you they are guilty of murder in the first degree. These defendants are entitled to the death penalty. Do not compromise. If they are not guilty of murder in the first degree, entitled to the death penalty, then they ought to (1843) be acquitted.

On behalf of the decent citizens of our community, I beg

of you, ladies and gentlemen, don't dismiss murder. The law: Thou shalt not kill was contained in one of the Commandments which guides all of us. Do not indicate you have an indifference by a compromise. Is this the place to compromise? Are we around the Statesmen's table where we are talking about compromise? For whom are you compromising, for these hoodlums? Don't force us back to lawlessness, ladies and gentlemen.

Why should you compromise yourselves, the whole community's future and welfare for these three despicable criminals? Tell them and through them to everyone else who even has an idea to venture in this criminal business that crime does not pay.

(1844) Ladies and gentlemen, last week I told you that I as a Prosecutor of Camden County had a duty.

I took an oath to perform that duty and I intend to perform it.

I hope that you agree with me that I have discharged that duty with some credit to myself, but more important than that, with credit to the community who insisted on a fair trial by an impartial jury.

I hope that you agree with me that I have been fair to the State, and that I have even been fair to these defendants.

I believe in that.

Ladies and gentlemen, the law enforcement officers of the City of Camden, and the County of Camden, the County Detectives, and the City Detectives, did a most commendable job. I am really proud to have been associated with them.

Their vigilant investigation of this crime made it possible for these defendants to be brought to the bar of justice.

(1845) You have already gathered from the evidence, from the lips of the witnesses themselves, ladies and gen-

tlemen, that this took around-the-clock work, sleepless nights, in a dedication to duty.

The same applies to the preparation and trial of this case.

Now the time has arrived for you to do your duty.

I said to you, and you may recall, that duty oftentimes is unpleasant, and to do your duty requires courage.

I took an oath to perform the duty of my office to the best of my ability.

Each of you ladies and gentlemen of the jury took an oath to try this case and to render a true verdict, in accordance with the evidence of this case.

This is important, ladies and gentlemen.

This is an important case.

This is a serious case. Oh, I rest very complacently because I am confident (1846) that you can arrive at only one verdict, and that is guilty of murder in the first degree. Of this I have no doubt, but I say to you, do not exercise your right to make a recommendation for life imprisonment.

This is not because I am blood-thirsty, God is my judge, ladies and gentlemen. I ask this with all the sincerity in every fibre and tissue of my body.

I am pleading here for the principle of respect for our law.

I want, as I believe you want, a decent, peaceful community in which to live. I think you want it too.

This is where we want to rear our children and our children's children.

Is that asking too much? Is this wrong for me to ask it?

You all took an oath that you had no religious or conscientious scruples against capital punishment.

Each of you swore on an oath that you could return the death penalty against (1847) all three defendants, if the

evidence warranted it and the law, as given to you by the Court, would justify it.

When you answered in the affirmative to that oath, you all qualified as jurors.

(1848) MR. HEINE: The facts of this case, ladies and gentlemen, clearly warrant a verdict of murder in the first degree against all defendants, with punishment against all of them, equally, without recommendation.

I have no compunction in asking for this. I dare say that you might even be derelict in your duty if you don't agree. You might have been guilty of violating your oaths were you not to return such a verdict. I beg of you, on behalf of the State, that you return a verdict against all defendants of guilty of murder in the first degree, so that all defendants can receive the death penalty.

They were all in this together and they should stand in this together to the end.

Ladies and gentlemen, on behalf again of the State of New Jersey, on behalf of the citizens, of the decent people, the people that I believe you and I represent, I respectfully urge you to return a verdict (1849) of guilty of murder in the first degree, without any recommendation.

Keep in mind, ladies and gentlemen, you will not be sentencing to death, the law takes care of that without you. All I ask of you is for the decent people, for the good of our whole community, don't exercise your discretion, don't make such a recommendation.

Again, I leave you, and this for the last time, return a verdict against all three defendants, each of them guilty of murder in the first degree, without any recommendation.

I thank you.

Summation of Mr. Heine

THE COURT: Members of the jury, you have heard all the evidence, you have heard all of counsels' summations, the only thing remaining now is the charge to be given to you by the Court tomorrow.

Now, as I have warned you in the past, do not discuss this case, because until you know what the law is, and how the facts are to be applied to the law, you are (1850) not in a position to discuss it honestly, fairly and sensibly, so do not discuss it tonight, and tomorrow we will start at ten o'clock.

The jurors may be taken from the Court room first.

(Jurors leave the Court room.)

(Adjournment at 6:30 P. M. until Saturday, January 24, 1959, at 10 o'clock A. M.)

(1852) (The following is taking place out of the hearing of the jury.)

THE COURT: Gentlemen, Juror Grace Wheeler was taken ill and at the suggestion of defense counsel and the State, Dr. David was summoned. Dr. David has examined the Juror, Grace Wheeler. You have heard his report which, in substance, states that he feels she should be excused because she has a condition which might interfere with her proper execution of her duty as a juror.

Do you have any objection to her being excused?

MR. BERTMAN: No objection insofar as I am concerned.

MR. CAGGIANO: No objection, Your Honor.

MR. FLUHARTY: No objection.

MR. HEINE: No objection from the State.

THE COURT: Juror, Grace Wheeler, will be excused. (1853) Doctor, thank you very much.

(The juror referred to is excused.)

(The jury is now brought into the Court room.)

(The jury is polled.)

CHARGE OF THE COURT.

Members of the jury, it becomes my duty to instruct you as to the law which you must apply to the facts in this case.

These defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, stand before you on an indictment found by the Grand Jury of this County, charging them with the crime of murder. The indictment is in statutory form, and you may bring it with you into the jury room and there examine it. Presently I will explain the indictment to you and the law applicable to it. But before doing that, there are certain fundamental principles that I want to call to your attention, and which you should keep in mind and be guided by at all times during your deliberations.

You will realize, of course, that (1854) there are three defendants on trial before you. As I shall explain to you

in more detail later on, we are in effect trying three cases in one, and each defendant is entitled to your separate consideration and verdict. For that reason, except as I may otherwise specifically indicate, you will understand that the principles of law which I am about to explain to you apply severally and specifically to each defendant.

The Court is the judge of the law; the Court is the sole judge of the law. It is the function of the court to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case.

And by reason of that rule, it is the duty of the jury to follow the law as it may be stated by the Court. On the other hand, the jury are the judges of the facts; the jury are the sole judges of the facts. The Court has no power to decide or to instruct the jury how to decide any (1855) question of fact, because the jury is the final and the only judge of the weight of the evidence, the credibility of the witnesses, the inferences to be drawn from the evidence, and of all inferences, issues, and questions of fact whatever, including the ultimate conclusion of guilty or not guilty, as well as the degree of guilt, if any, to be reached after the consideration of all of the evidence.

The Court has the right, and sometimes the duty, to comment on the evidence, but, if in so doing, the Court—and this goes as well for counsel—should state as its recollection of a fact something which does not coincide with the recollection of the jury, it is the duty of the jury to disregard those expressions of the Court, except where they completely coincide with the recollection of the jury. Or, if the Court in commenting on the evidence should appear to the jury to lay undue emphasis on any phase of the evidence, the jury should (1856) disregard such emphasis of the Court and remember that it is to decide the case not

only on the evidence referred to by the Court, but upon all of the evidence.

The Court has the right, if it sees fit, to express its opinion of the evidence, pointing out what evidence, conditions, or circumstances seem to the Court to be salient, controlling, or persuasive. And the Court has the right also to indicate any inferences or conclusions of fact which the Court would or may draw from the whole or any part of the evidence, but the jury are in no way bound thereby and may disregard all or any of such expressions or comments or opinions of the Court if they see fit to do so.

Now, the defendants in this case, and each of them, as are all defendants in all criminal cases, are presumed to be innocent, and unless the crime charged and the degree of crime charged and each and all of its elements are proved beyond a reasonable (1857) doubt, they, or any of them, are entitled to be acquitted. They cannot be convicted of any crime or degree of crime unless they are proved guilty thereof beyond a reasonable doubt. And the burden of proving the guilt of the defendants and the degree of their guilt beyond a reasonable doubt rests upon the State throughout the entire case and never shifts.

Reasonable doubt is not a mere possible or imaginary doubt because, as you may well know, everything relating to human affairs and depending upon oral testimony is open to some possible or imaginary doubt.

By a reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Reasonable doubt may arise also from a want of evidence or a lack of proof. (1858) And if you find that the State

has failed to produce evidence sufficient to satisfy you of the guilt of any or all of the defendants beyond a reasonable doubt, then he or they are entitled to an acquittal.

(1859) To revert to the indictment, I think if you will listen to me you will find that the law with respect to it is quite simple, and that you will have no difficulty understanding it. It charges in effect that the defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, on the 24th day of January, 1958, in the City of Camden, did wilfully, feloniously, and with malice aforethought, kill and murder Edward J. Davis.

The finding of that indictment by the Grand Jury is no evidence of the guilt of the defendants. It is merely a step that is necessary in our regular course of criminal procedure so that they may be brought on for trial before a court such as this and a jury such as you for the determination of their guilt or innocence, and the degree of guilt, if any.

The indictment, as I have said, is in statutory form, which form is required in all indictments which charge the crime of murder. In order to understand its purport, I must explain to you the statutes which define murder, and by which statutes this indictment is governed.

(1860) Our statute respecting murder provides in part as follows: "If any person, in attempting to commit robbery, or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, shall kill another, then such person so killing as aforesaid shall be guilty of murder."

The statute further provides: "Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating or at-

tempting to perpetrate robbery shall be murder in the first degree."

In connection with murder in the first degree our statute further provides that every person convicted of murder in the first degree shall suffer death unless the jury, by their verdict and as a part thereof, upon and after a consideration of all of the evidence, recommends imprisonment for life, in which case this, and no greater punishment, shall be imposed.

So far as the guilt of the defendants (1861) in this case is concerned, the State does not contend that it is a case of murder perpetrated by means of poison or by lying in wait, or by any other kind of wilful and premeditated killing. The State contends that this case is controlled by that part of the statute which provides that any killing which shall be committed in attempting to perpetrate robbery, shall be murder in the first degree. I shall therefore explain to you the law applicable to a homicide alleged to have been committed in the attempted perpetration of a robbery, which is the portion of the statute which applies to this case.

Robbery is defined as the intentional stealing of property with violence from the person or personal custody of another person. It is necessary, in order to constitute that crime, that the goods shall be on the person of the owner, or the owner's agent, or shall be in his presence and in his custody.

An attempt to commit the crime intended is not complete until the actors perform some overt act directly moving towards commission of the (1862) crime, which overt act must be such as will apparently result in the usual and natural course of events in commission of the crime itself if not hindered by extraneous causes.

If you find beyond a reasonable doubt from a consideration of all the evidence in this case that the defendants did intentionally attempt to commit a robbery upon the deceased, Edward J. Davis, and that the defendants in attempting to commit the robbery as aforesaid did kill him, then the defendants are guilty of murder in the first degree.

(1863) You will note that the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in attempting to perpetrate a robbery. In cases where death ensues from the attempted commission of robbery, the attempted robbery is regarded as standing in the place of, or as the legal equivalent of, the willfulness, deliberation, and premeditation required under the statute, and therefore the State is not under a duty to prove willfulness, deliberation, and premeditation where it has proved that a killing has been committed during the attempted perpetration of a robbery, which is the contention of the State in this particular case.

In this case the State contends that all three defendants aided and abetted in the attempted robbery perpetrated upon Edward J. Davis. The State further contends that during the perpetration of the attempted robbery Edward J. Davis was shot (1864) and killed by the defendant Johnson. That contention of course raises the question of the criminal responsibility of the defendants Cassidy and Godfrey if you find beyond a reasonable doubt that they, or either of them, aided or abetted the attempted robbery.

Now, the law with respect to aiders and abettors is as follows: If two or more persons act in concert in committing a criminal offense such as the one here charged, all those who participate in the committing of the criminal offense are equally guilty of that offense regardless of what part each one took in the commission of the crime.

Consequently, if a killing is brought about by the actions of one of those involved in the hold-up, all are guilty of murder in the first degree regardless of what their participation may have been, and therefore in the eyes of the law as far as their guilt or innocence is concerned, it makes no difference that Stanley Cassidy (1865) did not fire the shot that killed Edward J. Davis, nor that Wayne Godfrey was not at the scene of the actual killing if you find beyond a reasonable doubt that either or both of them, as the case may be, aided and abetted in the planning of the robbery as I have explained that principle to you.

Therefore, a person who agrees with his confederate that a robbery is to be committed, and he acts as a lookout, or provides an automobile for the escape, who does so while the robbery is being attempted, is an essential actor in the plan, and in the crime, and such a person, the law says, is equally guilty with his confederates for a killing committed by them, or one of them, during the attempted robbery.

Intention to commit a robbery, however, is one of the essential elements of this case, and the burden is on the State to prove to you beyond a reasonable doubt that all defendants intended to participate in the robbery of Edward J. Davis, (1866) that they did join and participate in the plan to perpetrate the robbery and that in the course of the attempted robbery, one of the defendants fired the fatal shot, or shots, that killed Edward J. Davis.

I shall undertake to point up for you the contentions on either side and while I am doing this I want to again caution you to keep in mind what I said before, that you and not the Court are the sole judges of the facts. It is your recollection and not mine that controls.

As the evidence unfolded in this case certain facts seemed

not to be in serious dispute. There was evidence to indicate that on January 24, 1958, at approximately 6:00 P. M. a man about 55 years of age, named Edward J. Davis, maintained a toy store at 1731 Broadway in the City of Camden. He was seen running out of his store and was heard to shout "Help! I'm shot", he later fell to the sidewalk. Shortly thereafter he was taken in the emer- (1867) gency patrol wagon to the Cooper Hospital. He arrived at the Cooper Hospital at 6:18 P. M. and died at 6:55 P. M. the same night. He had in his possession cash in the amount of $294.24.

The County Physician stated that four bullets had passed through decedent's body and the bullet which passed through his left groin and through a section of his small bowel and then through his liver and right lung after which it went through the posterior wall of his chest was the cause of death. He testified that the cause of death was a hemorrhage due to a perforation of the liver and right lung. The physician said he was a very robust man approximately 5'7" in height and 200 plus pounds in weight.

The first clue which eventually resulted in the arrest of these three defendants came from a witness who, while waiting for a red traffic light to change at the intersection of Fourth and Ferry (1868) Avenue in Camden, observed an automobile, which was to his rear and proceeding in his direction, pass him on his left side and go through the red traffic signal. He noted the license number which he later gave to the police. He also observed that this car stopped and then started up again.

The police checked the license registration number and learned that the car was registered in the name of the defendant Wayne Godfrey. The defendant Wayne Godfrey was arrested on January 28, 1958. At the time of his arrest

he was in the company of a man named Noah Hamilton who testified for the State. The defendant Stanley Cassidy was subsequently arrested on January 29, 1958, at approximately 4:00 A. M. The defendant Sylvester Johnson was arrested in Newark, New Jersey, on the same day around 5:00 P. M. at the home of an uncle.

A witness named James Walker was called by the State who stated he was friend- (1869) ly with the defendant Wayne Godfrey and that on the night preceding the attempted holdup of the deceased, Edward J. Davis, the defendant Godfrey called at his home and asked to borrow a revolver which this witness owned. The witness stated he loaned the defendant Wayne Godfrey this .32 calibre revolver, which revolver it is conceded was the one used and resulted in the death of the victim, Edward J. Davis. This same gun was later returned to this witness by the defendant Godfrey. It was recovered by the police and is marked in evidence for your examination. When this witness was asked by the defense whether Godfrey gave him a reason for wanting to borrow the gun this witness said Godfrey wanted it for protection since a couple of fellows were bothering him.

Another witness called by the State related of a visit to his home by the defendant Stanley Cassidy who discussed with this witness as to whether the witness had found a place to keep a .25 calibre auto- (1870) matic which the witness owned and was concerned about its hiding place. This witness stated that when the defendant Cassidy left his home this automatic revolver was in Cassidy's possession. This automatic was given to the defendant Cassidy several days before the attempted robbery. The gun was returned by Cassidy to this witness on Friday night, January 24, 1958, at 7:00 or 8:00 P. M. The automatic was

recovered by the police through the cooperation of this witness. This gun had not been fired.

The witness Noah Hamilton, who was arrested with Wayne Godfrey, testified for the State. He stated that on the evening of January 24, 1958, around midnight he was with defendant Godfrey, and Godfrey asked him to purchase a newspaper and look for holdups and when this witness referred to a newspaper story of a shooting at Broadway and Ferry Avenue the defendant Godfrey said that was it. This witness recounts of meeting the defendant Godfrey on the (1871) day following the attempted holdup at which time Godfrey was driving his automobile and had as a passenger the defendant Cassidy. He entered the car and the three went to defendant Johnson's home where defendant Johnson entered the car and they drove to Newark where Johnson remained at a home of an uncle where he was subsequently arrested. This witness testified he observed a band aid on Johnson's finger and when he inquired how defendant Johnson felt, Johnson expressed a desire not to talk about it. This witness also related a conversation he had with defendant Godfrey six or eight weeks before, at which time Godfrey asked him if he wanted to make some money and suggested a holdup and made some reference to a toy store on Broadway.

On January 29, 1958, the defendants, Stanley Cassidy and Wayne Godfrey, gave a detailed account of their respective participation in the attempted robbery to the police. The defendant, Sylvester (1872) Johnson, on January 30, 1958, likewise gave a detailed statement of his participation in the attempted robbery. No claim is made that these statements were secured by force or violence but were voluntary on the part of each of them.

(1873) The weight to be accorded these statements is

for the sole determination of the jury. None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify, but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree. 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.

The State contends that it has estab- (1874) lished beyond a reasonable doubt that these three defendants are guilty of murder in the first degree and that the circumstances do not warrant your returning a recommendation of life imprisonment.

In the closing arguments of counsel for all the defendants they made it clear that their objective is to obtain at your hands a recommendation for life imprisonment. This, of course, does not relieve the State of proving the guilt of these defendants beyond a reasonable doubt. The positions taken by the defendants and their counsel neither work toward or against their advantage. They must be judged by you on the evidence and that alone. But the positions taken point strongly toward that area of your deliberation which will be most important.

Now, members of the jury, what are the facts? That is

for you to decide, for you in your capacity as jurors are the sole, final, conclusive judges of the facts. Necessarily in your capacity as jurors you have the right to evaluate the demeanor of the witnesses as you (1875) listen to them, the manner in which they testify, to judge the comparative degrees of frankness of the witnesses and to draw reasonable inferences from the testimony you have heard. All these things fall peculiarly within your province as judges of the facts.

It is the duty of each juror, in your deliberation, to give careful attention and consideration to the views of his or her fellow jurors, and to discuss the facts with them. Each juror acts for himself or herself and must reach his or her own judgment after discussion of the facts with the other members of the jury.

Each juror must stand by and abide by his own belief formed in his or her mind from the whole of the evidence in each case. Each juror must reach a conclusion with respect to the guilt or innocence of each defendant. Your verdict in each case must be unanimous.

In the consideration of alleged statements of the three defendants, as I have cautioned you many times during the trial, and now instruct you, the statement made by any defendant is only (1876) evidential as to what he says he himself did, or said, not against any of the other defendants as to what he said such other defendant, or defendants, who didn't make the confession, did or said. I think we must by now understand each other upon this point.

Now, of course, during this lengthy trial, this Court was called upon many times to rule upon objections and motions made by both the State and the Defense. In ruling upon them I was deciding questions of law alone and whatever the ruling in any situation may have been, you will under-

stand that no expression on the merits of the case of the State or of the defense was intended or could properly have been intended. I hope I have made this thoroughly clear to you.

Under the evidence here the law requires your verdict to be one of guilty of murder in the first degree as to one, some, or all of the defendants, or a verdict of guilty of murder in the first degree with a recommendation of imprisonment for life as to one, some, or all of the defendants, or a verdict of not guilty as (1877) to one, some, or all of the defendants.

If you reach the conclusion that all or any of the defendants are guilty of murder in the first degree then you shall turn your attention to the portion of the statute to which I referred at the outset of my charge.

As I advised you, the law prescribes that all persons who are convicted of murder in the first degree shall suffer death unless the jury shall, by its verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment for life, in which case this and no greater punishment shall be imposed.

This recommendation, contemplated by the statute, rests entirely and solely in your judgment and discretion after a consideration of all the evidence.

Let me say to you that no article which may have appeared in any newspaper or anything that you may have read or heard about this case, before your selection as a juror cannot and should not be considered by you in the determination of this case; that you also are to completely dis- (1878) regard and eliminate from your minds any and all questions, and answers and expression of opinions that you may have heard during the examination of the prospective jurors. You must, under your oath, disregard the

same and any other extraneous matters, and enter upon your deliberations in this case solely and entirely upon the testimony presented to you in court and the law given to you by the Court for your guidance in applying the law to the facts as you find the facts to be.

You must not allow passion, prejudice or partiality to enter into your deliberation. Both the State and the defendants expect and expect justly that you will decide this case solely on evidence and in accordance with the law that I have given to you.

(1879) You will keep in mind in your deliberations in this case that there are three defendants on trial and that they are to be judged separately by you. Each defendant stands alone in so far as guilt or innocence or punishment is concerned, and the guilt or innocence or punishment of any one of them does not affect the guilt or innocence or punishment of the other defendants.

Now, a word as to the form of your verdict, which must be a unanimous verdict of the jury.

You must remember that three defendants, Sylvester Johnson, Stanley Cassidy and Wayne Godfrey, are standing trial. Therefore the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be in all respects the unanimous verdict of the jury. Here is the form: We find the defendant Sylvester Johnson guilty of murder in the first degree, and you could stop there; or we find the defendant Sylvester Johnson guilty of murder in the first degree with a recommendation of life imprisonment and stop there, or we find (1880) Sylvester Johnson not guilty.

Then as to Stanley Cassidy, the same. This is the form: We find the defendant Stanley Cassidy guilty of murder in the first degree, and stop there; or we find the defendant

Stanley Cassidy guilty of murder in the first degree with a recommendation of life imprisonment; or we find Stanley Cassidy not guilty.

And the same as to Wayne Godfrey: We find the defendant Wayne Godfrey guilty of murder in the first degree, and stop there; or we find the defendant Wayne Godfrey guilty of murder in the first degree with a recommendation of life imprisonment; or we find Wayne Godfrey not guilty.

(1881) Now, I will ask that the jury be taken in the corridor. I want to pass upon motions. You are not going to deliberate yet, I will call you back before that.

(Jury leaves the court room.)

THE COURT: Gentlemen, I will now pass upon these requests for instructions after which you may take your exceptions.

As to the defendant, Sylvester Johnson, I have refused to charge one, two, three, four and five, because I feel I have in substance covered them. I have refused to charge six and seven, eight and nine.

As to the defendant, Wayne Godfrey I refuse to charge one, two, three, four, five, six and seven, because I feel I have in substance covered those. I have charged eight.

MR. FLUHARTY: Yes.

May the record show my exception to the seven that were refused to be charged.

MR. BERTMAN: May the record show my exception by Sylvester Johnson to the Court's refusal to charge those requested.

Discussion

(1882) THE COURT: There being nothing further for the record, the Clerk will put the thirteen names in the box and call the first twelve.

MR. HEINE: If your Honor pleases, would you want to call for any objections to the charge?

THE COURT: I did. They have no objection to my charge. They object to my refusal to charge.

MR. HEINE: I didn't hear that they had no objection to your charge.

THE COURT: They didn't take any exception to my charge.

MR. CAGGIANO: No objection to your charge, however, as to Stanley Cassidy, we make the same objections as made by the other defendants.

MR. BERTMAN: No objection to the charge as stated but objections to the refusal to request as given to your Honor.

MR. FLUHARTY: As to the defendant, Godfrey, no objection to the charge as given but only objects to the refusal to charge the previous seven requests as mentioned.

MR. CAGGIANO: And Stanley Cassidy is (1883) the same.

THE COURT: Here, Mr. Stenographer, these requests to charge were given to me in ink, and they were handed

to me this morning. I feel they should be typed into the record.

Proceed with the selection of the jury.

(A panel jury of twelve was selected.)

THE COURT: Members of the jury, under the law the first person selected at this calling is the foreman. I have to call her forelady. Mrs. Gaskill, you are the forelady of this jury.

Supposing we call the names of the jurors in the box and see that we have the correct ones in there.

(Roll call of the jury.)

THE COURT: The attendants will be sworn, the jury attendants.

(The jury attendants were sworn.)

THE COURT: Have all exhibits been checked, gentlemen?

MR. HEINE: We checked them yesterday.

THE COURT: Supposing you take the jury, then come back for the exhibits. Supposing you (1884) take the jury out and they will all be ready for you.

(Jury leaves the court room at 12:12 P. M. to deliberate.)

THE COURT: The defendants may be taken from the court room at this time.

Requests for Instructions Defendant, Wayne Godfrey, by E. Stevenson Fluharty, Attorney

REQUESTS FOR INSTRUCTIONS DEFENDANT, WAYNE GODFREY, BY E. STEVENSON FLUHARTY, ATTY.

1. Ladies and gentlemen of the jury, you have the duty to determine what the defendant, Wayne Godfrey's punishment shall be if you find him guilty of murder in the first degree. After an examination of all the evidence you may, as part of your verdict, recommend life imprisonment at hard labor, in which event this shall be his punishment. If you fail to make such a recommendation his punishment shall be death. Before you return a verdict, if you do, of guilty of murder in the first degree you must unanimously agree as to the punishment to be imposed.

2. Ladies and gentlemen of the jury, if you should find the defendant, Wayne Godfrey, guilty of murder in the first degree, you have the duty to determine, within the limits fixed by law, what his punishment shall be: you are the final arbiters of the punishment, the choice is yours and this choice you must make. The matter rests entirely and solely in your judgment and in your discretion after a consideration of all the evidence. State vs. Cooper, 67 A. 2 298—State vs. Bunk, 73 A. 2 249.

3. Ladies and gentlemen, before you can return a verdict of guilty of murder in the first degree against the defendant, Wayne Godfrey, you must unanimously agree on the punishment. If your verdict does not carry with it a recommendation for life imprisonment at hard labor you must

all agree that your verdict will not contain as a part thereof, a recommendation for life imprisonment at hard labor. Until you have unanimously agreed upon the punishment to be imposed, a verdict of guilty of murder in the first degree may not be returned.

4. Ladies and gentlemen, you have heard three separate cases and you must determine the guilt or innocence of each defendant separately. You need not return the same verdict for each defendant. If you should, by chance, find all three defendants guilty of murder in the first degree you need not impose the same punishment upon all three. You may make a recommendation of life imprisonment at hard labor for one and not the other two; you may make a recommendation of life imprisonment at hard labor for two and not the third or you may make a recommendation of life imprisonment at hard labor for all three.

5. Each juror acts for himself or herself and must rely on his or her own judgment after discussion of the facts with the others. If after such discussion and deliberation, a juror entertains a different view as to the punishment that should be imposed from that of the others he or she should not agree to a verdict that is contrary to his own view.

6. You the jury must base your verdict on the evidence, however, you may exercise your own judgment and discretion based upon your personal experience in applying the general rules of law to the details of the question before you.

7. Ladies and gentlemen, before you may return a verdict that would impose the death penalty upon Wayne Godfrey, you must all agree that he is to suffer the death penalty.

8. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case you the jury should find any of the defendants guilty of murder in the first degree. State vs. Gimbel, 151 A. 756.

NOTE: This request to follow any charge with respect to the defendants failure to take the witness stand and testify.

REQUESTS FOR INSTRUCTIONS.

IT IS NOW RESPECTFULLY REQUESTED THAT THE COURT INSTRUCT THE JURY AS FOLLOWS:

1. It is not mandatory for you to sentence the defendants or any one of them to first degree murder carrying with it the penalty of death after you have considered all the evidence.

2. It is not mandatory for you to sentence the defendants or any one of them to the death penalty if you do not find any mitigating or extenuating circumstances after having considered all of the evidence.

3. If you find Sylvester Johnson guilty of murder in the first degree, you cannot sentence him to death by virtue of the lone fact that Sylvester Johnson did the actual shooting. Before reaching your verdict as to the penalty imposed upon Sylvester Johnson, you must consider all the evidence.

4. In no event are you required to impose the death penalty upon these defendants or any one of them, if you find them guilty of murder in the first degree. You must consider all the evidence in determining the penalty to be imposed.

5. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case that you, the jury, should find any of the defendants guilty of murder in the first degree. State vs. Gimbel, 107 N. J. L. 235; 151 A. 756.

6. Inasmuch as the State has failed to produce legal or competent evidence that a robbery or felony took place, you cannot find the defendants guilty of anything higher than murder in the second degree.

7. If you find the State has failed to produce evidence that a robbery or felony took place, you cannot find defendants guilty of anything higher than murder in the second degree.

8. The prosecutor in his summation stated the jury would be violating their oath as jurors if they brought in a verdict recommending life imprisonment.

I ask the Court to charge "It would not be a violation of their oath if they brought in a verdict of first degree murder with a recommendation of life imprisonment and it is not mandatory to sentence anyone of the defendants to death."

9. In view of statements by the Prosecutor in his summation that the defendants did not take the stand to say they were sorry and other comments by the Prosecutor in his summation in relation to the defendants' failure to take the stand which comments should have been limited to the fact that the failure of the defendants to take the stand raises an inference that the defendants could not truthfully deny inculpatory or incriminating facts, which when in fact the comments of the Prosecutor went beyond that limitation, I ask the Court to charge "The failure of the defendants to take the stand should not be considered as prejudicial in your determination as to whether or not you should attach to your verdict a recommendation of life imprisonment in case that you the jury should find any of the defendants guilty of murder in the first degree."

/s/ ELMER BERTMAN,
Attorney for Defendant,
Sylvester Johnson.

* * * * * * * * *

[fol. 344] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 345] IN THE SUPREME COURT OF NEW JERSEY

A-60 September Term 1964

Number 3278

STATE OF NEW JERSEY, Respondent,

vs.

SYLVESTER JOHNSON AND STANLEY CASSIDY, Appellants.

Argued November 16, 1964.

Mr. M. Gene Haeberle argued the cause for the Appellants. (*Messrs. Curtis R. Reitz and Stanford Shmukler,* both of the Pennsylvania Bar, and *Mr. M. Gene Haeberle,* on the brief.)

Mr. Norman Heine, Camden County Prosecutor, argued the cause for the Respondent.

OPINION—Decided January 19, 1965

The opinion of the court was delivered by PROCTOR, J.

The defendants, Sylvester Johnson and Stanley Cassidy, together with Wayne Godfrey, were tried in January 1959 for felony murder. The jury found them guilty of murder in the first degree without recommendation of life imprisonment, and the court sentenced them to death. This court affirmed the convictions, *State* v. *Johnson,* 31 *N.J.* 489 (1960), and a number of post-conviction applications followed.[1]

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[1] This is the fifth application of the defendants Sylvester Johnson and Stanley Cassidy for post-conviction relief which has been considered by this court. *State* v. *Johnson,* 63 *N.J.Super.* 16 (*Law Div.* 1960), *affirmed* 34 *N.J.* 212 (1961), *appeal dismissed* 368 *U.S.* 145, 7 *L.Ed.* 2*d* 188, *cert. denied* 368 *U.S.* 933, 7 *L.Ed* 2*d* 195 (1961); *State* v. *Johnson,* 71 *N.J.Super.* 506 (*Law Div.* 1962), *affirmed* 37 *N.J.* 19

[fol. 346] This appeal by Johnson and Cassidy is from the most recent trial court denial of their application for post-conviction relief. The trial court refused the defendants' request for a full evidentiary hearing and denied them relief after hearing oral argument only. On their appeal to this court, defendants submitted affidavits in support of their grounds for relief. For the purpose of this appeal, we will consider the affidavits as if they were offered for the trial court's consideration.

I

At the trial the evidence against the defendants and Godfrey included their confessions given to the police shortly after they were apprehended. The affidavits submitted by the defendants on their present application allege, *inter alia,* that prior to, and at the time they confessed, they were subjected to physical and mental coercion and were held incommunicado. These allegations were not made at the trial or on their direct appeal to this court. See *State* v. *Johnson, supra,* 31 *N.J.* at 502. The allegations of physical and mental coercion were raised, however, on their first motion for post-conviction relief. The trial court and this court found that the defendants' stories were unbelievable and that there was no reasonable basis to say the confessions were involuntary. *State* v. *Johnson,* 63 *N.J.Super.* 16, 42-43 (*Law Div.* 1960), *affirmed* 34 *N.J.* 212, 223, 228 (1961). These allegations and the allegation that they were held incommunicado go to the issue of voluntariness. As that issue has been fully litigated and decided against the defendants, it may not be raised again. *State* v.

(1962), *cert. denied* 370 *U.S.* 928, 8 *L.Ed.* 2*d* 508 (1962); *State* v. *Johnson,* 37 *N.J.* 326 (1962); *Johnson* v. *Yeager,* 38 *N.J.* 319 (1962). See also *United States ex rel. Johnson* v. *Yeager,* 327 *F.* 2*d* 311 (3*rd Cir.* 1964), *cert. denied* *U.S.* , 12 *L.Ed.* 2*d* 751 (1964); *United States ex rel. Johnson* v. *Yeager,* 327 *F.* 2*d* 320 (3*rd Cir.* 1964). Additionally, prior to their trial, defendants moved, *inter alia,* for an order allowing them to inspect their confessions. As a result of our opinion in *State* v. *Johnson,* 28 *N.J.* 133 (1958), the defendants were granted permission to examine their confessions.

(*Edgar*) *Smith,* 43 *N.J.* 67, 74 (1964); *R.R.* 3:10A-5. In-
[fol. 347] deed, the question of voluntariness has been fully litigated and determined against Johnson and Cassidy in the federal courts. *United States ex rel. Johnson* v. *Yeager,* 327 *F.* 2*d* 311, 316-19 (3*rd Cir.* 1964), *cert. denied* *U.S.* , 12 *L.Ed.* 2*d* 751 (1964). Godfrey's confession, however, was held to be unvoluntary.[2] 327 *F.* 2*d* at 313-16, *cert. denied, New Jersey* v. *Godfrey,* *U.S.* , 12 *L.Ed.* 2*d* 745 (1964).

The affidavits further allege that during their interrogation, the defendants asked for and were denied an opportunity to consult with an attorney and were not advised of their right to remain silent.[3] These allegations were not made in any of the prior proceedings, nor in their present petitions to the trial court. The defendants made these allegations for the first time in their affidavits submitted to this court. Denial of an opportunity to consult with an attorney and failure to be advised of the right to remain silent are factors relevant to the issue of voluntariness. *State* v. *Grillo,* 11 *N.J.* 173, 180-81 (1952); *State* v. *Pierce,* 4 *N.J.* 252, 262 (1950). See *Cicenia* v. *LaGay,* 357 *U.S.* 504, 509, 2 *L.Ed.* 2*d* 1523, 1528 (1958). If these allegations are made on that issue, our consideration is precluded by our prior judgment. *State* v. (*Edgar*) *Smith, supra; R.R.* 3:10A-5.

[fol. 348] II

The defendants, relying upon *Escobedo* v. *Illinois,* *U.S.* , 12 *L.Ed.* 2*d* 977 (1964), apparently contend that entirely apart from the issue of voluntariness, the alleged denial of an opportunity to consult with counsel, and the failure of the police to advise them of their right to remain

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[2] On Godfrey's first application for post-conviction relief, the trial court and this court fully considered Godfrey's new story, which attempted to establish the involuntariness of his confession, and found it to be unbelievable. *State* v. *Johnson, supra,* 63 *N.J.Super.* at 42-43, *affirmed* 34 *N.J.* at 223, 228.

[3] The police interrogator informed the defendants that anything they told him must be of their own free will and could be used against them.

silent prior to their confessions, invalidate their convictions. *Escobedo* was decided by the United States Supreme Court on June 22, 1964, which, of course, was later than their convictions and appeal, and their previous applications for post-conviction relief. That decision held inadmissible at a defendant's subsequent criminal trial a statement elicited from him by the police under the following circumstances: Escobedo was arrested and interrogated by the police concerning the murder of his brother-in-law. He made no statement and a lawyer whom he had engaged obtained his release pursuant to a writ of habeas corpus. Eleven days later, the police again arrested Escobedo and told him that one DiGerlando had named him as the murderer. The police took Escobedo to police headquarters where they interrogated him for a number of hours. The police denied his repeated requests to consult with his lawyer, and never advised him of his constitutional rights. During the interrogation, Escobedo's lawyer arrived at the police station, but his repeated requests to see his client were denied. The court held that in the combination of circumstances—the suspect had been taken into custody, the interrogation had turned from investigatory to accusatory, the suspect's repeated requests for an opportunity to consult with his lawyer, and his lawyer's repeated requests to consult with him had been denied, and the suspect had not been warned of his right to remain silent—the accused [fol. 349] had been denied the assistance of counsel in violation of the Sixth Amendment as made obligatory upon the states by the Fourteenth Amendment.

Only one year before the trial of defendants' case, and six years before *Escobedo,* the United States Supreme Court, in *Crooker* v. *California,* 357 *U.S.* 433, 2 *L.Ed.2d* 1448 (1958), and *Cicenia* v. *LaGay, supra,* 357 *U.S.* 504, 2 *L.Ed.2d* 1523 (1958), expressly rejected the contention that every accused has a constitutional right to consult with counsel during police interrogation.[4] This was the prevailing law

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[4] See also *Culombe* v. *Connecticut,* 367 *U.S.* 568, 589 to 591, 6 *L.Ed.2d* 1037, 1050 to 1052 (1961), where Justice Frankfurter stated.

> "[T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada,

not only at the times of defendants' trial and direct appeal, but also at the times of their previous applications for post-convication relief. The facts in *Cicenia* are so similar to those in *Escobedo* that it would be unreasonable to conclude that *Escobedo* did not overrule *Cicenia*. Assuming that the allegations contained in defendants' affidavits are within the principle announced by *Escobedo* (an assumption which we regard as unsound), and assuming for present purposes that *Escobedo* stands for a new rule of constitutional law [fol. 350] which does not depend on voluntariness, the question is whether that rule should be applied to the convictions of the defendants even though their trial, its affirmance on appeal, and the disposition of their previous applications for post-conviction relief antedated *Escobedo*.

The defendants, in support of their argument for retroactive application of Escobedo to their convictions, cite *Gideon* v. *Wainwright,* 372 *U.S.* 335, 9 *L.Ed2d* 799 (1963). *Gideon* was a federal habeas corpus proceeding which invalidated a state criminal conviction where the indigent defendant had been denied the right to have an attorney represent him at his trial. It held that every defendant is constitutionally entitled to the assistance of counsel at his trial. Defendants contend that since *Gideon* was a right to counsel case and has generally been given retroactive effect,[5] *Escobedo,* which also turns on the right to counsel, therefore must likewise be given retroactive effect.

> and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive."

[5] See, *e.g., Doughty* v. *Maxwell,* 376 *U.S.* 202, 11 *L.Ed.2d* 650 (1964); *United States ex rel. Durocher* v. *LaVallee,* 330 *F.2d* 303 (*2d Cir.* 1964), *cert. denied, LaVallee* v. *Durocher,* 377 *U.S.* 998, 12 *L.Ed.2d* 1048 (1964); *Craig* v. *Meyers,* 329 *F.2d* 856 (*3rd Cir.* 1964); *Palumbo* v. *New Jersey,* 334 *F.2d* 524 (*3rd Cir.* 1964). But see *Commonwealth* v. *Bamiller,* 410*Pa.*584, 189 *A.2d* 875 (1963).

There are, however, several factors which distinguish *Gideon* from *Escobedo*. First, *Gideon* itself was a collateral attack while *Escobedo* was a direct appeal. Second, the opinion in *Escobedo* does not indicate whether the court intended retroactive application. Unlike the treatment of *Betts* v. *Brady,* 316 *U.S.* 455, 86 *L.Ed.* 1595 (1942), in *Gideon,* which overruled that case, there is not the slightest intimation in *Escobedo* that either *Cicenia* or *Crooker* was an "abrupt break with its own well-considered precedents," see *Gideon* at 344, 9 *L.Ed.2d* at 805; or "departed from the [fol. 351] sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested," *Id.* at 345, 9 *L.Ed.2d* at 806; or was " 'an anachronism when handed down,' ". *Ibid.* Unlike *Mapp* v. *Ohio,* 367 *U.S.* 643, 6 *L.Ed.2d* 1081 (1961), there is no language in the court's opinion in *Escobedo* which provides ammunition for arguing whether retroactive effect was intended. For discussion of the arguments on either side, see Bender, The *Retroactive Effect of An Overruling Constitutional Decision: Mapp* v. *Ohio,* 110 *U.Pa.L. Rev.* 650, 668-73 (1962). And unlike *Griffin* v. *Illinois,* 351 *U.S.* 12, 100 *L.Ed.* 891 (1956), *Escobedo* does not contain a concurring opinion indicating that the majority intended retroactive application. See Justice Frankfurter, concurring, *Id.* at 20, 100 *L.Ed.* at 900. *Third,* no subsequent adjudication by the Supreme Court nor any other court has come to our attention which reveals whether *Escobedo* was intended to be applied retroactively. As noted above, *Gideon* has been given retroactive application in a number of cases. *Griffin* was applied retroactively in *Eskridge* v. *Washington State Board,* 357 *U.S.* 214, 2 *L.Ed.2d* 1269 (1958).

There is nothing in the Constitution itself which compels the automatic and general application of every new rule of law to invalidate decisions already finally rendered. See *Chicot Co. Drainage Dist.* v. *Baxter State Bank,* 308 *U.S.* 371, 374-75, 84 *L.Ed.* 329, 333 (1939); *Sisk* v. *Lane,* 331 *F.2d* 235, 239 (*7th Cir.* 1964); *United States ex rel. Linkletter* v. *Walker,* 323 *F.2d* 11, 14 (*5th Circ.*1963); see also Bender, *supra,* 110 *U.Pa.L.Rev.* at 671 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 *Yale L. J.* 907 (1962); Note, *Collateral Attack of Pre-Mapp* v. *Ohio Convictions Based on Illegally Ob-*

tained Evidence in State Courts, 16 *Rutgers L. Rev.* 587, 588-91 (1962).

[fol. 352] Perhaps, years ago, there was a philosophical compulsion to apply a new ruling retrospectively. The so-called Blackstonian conception of the nature of law and judicial decision-making was that law was perpetual and immutable. Judges were thought to be the discoverers rather than the creators of the law. Thus, a given decision was merely an evidence of the law; the most recent decision being the most authoritative evidence. An overruled holding was not bad law, it was simply never the law. See Levy, *Realist Jurisprudence and Prospective Overruling*, 109 *U.Pa.L.Rev.* 1, 2 (1960); Note, *supra,* 71 *Yale L.J.* at 908.

Whatever the past status of the above philosophy, it has been recently characterized as a "splendid myth." *United States ex rel. Durocher* v. *LaVallee,* 330 *F.2d* 303, 312 (1964); see also *Gaitan* v. *United States,* 317 *F.2d* 494, 497 (10*th Cir.*1963) *United States ex rel. Angelet* v. *Fay,* 333 *F.2d* 12, 16 (2*d Cir*), *cert. granted* *U.S.* , 13 *L.Ed.2d* 28 (1964); Levy, *supra,* 109 *U.Pa.L.Rev.* 1. See also Justice Frankfurter's concurring opinion in *Griffin* v. *Illinois, supra.*

It is now recognized that judicial decision making is often creative and requires that judges, although in a strictly limited sense, "legislate." See *Cardozo, The Nature of the Judicial Process,* 124-132 (1921); Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition,* 71 *Yale L. J.* 255, 275-76 (1961); Weintraub, *Judicial Legislation,* 81 *N.J.L.J.* 545 (1958); Levy, *supra,* 109 *U.Pa.L.Rev.* at 28. Thus, contemporary judicial decisions announcing a new rule of law are the the product, not only of a reevaluation of abstract prin-[fol. 353] ciples of justice but also of practical considerations of current economic, social, and political realities, and the effect of the rules announced in those decisions upon current institutions. Constitutional law is no exception.[6]

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[6] Indeed, it has been said that unlike ordinary law which can feasibly be corrected by legislation, constitutional decisions should be more closely attuned to the changing social order. See Bodenheimer, *Book Review,* 64 *Colum.L.Rev.* 1563, 1564 (1964).

See, *e.g., Brown* v. *Board of Education of Topeka,* 347 *U.S.* 483, 98 *L.Ed.* 873 (1954). In determining whether to give retroactive effect to a new rule of law, a court's consideration should be correspondingly broad. As Justice Cardozo said:

> "I feel assured, however, that [the extent of retrospective application of a new rule,] wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by consideration of convenience, of utility, and of the deepest sentiments of justice." *Cardozo, supra,* at 148-49.

Retroactive application of any new rule will cause some degree of inconvenience in the administration of justice. Society does have an interest in preventing its courts from being burdened with a flood of relitigation. See Note, *supra,* 16 *Rutgers L. Rev.* at 592. Furthermore, retroactive application of a new rule of law undermines the authoritative nature of final judicial decisions. Society reasonably expects that when a man is convicted of a crime by a method not considered unfair according to the rules of law then in effect, that conviction will stand. Therefore, unless some countervailing considerations of "the deepest sentiments of justice" compel otherwise, a new rule of criminal law should not be applied retroactively.

[fol. 354] While *Gideon* and *Escobedo* may both turn on the right to counsel as guaranteed by the Sixth Amendment, the effect of and justification for retroactive application in *Gideon* is fundamentally different from *Escobedo.* When *Gideon* overruled *Betts* v. *Brady,* only a few states still denied counsel to the accused in a trial in a non-capital criminal case. See Israel, *Gideon* v. *Wainwright*: *The "Art of Overruling, The Supreme Court Review,* 211, 267 (1963). But at the time *Escobedo* was decided, almost all the states permitted the introduction of voluntary confessions given, in the absence of counsel, during police investigation. Therefore, if *Escobedo* should be held to mean that the suspect must be furnished counsel during police investigation unless he affirmatively waives his right to counsel, then it is probable that the retroactive application of

Escobedo would invalidate far more convictions throughout the country than *Gideon.*

But turning to our "deepest sentiments of justice," in Justice Cardozo's phrase, there is a factor of paramount significance which distinguishes the retroactive effect of *Gideon* from *Escobedo.* Where a defendant in a crimnial trial was denied the assistance of counsel, abiding doubts arise as to whether the judicial procedure accurately ascertained the real culprit, see *Lewis, Gideon's Trumpet* (1964); whether the act done constituted the crime charged, see *United States ex rel. Durocher* v. *LaVallee, supra, at* 308 or whether the act done was a crime at all, see *Carnley* v. *Cochran,* 369 *U.S.* 506, 508-10, 8 *L.Ed.2d* 70, 73-74 (1962). In short, Gideon expresses judicial realization that denial of counsel during judicial procedings has the clear capacity to result in the conviction of a guiltless man:

> [fol. 355] " 'Without [the assistance of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' " *Gideon, supra,* at 345, 9 *L.Ed.2d* at 805-6.

Gideon thus challenges the reliability of the judicial determination of guilt.[7] *Griffin* v. *Illinois, supra,* similarly challenges the reliability of the guilt-determining process. There it was held to be a violation of the Fourteenth Amendment to deny a defendant appellate review solely on account of his inability to pay for a transcript.

Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent considerations cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time,[8] and sub-

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[7] In *State* v. *(James) Smith,* 37 *N.J.* 481, 484 (1962) Chief Justice Weintraub referred to the same thought as the "truth of the conviction."

[8] Thus, cases such as *Pennsylvania* v. *Claudy,* 350 *U.S.* 116, 100 *L.Ed.* 126 (1956) are distinguishable. There the petitioner for post-conviction relief alleged facts, never

sequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal.

At the time of the defendants' trial, voluntariness of a confession was the criterion for its admission in evidence. See *Grillo, supra,* and *Pierce, supra.* Further, to fortify the reliability of a voluntary confession, independent corroborative evidence was required to sustain a conviction. [fol. 356] *State* v. *Lucas,* 30 *N.J.* 37, 56 (1959); *State* v. *Johnson, supra,* 31 *N.J.* at 502. These two requirements still assure that the issue of guilt was reliably determined.

The case before us amply illustrates the point: On January 24, 1958, Edward Davis, while conducting business in his toy store in Camden, was shot four times resulting in his death. Witnesses identified Godfrey's automobile leaving the vicinity of the crime and shortly thereafter the defendants and Godfrey were apprehended by the police. The defendants and Godfrey all confessed that they had planned to rob Davis' store; that they had borrowed guns for Johnson and Cassidy to use in the holdup; and that Godfrey drove his automobile and waited near the store while Johnson and Cassidy went in to rob Davis. Johnson and Cassidy confessed that when they attempted to hold up Davis, Davis tussled with Johnson and Johnson fired at him a number of times, and that Johnson's finger was cut. They then fled the store, and rejoined Godfrey, who drove them home. The defendants' confessions were not given in the presence of each other yet were essentially identical.

At the trial these confessions were introduced into evidence. At the request of the defendants and Godfrey, the hearing on the voluntariness of the confessions was conducted by the trial judge out of the presence of the jury. The State produced evidence to show that the confessions were voluntarily given. The defendants did not take the stand. Nor did they offer any other evidence in rebuttal. After the trial court found that the confessions were voluntary and therefore admissible, the prosecutor expressed his

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before raised in a judicial proceeding, which would have entitled him to relief under the due process standards existing at the time of his conviction if raised at that time.

intention to produce the same evidence of voluntariness [fol. 357] for the jury's consideration.[9] But defendants informed the court that the confessions could be read to the jury without any testimony on the issue of voluntariness since they were "satisfied not to go through it again."

The confessions were read to the jury. The State also introduced evidence which corroborated many of the details contained in the defendants' confessions. See *State* v. *Johnson, supra,* 31 *N.J.* at 494-501. Included in the State's evidence were the guns used by Johnson and Cassidy. The State proved that the gun Johnson confessed to using had in fact fired the fatal shots. Further, a witness testified that Johnson told him on the day following the shooting that he had hurt his finger tussling with the proprietor of the toy store. In his summation, Johnson's counsel told the jury that Johnson had had no opportunity to learn what his co-defendants had confessed to and that his confession was "truthful and honest." Cassidy's counsel, in his summation, told the jury that the confessions made by Cassidy were true, as he and Cassidy had been over them "many, many times." Both counsel conceded their clients' guilt but pleaded with the jury not to impose the death penalty.

Unlike *Gideon,* the rule of law which the defendants contend *Escobedo* announces does not raise substantial doubt [fol. 358] as to the reliability of the determination of guilt.[10]

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[9] Under the New Jersey procedure for the admission in evidence of a confession, the trial judge must first determine whether the confession was voluntary. If he finds the confession to be voluntary, and hence admissible, he instructs the jury to also consider the voluntariness of the confession and to disregard it unless the State proves it was voluntarily given. *State* v. *La Pierre,* 39 *N.J.* 156, 162-63 (1963). This procedure conforms to the constitutional requirements of *Jackson* v. *Denno,* *U.S.* 12 *L.Ed.2d* 908 (1964).

[10] This distinction has been recognized by Judge Irving R. Kaufman of the Second Circuit Court of Appeals in a recent article. *The Uncertain Criminal Law, The Atlantic,* January, 1965, *pp.* 61, 62-64.

Therefore, we will not apply that rule to the prior convictions of Johnson and Cassidy.

The purpose of a rule calculated to prevent police interrogation, without the presence of counsel, of a suspect accused of a crime is more akin to the rule of *Mapp* v. *Ohio* than to the *Gideon* rule. The Mapp rule prohibits the introduction of evidence seized in violation of the Fourth Amendment. Most authorities recognize that the purpose of the *Mapp* rule is the deterrence of illegal police conduct. See, *e.g.,* Traynor, *Mapp* v. *Ohio at Large in the Fifty States,* 1962 *Duke L. J.* 319 (1962); Bender, *supra,* 110 *U.Pa.L.Rev.* at 660. We, like the courts in most jurisdictions, have held that *Mapp* does not apply retroactively in a collateral attack upon a prior judgment no longer subject to direct appeal. See *State* v. *(Edgar) Smith, supra,* and the cases cited therein at 78-79. The rationale of these decisions, which is supported by the commentators, is that the purpose of the *Mapp* rule is deterrence, and it is impossible to deter past conduct. See, *e.g., United States ex rel. Angelet* v. *Fay,* 333 *F.2d* 12, 19 (2*dCir.*1964). See also Traynor, *supra,* 1962 *Duke L. J.* 319.[11]

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[11] Justice Traynor's remarks concerning the retroactive application of the Mapp rule are also appropriate in relation to the retroactive application of *Escobedo*:

> "The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary confession, the denial of an opportunity to present a defense, and the denial of the right to counsel. A comparable risk arises upon a failure to provide an indigent defendant with a trial transcript necessary to perfect his appeal.
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> "The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the purpose of the exclusionary rule to protect the guilty. Its purpose of deterring lawless law enforcement will be

[fol. 359] We note that certiorari has been granted in *United States ex rel. Angelet* v. *Fay, supra* (*U.S.* , 13 *L.Ed.2d* 28 (1964)) and *United States ex rel. Linkletter* v. *Walker,* 323 *F.2d* 11 (*5th Cir.* 1963) (337 *U.S.* 930, 12 *L.Ed.2d* 295 (1964)). Both these cases refused to hold *Mapp* retroactive on collateral attack. Despite the similarities noted above between *Mapp* and *Escobedo,* there is a significant difference between the cases, which leads us to believe that if *Mapp* should be held retroactive, it does not follow that *Escobedo* should. *Weeks* v. *United States,* 232 *U.S.* 383, 58 *L.Ed.* 652 (1914), held that the Fourth Amendment prevented the admission in federal courts of all evidence obtained by an unreasonable search and seizure. Later, *Wolf* v. *Colorado,* 338 *U.S.* 25, 93 *L.Ed.2d* 1782 (1949) held that although the state obtained its evidence unconstitutionally, the evidence was nevertheless admissible in a state trial. It is clear, therefore, that it has always been unconstitutional [fol. 360] to conduct an unreasonable search and seizure. *Mapp* merely provided an exclusionary remedy for the violation of a pre-existing constitutional right. Therefore, it could be argued that reliance of the police on *Wolfe* was not in good faith, because they were on notice that their

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amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal.

"Deterrence would be served but little more and at exorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of any exclusionary rule and hence had no way of challenging the admissibility of the evidence. To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and uprooting of final judgments." 1962 *Duke L. J.* at 340-41.

conduct in obtaining the evidence was unconstitutional.[12] On the other hand, prior to *Escobeda,* it had generally been assumed that the police could lawfully detain and question a suspect, in the absence of his counsel, for a reasonable period of time. Since the police were not on notice that their conduct was unconstitutional, their reliance on the existing status of the law was justified.

III

The defendants next contend that under *Malloy* v. *Hogan,* *U.S.* , 12 *L.Ed.* 2*d* 653 (1964), decided by the United States Supreme Court on June 15, 1964, it was constitutionally impermissible in the present case for the prosecutor and the trial court to tell the jury that they may infer from the defendants' failure to testify that the defendants could not truthfully deny the inculpatory facts produced against them. The defendants argue that the rule of *State* v. *Corby,* 28 *N.J.* 106 (1958), which permits such comments, has been declared unconstitutional by *Malloy. Malloy* held that the Fifth Amendment's privilege against self-incrimination is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and expressly overruled *Twining* v. *New Jersey,* 211 *U.S.* 78, 53 *L.Ed.* 97 (1908) [fol. 361] and *Adamson* v. *California,* 332 *U.S.* 46, 91 *L.Ed.* 1903 (1947) on this point. *Twining* and *Adamson* assumed but did not decide that "comment" was forbidden by the Fifth Amendment. Since 1878 a federal statute (18 U.S.C.A. §3481) has prohibited comment in federal courts, therefore the constitutional issue of the permissibility of comment has never been decided by the United States Supreme Court. See *Wilson* v. *United States,* 149 *U.S.* 60, 58 *L.Ed.* 650 (1893); *Bruno* v. *United States,* 308 *U.S.* 287, 84 *L.Ed.* 257 (1939). The holding in *Malloy* was that a witness's right in a state proceeding to refuse to answer questions on the ground that his answers would tend to incriminate him was to be determined by federal standards. *Malloy* did not involve the issue of "comment." However, the court's opinion contains the following dictum:

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[12] See the dissenting opinion of Judge Marshall in *United States ex rel. Angelet* v. *Fay, supra,* 333 F.2d at 25.

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." 12 *L.Ed.* 2*d* at 659.

See also *State* v. *Murphy*, 85 *N.J. Super.* 391 (*App.Div.* 1964).

Assuming *arguendo* that *Malloy* forbids comment by the prosecutor and the court on defendant's failure to testify, the question is whether that ruling should be applied here. When the defendents were tried, they made no issue of their guilt. Indeed, their attorneys told the jury that the defendants were guilty of the crime with which they were charged. The sole thrust of the defense offered was to persuade the jury to recommend life imprisonment and thus spare defendants' lives. Under these circumstances the comment [fol. 362] of the prosecutor and the trial court could not have influenced the jury in its determination of the defendants' guilt.

The defendants further contend that the prosecutor's comment about the failure of the defendants to take the stand, suggested to the jury that they should consider that failure on the issue of punishment. We considered the prosecutor's remarks in *State* v. *Johnson, supra*, 31 *N.J.* at 512 and held that:

> "[I]n view of the trial court's clear instruction that the defendants' failure to testify should not be considered by the jury in their determination whether to recommend life imprisonment—the only real issue before the jury—we are satisfied that the remark did not prejudice the substantial rights of the defendants."

Therefore, we conclude that the comment of the prosecutor and the trial court could not have adversely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. In so holding, we express no opinion as to whether *Malloy* forbids adverse comment by the prosecutor or the court on defendants' failure to testify. Nor do we express an opinion

whether, if *Malloy* does forbid such comment, that rule should be applied retroactively in a collateral proceeding under circumstances other than those in this case.

IV

The defendant Cassidy next contends, for the first time, that his confession that he had a gun in his possession at the time of the holdup, and the introduction of the gun into evidence at the trial were the products of fraudulent state-[fol. 363] ments made by the police.[13] Further, in the affidavit he alleges that the police promised to save him from the electric chair if he confessed. Each of these allegations goes to the issue of voluntariness and could have been raised

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[13] Cassidy attempted to obtain relief on the basis of this allegation for the first time on his appeal to the Third Circuit. That court made no determination of the point because it had not been raised in the District Court. It noted, however:

> "If the Prosecutor did give the prisoner this assurance, it is arguable that the rules of evidence should exclude an admission thus obtained in exchange for a promise of favorable treatment. See *Shotwell Mfg. Co.* v. *United States,* 1963, 371 *U.S.* 341, 348, 83 *S.Ct.* 448, 9 *L.Ed.* 2d 357 (dictum) (federal prosecution): *Crawford* v. *United States, 5th Cir.* 1955, 219 *F.* 2*d* 207 (semble) (federal prosecution). See generally *Bram* v. *United States,* 1897, 168 *U.S.* 532, 18 *S.Ct.* 183, 42 *L.Ed.* 568 (federal prosecution); Maguire, *Evidence of Guilt,* 1959, *p.* 139. But such a bargain is an improper means of persuasion rather than a device of compulsion. It may produce a statement that is untrustworthy because a suspect may be induced to incriminate himself falsely when he is led to believe that all things considered, he will gain thereby. But bargaining for a confession is not shocking and outrageous in the way that third degree methods are. Probably for this reason, courts have not heretofore made the rule which excludes testimony induced by promise of favor a constitutional mandate." *United States ex rel. Johnson* v. *Yeager,* 327 *F.*2*d* 311, 317 (1964).

on the direct appeal or on his first application for post-conviction relief, when the issue of voluntariness was considered. See *State v. Johnson, supra,* 34 *N.J.* at 223. This issue, having been previously determined, is foreclosed from our present consideration. *State v. (Edgar) Smith, supra; R.R.* 3:10A-5.

V

Defendants next contend that their confessions, even if voluntary, should have been excluded from evidence because they were obtained while the defendants were illegally de-
[fol. 364] tained in that they had been arrested but had not been taken without unnecessary delay before a magistrate as as directed by R.R. 3:2-3(a). This issue was decided in our recent dcision in *State* v. *Jackson,* 43 *N.J.* 148 (1964), which noted that the federal exclusionary rule of *McNabb-Mallory (Mallory* v. *United States,* 354 *U.S.* 449, 1 *L.Ed.* 2*d* 1479 (1957): *McNabb* v. *United States,* 318 *U.S.* 332, 87 *L.Ed.* 819 (1943)), is not of constitutional dimension. There being no definitive United States Supreme Court holding to the contrary since our decision in that case, we will not depart from *Jackson.* Moreover, even if the Supreme Court should declare the *McNabb-Mallory* rule applicable to the states, since that rule is not predicated upon the issue of the unreliability of the evidence obtained during illegal detention, the rule should not be applied to the trial of this case which occurred in January 1959. See our discussion above considering the similar application of *Escobedo.*

Cassidy further contends that he was illegally arrested. If true, this factor would be pertinent to the issue of the illegality of his detention. As we have discussed immediately above, the *McNabb-Mallory* rule which excludes in federal prosecutions confessions obtained during illegal detention is not a rule of constitutional dimension and thus not applicable to our courts.

VI

As mentioned above, the Third Circuit has held that the confession of Godfrey was involuntary and therefore inadmissible. But the confessions of the defendants Johnson
[fol. 365] and Cassidy were found to be voluntary. *United States ex rel. Johnson* v. *Yeager, supra,* 316, 319. The

defendants now argue that since Godfrey's confession has been held to have been involuntary and therefore inadmissible, the introduction of his confession, which implicated them, at the joint trial of Godfrey, Johnson and Cassidy, denied Johnson and Cassidy a fair trial. The Third Circuit considered this point. It held that the admission of Godfrey's involuntary confession did not prejudice the rights of Johnson and Cassidy:

> "Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. *Stein* v. *New York, supra,* 346 *U.S.* at 194-196, 73 *S.Ct.* at 1097-1098; *Malinski* v. *New York, supra,* 324 *U.S.* at 410-412, 65 *S.Ct.* at 786. The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." *Id.* 318-19.

We are entirely in accord with the above views as to Johnson and Cassidy. Furthermore, while the conclusion of the Third Circuit that Godfrey's confession was involuntary alters the status of his confession as to him—it is no longer admissible on the state of the evidence before that court—the status of his confession as to Johnson and Cassidy remains unaltered since Godfrey's confession was never admissible against them.

On their direct appeal from their convictions the defendants contended that they were deprived of a fair trial by the denial of their motions for separate trials. They [fol. 366] argued that their respective confessions inculpated the others, and the jury could not be expected to limit the

effect of the statements to the declarant. We noted that the confessions of all three defendants were in substantial agreement, that none placed the onus of the crime on the others, and that the trial judge repeatedly cautioned the jury on the limited effect to be given each confession. We held that, under those circumstances, a severance was unnecessary. 31 *N.J.* at 505-506. In so holding we necessarily concluded that the admission of each defendant's confession did not prejudice the others in the jury's finding of guilt. The defendants, in essence, make the same argument now that was made on their direct appeal, *i.e.,* that the admission of Godfrey's confession prejudiced them. As above mentioned, we have already decided this issue on defendants' direct appeal. An issue, even of constitutional dimensions, once decided, may not be relitigated. See *State* v. (*Edgar*) *Smith, supra,* at 74; *R.R.* 3:10A-5.

Defendants further contend that their confessions were a product of Godfrey's confession, which the Third Circuit has held to be involuntary. They argue that their confessions should have been inadmissible as the "evil fruits" of the coercion of Godfrey. In their affidavits they allege that before they confessed, the police told them that Godfrey had made a statement implicating them.

Of course, whether Godfrey's statements were voluntary or involuntary does not affect the previous findings of this court and the federal courts on the voluntariness of Johnson's and Cassidy's confession. Assuming the truth of the defendant's affidavits and assuming further that Godfrey's statements as used by the police were a factor in causing [fol. 367] Johnson and Cassidy to confess, we conclude that the constitutional rights of Johnson and Cassidy were not violated. This is not a case where a defendant's involuntary statement has led to other evidence which is introduced at trial against *him.* See, *e.g., Wong Sun* v. *United States,* 371 *U.S.* 471, 487-88, *L.Ed.2d* 441, 455 (1963). *Cf. Trilling* v. *United States,* 260 *F.2d* 677, 694 (*D.C. Cir.* 1958); *Jackson* v. *United States,* 273 *F.2d* 521 (*D.C. Cir.* 1959). Here, the alleged coercion of Godfrey's confession was in violation of his constitutional rights and would preclude its introduction in evidence against *him.* Analogous cases dealing with the introduction of illegally seized evidence against one who was not the victim of the seizure, have consistently held that

that person cannot assert the denial of another's rights. See *Wong Sun* v. *United States, supra,* at 492, 9 *L.Ed.* 2*d* at 458; *State* v. *Nobles,* 79 *N.J. Super,* 442 (*App. Div.* 1963). *Cf. Goldstein* v. *United States,* 316 *U.S.* 114, 86 *L.Ed.* 1312 (1942). Voluntariness remains the test in this situation. *State* v. *Wade,* 40 *N.J.* 27, 35 (1963).

VII

The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of due process of law. The character of the prosecutor's remarks was fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied. *State* v. *Johnson, supra,* 31 *N.J.* at 513. Defendants are precluded from again raising this issue. R.R.3:10A-5. Nevertheless, the defendants contend that the court should reconsider because the Third Circuit (327 *F.*2*d* 311) has now held Godfrey's confession to have been involuntary and [fol. 368] therefore inadmissible. However, they offer no explanation of how this factor now makes the prosecutor's remarks so prejudicial to them as to be a denial of due process. We can see no new prejudice to the defendants from the Third Circuit's finding that Godfrey's confession was inadmissible, since the inadmissibility of Godfrey's confession does not, of course, undermine the propriety of Godfrey's being a co-defendant.[14]

The judgment of the Law Division is affirmed.

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[14] Godfrey's confession was not the only evidence the State produced against him. For example, Godfrey told a friend that he had been in the holdup, but had not done the shooting. See *State* v. *Johnson, supra,* 31 *N.J.* at 501.

[fol. 369] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF STANLEY CASSIDY

STATE OF NEW JERSEY,
County of Camden, ss:

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

1. I am one of the petitioners in this matter and I am presently in the New Jersey State Prison, Trenton, New Jersey.

2. I have read the affidavit of my mother, Mildred Cassidy, and the facts contained in paragraphs 2 through 13 of my mother's affidavit are the same as my recollection of the events and are incorporated herein as if recited at length.

3. About 5:00 A. M., Wednesday, January 29, 1958, the detectives took me to City Hall in Camden, New Jersey. I was first taken to a room by one of the detectives, whom I believe was Detective Philipp Large. Wayne Godfrey was in this room with another detective and told Detective Large to get me out of there.

4. I was then taken to the 6th floor of the City Hall in Camden and questioned by about 7 detectives. The detectives whose names I know and who were there are as follows: Detectives, Nate Jones, Golden Sunkett, Philipp Large, Barney Tracy and detective Large's brother. These detectives kept asking me questions as to where I had been and what I knew about the murder of Mr. Davis. One detective, then another would ask me questions. I told them I did not want to say anything before I talked with my mother about getting me a lawyer. I was told that my re-
[fol. 370] quest would be taken care of later, and I was told "but first give a statement".

5. These detectives questioned me continuously for about 3 hours. I was told I was going to the electric chair unless I told them everything.

6. I had never been arrested and interrogated by the police before. I was confused, nervous and upset, not only by this time, the method and manner of my arrest, but by

the large group of detectives and their actions, manner and method of questioning me.

7. In response to the detectives questioning me, I denied everything. In spite of my denials they kept on questioning me. No one at any time, prior to my arraignment, advised me of my right to remain silent, to contact my family, or to see a lawyer. The detectives told me I had to give a statement.

8. The detectives did many things to make me confess. The detectives, at one time, put some chairs together to show me what the electric chair looked like. They told me to sit in the chair with my arms on the arm rests and my legs and back firmly against the chair. I was told to sit up straight. Over my arms and legs were shackles like the electric chair. In back of my head they put a telephone book. I was told to imagine over my head a mask, then they said: "The switch is about to be thrown" and then [fol. 371] said: "It was thrown" and at that time one of them hit the book in the back of my head. I was frightened crazy.

9. I was tired and had had no sleep the previous night.

10. At that time Nate Jones read to me quotations from some written statements. Tey told me that Wayne Godfrey had said I was involved. They said they knew everything and that I might as well tell them the truth. Then they brought in Wayne Godfrey who identified me without speaking to me. Again, I asked to contact my parents and talk to my family. I asked for a lawyer. When I asked for my parents this time, Detective Large threw a telephone book at me. During this period, Detective Sunkett put a book behind my head and slapped the book with either his hand, his fist, or his gun. I am not sure which it was. Before I gave my first statement, Detective Sunkett repeatedly said throughout the questioning: "You are a wise guy, you know all the answers" and he cursed me and cursed me. They told me if I asked for my mother or father again that they would: "Lock them up too."

11. The detectives told me if I didn't give them a statement I would go to the electric chair. It was about 29 hours since I had last slept, finally, I told them I would give them a statement. After I gave the statement I again asked to

speak with my parents and was told that I could only see them after I completed all the questioning.

[fol. 372] 12. After I gave the statement to Detective Tracy, Chief Dube came in and I asked him if I could talk to my parents so that I could get a lawyer. Chief Dube said I would have to wait until the statement and questioning was finished.

13. About an hour or so after I gave my statement, I was taken to a room where Wayne Godfrey was. Wayne Godfrey told me he had confessed.

14. I was taken to another room and questioned more about the gun. I was taken to Prosecutor Cohen's Office and they took a second statement from me. Prosecutor Cohen asked me if I had a gun. I told him I had been holding a gun for a friend. The Prosecutor said he only wanted to check the gun to see if it had been fired, and if not, I would be cleared of murder. I gave them the statement because of the promise from Mr. Cohen that afterwards I could contact my mother and father. However, even after the statement, I was not allowed to contact my parents. Mr. Cohen said he would get in touch with my parents, which he did not do. Detective Sunkett said he would go to my mother's house and tell her what was happening. This, he did not do.

15. About midnight they said they had more questions and took a third statement from me. I asked Chief Dube if I could telephone my mother. He said I could if I completed the statement. After the statement the detective told me that I could see my family when I went before the Judge. I asked about making a telephone call but I was [fol. 373] told I was not allowed to. During the times that they questioned me, they told me about Wayne Godfrey's confession.

16. I believe I saw Noah Hamilton's typewritten statement but I do not believe I saw Godfrey's in typewritten form. However, prior to my second and third statements they allowed me to talk to Godfrey and he said that I might as well confess because he had.

17. I was arraigned on Friday, January 31, 1958, and the Judge asked me why I had no lawyer. I told him that the police had not allowed me to contact my folks so that I could

get one. The Judge told the Prosecutor to let us speak to our families so that they could get us lawyers.

18. I spoke to my Aunt Blanche Hurdle, my mother, my father, and my Aunt Bertha, in a room for about 10 minutes. I begged them to get me a lawyer because now the police were telling me I was going to go to the electric chair.

/s/ Stanley Cassidy.

Sworn and Subscribed to, before me, this 22 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 374] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF MILDRED CASSIDY

STATE OF NEW JERSEY,
County of Camden, ss:

Mildred Cassidy of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the mother of Stanley Cassidy, and I am 52 years of age, and I reside at 507 Chestnut Street, Camden, New Jersey.

2. About 4:00 A.M. on Wednesday, January 29, 1958, I was awakened by shouts and noises and by the sounds of someone up the stairs of our home. The sound of the first person running was followed by the sound of a number of other persons racing up the stairs. There was a great deal of noise and commotion. I heard pictures being knocked down from the wall alongside of the stairway and voices shouting. I was startled and frightened.

3. I got out of my bed, left my bedroom and went into the hall and called for my son, Stanley. Then, I heard the door slam. A white detective was standing at the top of our second floor stairway with a drawn gun in his hand. Stanley's bedroom door was ajar and I saw him lying on the bed with his feet and arms extended in the air while another detective, either Camden Detective Nate Jones or Camden Detective Golden Sunkett was bending over and searching him.

4. Other detectives were rummaging through Stanley's clothes, his closet, his bureau, and I saw other detectives breaking open cigarettes and smelling them. After a while they pushed Stanley out of the room and shoved him into the hallway. The detectives put a bedspread on the floor in Stanley's room and they threw all of his personal effects, clothing, even his dirty clothes into the bedspread and wrapped it up and took it with them.

[fol. 375] 5. When I first came out of my bedroom, I asked the detectives what was wrong, what was happening, but no one would answer. When I saw what they were doing to Stanley in his room and in searching our home, I continued to ask what was wrong and what they were doing. One

told me "not to worry". Another one said: "Stanley knows."

6. I was very frightened and I began to cry. Stanley told me "don't cry mother". Detective Golden Sunkett shouted at Stanley "You have a helluva lot of nerve telling your mother not to cry. If a son of mine did something like you did, I would chop his head off." I asked Detective Sunkett, whom I have known for many years, if he could tell me what it was about and he said: "No, Mildred, my hands are tied."

7. About this time I called my brother, Charles Gaines to help me. My brother looked frightened and upset. My brother, Charles, was told by Detective Nate Jones "Don't worry and go back to bed." I heard my brother ask Detective *H*ones "What's wrong?" Detective Jones using my brother's nickname said: "Birdie, don't worry, go back to sleep. Stanley knows why we are here."

8. A number of the detectives shoved Stanley in front of them and took him downstairs to the first floor.

9. Stanley had a coat on the chair in the front living room and as he put it on something rattled. Camden Detective Phillip Large put his hand into Stanley's coat pocket and took out a Milk of Magnesia can. Detective Phillip Large opened the can and in it were some white pills. He broke one open, smelled it, and offered it to Detective Sunkett to also smell it. They seemed to look at each other [fol. 376] knowingly, shrug, and then Detective Large put the can into his pocket.

10. Stanley said he had a terrible headache. Detective Phillip Large turned to him and said: "Brother, if you've got a headache now, just wait, your troubles are just beginning:"

11. When I was downstairs I noticed a number of detectives coming from the alley of the rear of the house, and even though it was winter time and cold, the front door was open and all the lights in the house were on. There seemed to be police and detectives all around the house and in the rooms of our house.

12. I kept asking the detectives what was wrong and where they were taking Stanley. They never told me anything concerning the reason for Stanley's arrest.

13. No one showed me a search warrant, nor a warrant for Stanley's arrest, nor did anyone give a reason for enter-

ing our home. The detectives and the police were in our home about one hour and left around 5:00 A.M.

14. My brother, Charles, and I were nervous and upset and frightened. We went to the home of my sister, Mrs. Nettie Jones, 620 Spruce Street, Camden, N. J. We stayed there until about 5:00 P.M. listening to the radio and trying to decide what to do.

15. We did not know what to do. We did not know how to act. We did not know what was wrong.

16. In my presence, my sister, Mrs. Nettie Jones, called the Camden Detective Bureau at least three times prior to 5:00 P.M., but each time she received no information concerning her request about my son, Stanley.

[fol. 377] 17. About 5:00 P.M. we decided we would go in person to the Camden Detective Bureau. Accompanied with my husband, Adrian Cassidy, my sister, Mrs. Nettie Jones, and my brother, Charles Gaines, we drove in a car to the Camden Detective Bureau.

18. My sister, and my husband, Adrian, accompanied me inside to the Detective Bureau, while my brother, Charles, waited outside since he was driving the car. I talked to a white detective who was in plain clothes and whose name I do not know. I asked this detective if I could see my son, Stanley Cassidy. The detective said: "You cannot see him, and I cannot give you any information." I asked him if I could speak to Detective Golden Sunkett, one of the officers who had come to my home, and I was told that Detective Sunkett was not there but had gone home to eat.

19. We left the Camden Detective Bureau and went to the home of Detective Nate Jones in Camden. Detective Jones was also one of the arresting officers. I asked his wife if he was at home and she told me that he had gone to Newark, New Jersey, on business. Mrs. Jones said that she could tell me "nothing". Mrs. Jones advised me to go to the Camden Detective Bureau for additional information. We left the home of Detective Jones and went to the home of Detective Golden Sunkett. Detective Golden Sunkett was not at home but his wife told me after repeated requests on my part that "Stanley is involved in a murder case" and she thought Stanley "was in very deep". Mrs. Jones and I broke down and cried. We left the home of Detective Sun-

kett and returned to the home of my sister, Mrs. Nettie Jones. About 11:00 P.M. that night I went to bed, still being unable to talk with my son, Stanley.

[fol. 378] 20. Despite my efforts and the efforts of my family, I never saw, nor heard from my son, Stanley, from the time of his arrest until his arraignment on Friday, January 31, 1958.

21. At the arraignment, the Judge asked my husband and I if we were Stanley's parents and what we were going to do for a lawyer. I told the Judge "I would do the best I could but we have no money. The prosecutor said that Stanley wanted to speak to his parents.

22. We went to a room near the court room and spoke with Stanley. Stanley said: "Please, please, mother get me a lawyer. After they took my statements they told me I am going to the electric chair."

23. In the hallway, outside of the Municipal Court where the arraignment was, someone pointed to a man and said he was a good lawyer. We retained this man as Stanley's attorney. His name is Louis N. Caggiano, Esq.

/s/ Mildred Cassidy.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 379] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF CHARLES S. GAINES

State of New Jersey,
County of Camden, ss:

Charles S. Gaines of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the maternal uncle of Stanley Cassidy and presently 39 years of age and I reside at 301 Pine Street, Camden, New Jersey.

2. I have been employed for some time and I am presently employed by the Budd Company, Philadelphia, Pa.

3. About 3:30 or 4:00 A.M. on Wednesday, January 29, 1958, I was asleep in bed on the third floor of my sister, Mrs. Mildred Cassidy's home.

4. Stanley and I were having a conversation when suddenly the doorbell began to ring repeatedly.

5. Stanley went down to answer the door and then I heard a great deal of commotion; people running up the stairs, pictures falling off the walls, and the shouting of voices.

6. I heard Stanley yell: "No, no, don't." At this time I saw the glare of flashlights or search lights from the window of my bedroom. I heard the sound of many footsteps coming up the stairs. I got out of bed and went down to the second floor. I looked in Stanley's room and say that a detective had Stanley by the ankles shaking him up and down on the bed.

7. I believe there were at least three other detectives rummaging and searching through Stanley's room and his personal effects and clothing.

8. I repeatedly and continuously asked the detectives what [fol. 380] was wrong and what was happening, but they did not answer. Finally, detective Nate Jones, with whom I was acquainted, told me: "Don't worry Birdie, go back to bed." Detective Jones said: "We got what we wanted."

9. I was so shocked and upset by the confusion and commotion, my heart was pounding and pounding, that I meekly obeyed and returned to my room on the third floor. I remained there for a brief period of time until my sister,

Mildred Cassidy, called to me and said to the effect that they were going to take Stanley out of the house.

10. I then came back down stairs. As I came upon the scene, I heard Stanley ask his mother not to cry. A detective, I am not sure which one, then said something to the effect that Stanley had really done something serious.

11. The detectives then shoved Stanley before them into the stairwell and took him down to the first floor. The detectives also took all of Stanley's personal effects wrapped in a sheet or pillow case.

12. When they got to the first floor livingroom, a detective, whom I believe was detective Phillip Large, picked up a coat which was Stanley's. Detective Large took a container from the pocket, opened it and took out some pills or capsules. Detective Large broke one open, smelled it, and offered it to Detective Sunkett, whom I believe also smelled it. The detectives looked at each other and Detective Large put the container with pills in his pocket. Stanley said something about having a headache and Detective Large said something to this effect "That's nothing to what you will have."

[fol. 381] 13. There were many detectives and police around the house, in the rooms of the house, and coming from the rear through an alley and in front of the house. Stanley was taken to a waiting automobile and driven away. Although I asked and although I heard my sister ask, we were never informed why Stanley was arrested, nor allowed to talk to him about his arrest.

14. It was now about 5:00 A.M. Wednesday, January 29, 1958. My sister, Mildred Cassiday and I, went to another sister's home, Mrs. Nettie Jones at 620 Spruce Street, Camden, New Jersey.

15. I went to work that morning but I was so upset and disturbed I could not work and returned to my sister, Nettie Jones' house. We were uncertain as to what we should do. I heard my sister, Nettie, several times call the Camden Detective Bureau to try to get information about Stanley. The Detective Bureau would tell her nothing. We had no idea why Stanley was being detained.

16. Finally, about 5:00 P.M. my sister, Mrs. Mildred Cassidy and my sister, Mrs. Nettie Jones, and Stanley's father, Adrian, and I, went to the Camden Detective Bureau.

17. I waited outside in the car when we got to the City since I was the driver. After a short time they came out of Camden City Hall and told me that a detective had said they could neither speak to nor see Stanley.

18. We drove to the home of Detective Nate Jones, but he was not at home.

19. I then drove the group to the home of Camden Detective Golden Sunkett. I did not wait in the car this time but accompanied the group. We were told by Detective [fol. 382] Sunkett's wife, Mamie, that Detective Sunkett was not at home. In answer to our many questions, Mrs. Sunkett finally stated that Stanley was being held for being involved in a murder. The women cried.

20. I drove them to the home of my sister, Nettie. We didn't know what to do; we didn't know how to see Stanley. I believe it was the next morning that I heard over the radio that Stanley Cassidy had confessed to participating in a murder.

/s/ Charles Gaines.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 383] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF BLANCHE HURDLE

STATE OF NEW JERSEY,
County of Camden, ss:

Blanche Hurdle of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am 41 years of age and I presently reside at 410 N. Salford Street, Philadelphia, Pa.

2. I am employed at the Philadelphia Naval Depot at Philadelphia, Pa.

3. On Thursday, January 30, 1958, I read in the newspaper that my nephew, Stanley Cassidy, had been arrested and connected with a murder. I contacted my sister, Mrs. Mildred Cassidy by telephone. I then went to the home of another sister, Mrs. Nettie Jones, 620 Spruce Street, Camden, N. J., where the family gathered. I was informed that Stanley was being held at the Camden City Hall and that all of the efforts to see Stanley or to speak to him had been unsuccessful. I told my family that nevertheless I would try to see Stanley.

4. Early in the morning of the next day, Friday, January 31, 1958, I went to the office of the Camden County Prosecutor and spoke to Mr. Mitchell Cohen, the Camden County Prosecutor. I told him that I would like to speak to my nephew, Stanley Cassidy. Prosecutor Cohen said: "Hell, no: You cannot see him and no one else can see him." I told Mr. Cohen that he did not have to curse me because I understood plain English and that a plain "no" was sufficient.

5. I left the Prosecutor's office and saw detectives Sunkett and Jones, in the hallway. Detective Sunkett asked me if I was trying to see Stanley. I told him "I was". Detective Sunkett told me that "no one can see him until after the hearing". Detective Sunkett said the hearing [fol. 384] was going to come on shortly and that if I waited I could probably see Stanley but most likely I would not be allowed to talk to him. I went into the court room and waited.

6. Stanley and the two others involved were brought into the court room and after awhile the Prosecutor asked Stanley if he had a lawyer. Stanley replied in effect that he did not have a lawyer. The Prosecutor asked Stanley why he had no lawyer. Stanley replied: "I have not been allowed to call my family nor a lawyer." The Prosecutor then asked Stanley if any of his family was in the court room. Stanley replied that his aunt, Blanche, was present, meaning me.

7. Meanwhile my sister, Mildred, had left the court room because she had become so upset and crying. The Prosecutor then asked if Stanley's aunt was present. I was so dumbfounded that I did not answer at first. The Prosecutor again asked Stanley if his aunt was present. Stanley again said that "my aunt is here". The Prosecutor again called for me and this time I answered and went forward to where they were all standing. The Prosecutor asked me if I was getting counsel for Stanley. I replied that "We haven't even had a chance to speak to Stanley, we don't know what to do." The Prosecutor then told me that I could speak with Stanley in a room around the court. I went back to this room and spoke to Stanley. Meanwhile, my sister and I believe Stanley's father, Adrian, now deceased, entered the room. Stanley begged my sister, Mildred, to get him a lawyer because he said, "now, they tell me I am going to go to the electric chair". After about 5 to 10 minutes at the most, the police [fol. 385] told us Stanley had to go back to his cell.

/s/ Blanche Hurdle.

Sworn and Subscribed to, before me this 11th day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey, My Commission Expires Oct. 26, 1966.

[fol. 386] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF NETTIE JONES

STATE OF NEW JERSEY,
County of Camden, ss:

Nettie Jones of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the maternal aunt of Stanley Cassidy, and I am 45 years of age, and at the present time I reside at 620 Spruce Street, Camden, N. J.

2. I am self-employed as a beautician in Camden, New Jersey.

3. About 5:15 A.M. on Wednesday, January 29, 1958, my sister, Mrs. Mildred Cassidy and my brother, Charles Gaines, came to my home and told me that my nephew, Stanley Cassidy had just been picked up and taken away by the police. Neither my sister, Mildred, nor my brother, Charles, could give me any idea why Stanley had been arrested. We didn't know what to do, we didn't know what was wrong, we did not know who to ask.

4. I called the Camden Detective Bureau about three or four times during that day and I was told that there could be no information given on Stanley Cassidy. We waited in my house until about 5:00 P.M. and when Stanley did not appear we decided to visit the Camden Detective Bureau.

5. My sister, Mildred Cassidy, my brother, Charles Gaines, and my brother-in-law, Adrian Cassidy and I went to the Camden Detective Bureau. My brother, Charles, was the driver and stayed in the car. We went in to the City Hall and we spoke to a white detective who told us that Stanley could not be seen. One of us asked where Detective Gonden Sunkett was and the detective answered that he was at home eating supper.

[fol. 387] 6. We left the Detective Bureau and went to the home of Detective Nate Jones. He was not at home and his wife told us she knew nothing. She told us to go to the Detective Bureau for information.

7. We then went to the home of Detective Golden Sunkett. He was not at home and we spoke with his wife, Mamie

Sunkett. She told us that Stanley was "deeply involved in a murder" but she could not give us any details. My sister, Mildred, became very upset and was crying. We went back to my house and waited there until 11:00 P.M. but we still heard nothing from Stanley.

8. The next day I learned that Stanley had confessed to participating in a murder.

/s/ Nettie Jones.

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

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 388] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF SYLVESTER JOHNSON

STATE OF NEW JERSEY,
County of Camden, ss:

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

1. I am one of the petitioners in this matter and presently confined in the New Jersey State Prison.

2. I was arrested in Newark, New Jersey, at about 5:00 P.M., Wednesday, January 29, 1958, at the home of my uncle, Joseph Evans.

3. Wayne Godfrey had personally brought the police to where I was staying in Newark, New Jersey. The arresting officers accompanying Wayne Godfrey included Newark and Camden Police. The Newark detective in charge, I believe, was named Clayton B. Norris. I believe the Detective, Vincent Conley, was in charge of the Camden Police, and among the Camden Police officers was Detective Nate Jones.

4. Following my arrest, I was taken to a Newark Police Station.

5. Neither at the time of my arrest, nor subsequently was I advised by anyone that I had the right to obtain counsel, that I either had the right or could talk to an attorney, or my family. No one had advised me that I could remain silent.

6. At the Newark Police Station there were at least 5 or [fol. 389] 6 police officers including Detective Vincent Conley interrogating me. This interrogation continued intermittently for 4 or 5 hours. About 5 hours after I was arrested I was taken to a court in the same building.

7. At the time I was taken to a court in Newark for my arraignment I asked to see an attorney and to be able to contact my family; my requests were ignored. Detectives, Conley and Norris, told me I could see an attorney and talk to my family after "you give us a confession". It was about 10:00 o'clock at night when I was in the court room in Newark, New Jersey, on January 29, 1958 for my arraignment. I was frightened and confused but I believe

that Detective Vincent Conley signed some papers and that the Judge asked the officers some questions. I was not advised of my right to see counsel, nor of my right to see my family, nor of my right to remain silent. I was in the court room for 10 minutes or less and then was taken out. I was not asked anything by the court or by anyone.

8. After the court appearance I was taken back to the interrogation room and fingerprinted. I was questioned intermittently until about 1:00 or 1:30 A.M., Thursday, January 30, 1958.

9. During this interrogation I again asked Detective Vincent Conley if I could get in touch with my uncle, Joseph Evans, in Newark, so that he could arrange to get me a lawyer. Detective, Vincent Conley, told me in effect [fol. 390] that I could neither see nor speak to anyone until after I had given a confession.

10. About 1:30 A.M., Thursday, January 30, 1958, I was returned to my cell and about 2:00 A.M. I was taken out of the cell for the trip back to Camden, New Jersey.

11. Three detectives accompanied me on my trip to Camden, New Jersey, one of whom was Detective Vincent Conley, and the other two I do not know their names. During the ride to Camden, New Jersey, I was questioned persistently and constantly. I answered that I had no knowledge of any murder or holdup. I asked these detectives many times if I could speak to my family so as to get a lawyer when we arrived in Camden. Detective Conley answered to the effect that I could not and would not be allowed to see anyone until after I told them what they wanted to know and Detective Vincent Conley, got mad at my request and my refusal "to cooperate" and he punched me in the mouth. Detective Vincent Conley's punch cut my lip and thereafter it began to swell.

12. We arrived in Camden City Hall Police Station about 4:00 A.M., January 30, 1958. My interrogation was continued by Detectives Vincent Conley and Philip Large, and other detectives, whose names are unknown to me.

13. About 4:45 A.M. I was taken to Chief Dube's Office where I was told that Wayne Godfrey had confessed and [fol. 391] that Stanley Cassidy had confessed, and that both Stanley Cassidy and Wayne Godfrey were brought in separately and identified me as the person who had

actually done the shooting. Again, I asked if I could contact my mother to get a lawyer and again I was told I could see no one until I gave a statement.

14. I had only a half hour's sleep in the prior 48 hours. Finally, I felt that I wasn't going to be able to talk to my family nor to an attorney until I did what the police wanted. I gave the statement they wanted and again I asked to contact my mother but I was told by Chief Dube that I would only get a chance to see a lawyer and my family when I went to Police Court.

15. I was taken to the arraignment on Friday morning, January 31, 1958. My mother was in the audience and came forward to where I was standing before the Judge. The Judge asked me if I had a lawyer. My mother answered that she had retained Elmer Bertman, Esq., and that Mr. Bertman could not be there at that time but would get in touch with me later in the afternoon of that day.

/s/ Sylvester Johnson.

Sworn and subscribed to before me, this 22 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 392] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF ALLIAN JOHNSON

STATE OF NEW JERSEY,
County of Camden, ss:

Allian Johnson of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the mother of Sylvester Johnson, and I am 50 years of age, and I reside at 752 Division Street, Camden, New Jersey.

2. I am employed at the Campbell Soup Company, Camden, New Jersey, and have been so employed for 19 years.

3. On either Monday, January 27, 1958, or Tuesday, January 28, 1958, at about 7:00 P.M. someone knocked at the door of my residence which was then 693 Everett Street, Camden, New Jersey. I opened the door and a group of men burst in, stating that they were looking for my son, Sylvester. They later identified themselves verbally as Camden Detectives.

4. One of the detectives raced through the house, opened the rear door, and let in a group of other detectives and, I believe, uniformed policemen. I was shocked and frightened and continually asked why they were looking for my son. I was only told that I would find out later. They searched the entire house for about one-half of an hour. They never showed me a search warrant nor informed me as to why they had searched my home. There were at least seven or eight police officers present. I remember that search lights were set up in front of the house.

[fol. 393] 5. After the police left I called the Camden Detective Bureau and asked what they were searching for. The man answering the phone told me he had no information to give me.

6. The next day I again called the Camden Detective Bureau. Again, I identified myself as Sylvester's mother but was told by an unidentified man that he could give me no information as to whether Sylvester was arrested.

7. On Wednesday, about 7:00 P.M., January 29, 1958, I heard on the radio that Sylvester had been apprehended

at Newark, New Jersey. I immediately contacted Attorney Elmer Bertman, at his home.

8. Mr. Bertman told me to come to his home which I did. After explaining the circumstances as I had heard them from the radio, Mr. Bertman agreed to represent Sylvester. He stated that his fee would be $1,500.00 and that I would have to give him $500.00 the next morning. I asked Mr. Bertman to be at the Camden City Hall when they brought Sylvester in from Newark.

9. Mr. Bertman told me it was impossible to know or to find out when Sylvester would be brought in. Also he stated that when he did arrive that Sylvester could be held incommunicado for 24 hours. He promised to see Sylvester early the next morning after I paid the $500.00.

10. On Thursday morning, January 30, 1958, I paid Mr. Bertman the $500.00. On Friday, January 31st, I saw my [fol. 394] son at the arraignment at the Camden City Hall. It seemed that his mouth was swollen as if he had been hit. However, for some unknown reason I did not mention it nor did he. I told him that I had retained a lawyer for him.

/s/ Allian Johnson.

Sworn and subscribed to before me, this 19 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 395] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT OF VERNIE JONES

STATE OF NEW JERSEY,
County of Camden, ss:

Vernie Jones of full age, being duly sworn according to law, upon her oath deposes and says:

1. I was the girl friend of Sylvester Johnson at the time of his arrest during January, 1958.
2. I am 25 years of age and I reside at 425 Henry Street, Camden, New Jersey.
3. I am presently employed as a Sales Clerk at Nichols Discount Center, Maple Shade, New Jersey.
4. On January 29, 1958 at about 8:00 P.M. I heard on the radio that Sylvester Johnson had been apprehended in Newark, New Jersey, in connection with a murder. I immediately attempted to contact his mother, Mrs. Allian Johnson, at her home but was unsuccessful.
5. About 10:00 P.M. I telephoned the Camden Detective Bureau, and stated that I was Sylvester's sister, and asked if I could see or speak with him. An unidentified man told me that Sylvester had not been brought in yet.
6. About 8:00 A.M. on Thursday, January 30, 1958, I again called the Camden Detective Bureau. Again I pretended to be his sister and inquired as to whether I could see him. I was told that I could not see him yet.
7. About 10:00 A.M. on Thursday, January 30, 1958, I [fol. 396] went to the Camden County Jail, posing as his sister, and was told by a guard that Sylvester could not have any visitors.

/s/ Vernie Jones.

Sworn and subscribed to before me, this 21 day of October, 1964.

/s/ Charles A. Ashley, Notary Public of New Jersey. My Commission Expires Oct. 26, 1966.

[fol. 397] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 398] IN THE SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3278

Criminal Action On Appeal

STATE OF NEW JERSEY, Plaintiff-Respondent,

vs.

SYLVESTER JOHNSON AND STANLEY CASSIDY,

Defendants-Appellants.

MANDATE ON AFFIRMANCE—January 19, 1965

This cause having been duly argued before this Court by Mr. M. Gene Haeberle, counsel for the appellant, and Mr. Norman Heine, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Camden County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Camden County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 19th day of January, 1965.

[File endorsement omitted.]

[fol. 399] PETITION FOR REHEARING AND SUPPLEMENTAL PETITION FOR REHEARING COVERING 16 PAGES OMITTED FROM THIS PRINT. IT WAS DENIED, AND NOTHING MORE BY ORDER —February 23, 1965.

[fol. 400] IN THE SUPREME COURT OF NEW JERSEY

No. M-158 September Term 1964

No. 3278

STATE OF NEW JERSEY, Plaintiff-Respondent,

vs.

SYLVESTER JOHNSON, ET AL., Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING—February 23, 1965

No justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton this twenty-third day of February 1965.

John H. Gilder, Clerk.

[File endorsement omitted.]

[fol. 401] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 205 Misc.

SYLVESTER JOHNSON AND STANLEY CASSIDY, Petitioners,

v.

NEW JERSEY

On petition for writ of Certiorari to the Supreme Court of the State of New Jersey.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —November 22, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 762 and placed on the summary calendar and set for oral argument immediately following No. 80, Misc.

And it is further ordered that duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 796221 395