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THE PEOPLE VS. MAESTRY AND NAPOLITANO

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CASE #2094

COURT OF GENERAL SESSIONS OF THE PEACE.

City and County of New York, Part IV.

THE PEOPLE

vs.

: Before: HON. JOSEPH F. MULQUEEN
: and a Jury.

FRANK MAESTRY, alias
FRANK MILLER and JOHN NAPOLITANO

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New York, August 3rd, etc., 1915.

Indicted for assault in the first degree:

Indictment filed June 23rd, 1915.

A p p e a r a n c e s :

ASSISTANT DISTRICT ATTORNEY W. H. L. EDWARDS, FOR THE
PEOPLE.

MESSRS. JOHN PALMIERI AND JOSEPH RAMO, FOR THE DEFENSE.

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TRANSCRIPT OF STENOGRAPHER'S MINUTES.

Frank S. Beard,
Official Stenographer.

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(A jury was empaneled and sworn.)

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess for fifteen minutes.)

AFTER RECESS.

MR. PALMIERI: Will your Honor permit us to add to our plea the plea of former jeopardy? I have just been informed by Associate Counsel that these men were tried by the Warden of the City Prison, who had jurisdiction over them at the time of this occurrence, when the fight occurred, and he punished the defendants by ten days of solitary confinement.

THE COURT: Well, a plea of former jeopardy must be made in writing. I cannot waive that formality. But that is not former jeopardy. They are charged here with a felony, and no Court, except this Court or the Supreme Court, has jurisdiction of felonies in this County. They are charged with having committed a felony in the County of New York.

MR. PALMIERI: Then, if that is the case, the Warden shouldn't have punished my clients.

THE COURT: Well, that is another matter. That is a matter of prison discipline. I suppose he deprived them of certain privileges which they ordinarily would have been entitled to under the prison rules. If there was any merit in your plea, I would allow you an adjournment and an opportunity to put the plea in writing. However, I might take that into consideration in any

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punishment which might be inflicted, in the event of a conviction. But the plea of former jeopardy means that they have been previously tried by a Court of competent jurisdiction, and acquitted or convicted for the same offense. But, of course, that implies trial in a Court of competent jurisdiction.

MR. PALMIERI: Well, then, your Honor will not forget the facts that my client has served ten days of solitary confinement in a cell. And I understand that both defendants and the complainant also received ten days each in solitary confinement.

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THE PEOPLE'S TESTIMONY.

BENJAMIN SCHNEIDER, of 108 Essex Street, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Now, Schneider, how long have you been confined in the Tombs? A Fifteen months.

Q Do you remember what date you were first arrested on?

A I was arrested the eleventh of May, 1914.

Q Now, you have pleaded guilty to some, have you not?

A Yes, to manslaughter in the first degree.

Q Have you been sentenced yet? A Not yet.

Q Before what judge did you plead guilty? A Before Justice Davis.

Q Before Justice Davis, of the Supreme Court? A Yes, sir.

Q Have you ever been convicted of any other crime? A No, sir.

Q That is the only one? A Yes, sir.

Q Now, during these fifteen months that you have been here in the Tombs, have you been over to the District Attorney's Office at all?

MR. PALMIERI: I object to that as immaterial, irrelevant and incompetent.

THE COURT: Well, I will allow it.

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MR. PALMIERI: Exception.

THE COURT: Of course, if knowledge is not brought home to the defendant, it will be stricken out.

MR. PALMIERI: Well, that's the point.

MR. EDWARDS: And I can go only one step at a time.

MR. PALMIERI: We except.

MR. RAMO: May the exception apply to both defendants?

THE COURT: Yes.

BY MR. EDWARDS:

Q (Question repeated) A Yes.

Q And have you furnished the District Attorney with any information? A Yes, sir.

Q In connection with what matter? A In connection with a murder case and the Union affairs.

Q In what? A In the affairs of the Union.

Q And can you tell us the names of the cases? A Yes, sir.

Q Well, please do so? A Max Kasamersky, Petloffsky, Mesher Boroff.

THE COURT: Well, it is not claimed that those people were in any way connected with these defendants, is it?

MR. EDWARDS: No, sir.

THE COURT: Then further names are not necessary.

BY MR. EDWARDS:

Q And during what period of time have you been giving that information to the District Attorney, for how long? A About

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seven or eight months.

Q Now, when did you first meet these two defendants, Maestry and Napolitano? A I can't remember because when they come up I was already there.

Q You were in prison when they came there to the Tombs? A Yes. I never had no dealings with nobody. I always---

Q Have you ever talked with those two men? A No, sir; I wasn't talking to them.

Q You never talked to them at all? A No, sir.

Q Well, now, on the nineteenth of June, what cell were you occupying? A 210.

Q That is on the second tier? A Yes, sir.

Q And who was your cell mate? A Abe Rothman.

Q Now, on the morning of that day, what time did you get your breakfast? A About ten minutes after seven o'clock.

Q Now, tell us how your breakfast was furnished to you? A When the keeper opens the doors, he comes around, and they put the plates---we take in the milk and the coffee, and I took in my milk and coffee, and my partner, Rothman, the man that was in the cell, was going to take his, and at the same time those three men come over to the cell.

Q Which three men? Who were the three men? A This fellow and this fellow (Indicating the defendants) and I don't know the name of the other fellow.

Q Would you know the name if you heard it? A I don't

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know.

Q Was it Ferrone or Fiola? A I'm not sure.

Q But you are sure these two defendants were there? A Yes, sir.

Q Maestry and Napolitano? A Yes, sir.

Q And were you in your cell or outside when they came to your cell? A I was inside, and Rothman was outside of the door.

Q And what were you doing inside? A I was going to sit down to eat my breakfast.

Q And what was Rothman doing outside? A He blocked the cell door. (Illustrating) They were trying to get in the cell.

THE COURT: Strike that out, what they were trying to do. Tell what they did.

BY MR. EDWARDS:

Q Now, what was he doing outside of the cell? A He was getting in his breakfast.

Q Now, all right. Go on.

BY THE COURT:

Q Was the cell door opened for the breakfast? A Yes, sir.

Q It is not passed in through an opening, but the door is opened? A Yes, sir.

Q What kind of a door is there on the cell? A It is an iron door.

Q Well, is it a solid iron door or a grating? Are there spaces? Can you see from your cell into the corridor? A Yes,

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sir.

Q Then it is not a solid door, like that there? (Indicating the door of the Court Room) A No, sir; it has bars.

Q And so this barred door was open, and he was getting in his breakfast? A Yes, sir.

BY MR. EDWARDS:

Q And what did these men do when they came to your cell?

A They started to holler "rat", and started to throw in plates.

MR. PALMIERI: -- I object to that, that "they" did something, unless he can pick out a particular person who did anything.

THE COURT: Yes. Objection sustained. Strike that out.

BY MR. EDWARDS

Q Now, won't you use the names of these two defendants, and, if possible, tell what each one did. A I can't remember the names.

BY THE COURT:

Q Now, first tell us what Maestry did, if anything. A He come over and he says---and he started to holler, and he said, "We are going to give it to this rat, this stool pigeon". Rat, you know, judge?

Q No, I don't know, but never mind, go on.

BY MR. EDWARDS:

Q And did he use any other words but "rat"? A Yes, "District Attorney's man."

Q Well, you know that he said those two things, do you?

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A Yes. And then he grabbed me by the throat, and this Abe Rothman started to plead with them, "Leave him alone. He's going to get his sentence. What do you want with him?" And they took him away from the door, and they threw plates in the cell, and he run in and grabbed me by the throat and laid me down on the bed (Indicating Maestry).

Q Now, what did the other man do? Napolitano? A He jumped right on me in the bed, and they started to kick me and beat me, and I was unconscious. And, when the keepers come in, I was like that. (Illustrating).

Q Now, where did they do all this? Inside of the cell, or outside? A Yes, inside of the cell.

Q And where did they put you? A On the bed. The bed was right in the bottom, you know, so I fell right over it.

BY THE COURT:

Q How many beds are there in the cell? A Two, one on top and one on the bottom.

Q And you slept in the bottom one? A Yes, sir.

BY MR. EDWARDS:

Q And you say they threw you on the lower one? A Yes, sir.

Q Now, who did that? A The three of them. They were altogether in the cell.

Q And when they got you down on the bed, what did they do?

A Maestry grabbed me by the throat. He was the first one that

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came into the cell.

Q Well, what did Napolitano do, and the other man? A They started to kick me in the face, and in the back and everywhere, and I was all swelled up, and the other man did the same thing.

Q And did they do anything else besides beat and kick you?

A Yes, and I've got a cut in my back that the doctor found, and when the Keepers came in I was unconscious.

Q And how long was it before you recovered consciousness?

A About three or four minutes.

Q And what did you do after that? Just one moment. When you first came to, where were these men? Were they still in your cell? A One was in the cell.

Q Which one? A The fellow with the bad finger, you know.

(Illustrating) He isn't here now.

Q The third man, the man with a broken or short finger, do you mean? A Yes.

Q All right. A And then the Keeper or Deputy Warden said, "Do you know the men?" And I said "Yes".

THE COURT: No. Strike that out.

BY MR. EDWARDS:

Q And what did you do after that? A, I went out and picked out the men.

THE COURT: No. Strike that out. That is all improper testimony.

BY MR. EDWARDS:

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Q Then what did they do with you? A They took me down to the Warden.

Q Now, when these men first came to the door of your cell, that morning, was any one else with them? A No, sir.

Q Just these three alone? A Yes, sir.

Q And after they had---after you had come to, where did the Keepers take you, any where? A They put me in the cell.

Q No, where did they take you to? Anywhere?

THE COURT: How is that material?

MR. EDWARDS: I want to show the examination by the Doctor, that is all.

BY THE COURT:

Q Well, they took you to the Doctor, and the Doctor examined you? A Yes, sir.

BY MR. EDWARDS:

Q And that was Dr. Lichtenstein, over in the Tombs? A Yes, sir.

Q And did you feel any pain? A Yes, I feel a little pain. I was awful excited that time.

Q Well, did you feel any afterwards? A After I felt.

Q Where? A Oh, my whole body.

BY THE COURT:

Q How long after the assault did the pain start? A Five or six hours after.

BY MR. EDWARDS:

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Q And continued how long? A Oh, for a couple of days.

MR. EDWARDS: Your witness.

CROSS EXAMINATION BY MR. PALMERI:

Q Mr. Schneider, you were known on the East Side as "Nigger Mike", weren't you? A No, sir, "Nigger Bennie."

Q Oh, "Nigger Bennie"? I beg your pardon. A Yes.

Q And what were the crimes in which you were concerned, and in which you said you gave valuable information to the District Attorney about your pals?

MR. EDWARDS: I object to the form of that question.

BY MR. PALMIERI:

Q You just stated to the prosecutor that you gave valuable information to the public prosecutor as to crimes with which you were connected? A No, sir; I gave him such cases as I wasn't connected with.

Q Yes, and some cases in which you were connected, too? A Yes, some cases I was connected with.

Q How many crimes were you connected with? A In only one case.

Q And that was the murder case in which you pled guilty? A Yes, sir.

MR. EDWARDS: I object to that. I object to his characterizing it as a murder case.

THE COURT: Well, he asked the question and I will allow it. Let the defendant answer yes or no.

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BY THE COURT:

Q What was the charge? A For murder.

Q You were charged with murder in the first degree? A Yes, sir.

Q And you pleaded guilty to manslaughter in the first degree you say? A Yes, sir.

BY MR. PALMIERI:

Q And, of course, you haven't been sentenced for that? A No, sir.

Q And you pled guilty a good many months ago? A Yes, sir.

Q Now, besides this murder, in how many cases have you given the District Attorney information? About how many, in reference to other crimes? A Crimes which I wasn't in?

Q Well, whether you were in or out of them? A Only one.

Q I thought you said many other cases?

MR. EDWARDS: Many other defendants were charged, but only in one crime.

MR. PALMIERI: Oh, I understand.

BY MR. PALMIERI:

Q But there were several crimes committed by other defendants? A Yes.

Q And several men were convicted on your testimony? A They wasn't convicted yet.

Q What? A They haven't been tried yet.

Q Now, these defendants had absolutely nothing to do with

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those crimes? A Eh?

Q (Question repeated) Or the other man that came to the cell had no more to do with the crimes than I did; isn't that so?

A I don't know. I don't know them.

Q You never knew them before this occurrence? A No, sir.
BY THE COURT:

Q Now, answer the questions. Did you tell the District Attorney anything about these two defendants? Yes or no? A No, sir.

Q And how long ago did you make the statement to the District Attorney about the other cases? A Seven or eight months ago.

Q And when was this assault committed? A This assault?

Q Yes? A On the nineteenth of June.

Q Well, now, on the 19th of June, how long a time had elapsed since your visit to the District Attorney? A It was only a couple of days before.

Q It was only a couple of days before? A Yes, sir.

Q That is, you started eight months ago, and you were going over continually until a couple of days before? A Yes, sir.

Q And you don't know how long these men had been in the Tombs, when they assaulted you, as you claim? A No, sir.

Q And the time that they came into your cell was the first time that you took notice of them? A Yes, sir.

Q Did you see them in the corridors, during the recess hours?

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A Yes.

Q Well, when did you first see them in the Tombs, Mr. Palmieri wants to know. A I seen them all the time.

Q Well, how long before the nineteenth of June? A The last couple of months. I can't tell exactly how many months, three or four months.

BY MR: PALMIERI:

Q Then you had known them for three or four months before that? A Yes, I know them since they have been in there, but I never talked to them. I seen them in there.

BY THE COURT:

Q Now, counsel wants to know how long a time elapsed between the first time you saw them and the day they went into your cell, as you say? A Every day I used to see them.

Q Well, about how many days before? A week or a month? A A couple of months.

Q They had been in the Tombs with you then a couple of months before they assaulted you? A Yes, sir.

Q But you say you never talked to them? A No, sir.

Q But you saw them in the corridors of the Tombs? A Yes, sir.

Q The practice is, every day, to let the men out for an hour in the morning, for exercise, and for an hour in the afternoon, and during that time you may mingle freely with the other prisoners, and take your exercise with them? A Yes, sir.

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Q Now, before that did they ever assault you? A No, sir; they didn't assault me, but they did bother me, but I didn't answer them.

Q No, I didn't ask you about bothering you. There is no such crime as bothering. Did they ever assault you or strike you? A No, sir; they didn't strike me, but they assaulted me with their mouths.

Q They hurt your feelings? A Yes. And they were walking and I was walking and they said, "There is a rat", you know. And I make out I don't hear them, and I don't answer.

BY MR. PALMIERI:

Q They were on the same tier with you for three or four months? A I don't know how many months.

Q And you are on the homicide tier? A Yes, sir.

Q And Maestry was on the same tier with you for three or four months prior to this time? A I couldn't say how long.

Q Now, you had never had any trouble in the Tombs before this occurrence, had you? A No, sir.

Q Are you sure about that? A Yes, one time I---

Q One moment. Now, weren't you punished for five days? A One time, I was going to explain---

BY THE COURT:

Q Were you punished for five days? Yes or no? A Yes, I was punished for hollering. I want to explain it.

BY MR. PALMIERI:

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Q Now, you appeared before the Warden? A Yes, sir.

Q And you were found guilty of calling and shouting to other prisoners on other tiers, as well as on your own tier---you seem to know them all---on the 20th of November---and you were warned by the Keeper---

THE COURT: No, do not read the whole entry---that is not necessary.

MR. PALMIERI: All right, sir.

BY MR. PALMIERI:

Q Well, you were found guilty of shouting and calling names to other prisoners, thereby raising confusion and---

THE COURT: Well, never mind that. The mere fact that he was punished is all that you can bring out.

MR. PALMIERI: Very well, your Honor.

BY MR. PALMIERI:

Q You were punished for five days and deprived of privileges for five days? A Yes, sir.

Q So that you did have trouble with other prisoners? A I didn't have no trouble. That was a holiday and they were hollering, and I just happened to be picked up, because just in the time the Keeper came by. I hollered for a paper, and he made a complaint against me.

Q Then you were punished unjustly? A Yes, I was.

Q And at that time these prisoners had nothing to do with your punishment, these defendants? A No, sir.

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Q Now, did you ever shout at these defendants at any time? A I never had no dealings with them.

BY THE COURT:

Q Yes or no? A No.

BY MR. PALMIERI:

Q You never said a word to them at all? A No, sir.

Q And you didn't strike them at all? A No, sir.

Q Didn't do anything to them at all? A No, sir.

Q You didn't say to them, "You Dago bastards, I'll put you away. I am a friend of the District Attorney, and, if you and I ever get into trouble, you will see what becomes of you?" A No, sir; I didn't. I didn't speak to them at all.

Q Now, isn't it a fact, Mr. Schneider, that, on many occasions, on the same tier, while these prisoners---I mean these defendants were walking, as they passed by you, you made a motion with your mouth, like that (Illustrating) and these defendants said to you, "Now, don't do this. That isn't right." And you said to them, "You Dago son-of-bitches, shut up?" A No, sir.

Q You never did that to them? A No, sir.

Q And do you remember that, on another occasion, they said to you, "Now, don't do that. There'll be trouble, if you keep on", and you said, "I don't care a damn. I am a friend of the District Attorney, and, if we have a fight or anything, you'll get the worst of it." A No, sir.

Q You never said that? A No, sir.

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MR. PALMIERI: That's all.

MR. EDWARDS: That's all, Schneider.

BY THE COURT:

Q How many crimes have you committed? A Who? Me?

Q Yes. A How many crimes have I committed?

Q Yes? A I didn't commit any crime, only this one.

Q You did not commit any crimes? A I committed a crime once, and I was arrested and discharged.

Q How many times have you been in prison? A Never.

Q Weren't you tried and convicted before Judge Malone? A No, sir.

Q Aren't you called "Dopey Bennie"? A No, sir; he is called "Nigger Bennie". He gave information about "Dopey Bennie" and his gang to the District Attorney.

THE COURT: Very well. I just wanted to straighten that out.

BY THE COURT:

Q Then the only crime that you committed was the homicide of which you pleaded guilty? A Yes, sir.

BY MR. PALMIERI:

Q But you admit that you are the original "Nigger Bennie"?

A (No answer).

BY THE COURT:

Q You are called "Nigger Bennie" and not "Dopey Bennie". A Yes, sir.

BY MR. PALMIERI:

Q But you know "Dopey Bennie"? A Yes, I know him from

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the Tombs.

MR. EDWARDS: I object to the preceding question by counsel for the defendant, as to his being "Nigger Bennie". It is his nick-name, he claims.

THE WITNESS: Yes, they call me that because I was a black fellow, "Nigger".

MR. EDWARDS: And he has testified that his nick name was "Nigger Bennie".

THE COURT: Very well. The answer may stand.

HARRY M. LICHTENSTEIN, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Dr. Lichtenstein, you are the Assistant Physician of the City Prison, are you not? A I am.

Q And you are duly licensed to practice medicine in this State? A I am.

Q And have been for how many years? A Five years.

Q Now, did you make an examination of Benjamin Schneider, on the nineteenth of June? A I did.

Q About what time was that? A I made the examination about a quarter to ten.

Q And that was the last witness who was on the stand? A Yes, sir.

BY THE COURT:

Q You saw him on the stand, and that was the man whom you

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examined on the nineteenth of June? A Yes, sir.

BY MR. EDWARDS:

Q Now, will you please describe the condition in which you found him at that time? A Schneider was extremely nervous, and he had a pulse of 120, and he was bleeding from the mouth, the right side of the lower lip was cut, and was bleeding profusely. He had abrasions on both sides of the forehead.

Q Just what do you mean by an abrasion? A A break in the skin. And both eyes were contused. By contused I mean a slight blueness of both eyes. And they were swollen. And the right cheek was more contused and bruised than the left side.

Q Well, were both somewhat bruises? A Yes, sir; both; but the right more than the left. He also had a mark about an inch and a half long, on the right side of his neck, an abrasion. The chest showed an abrasion or break of the skin, ~~about two~~ and a half inches long, just above the fourth rib, on the right side.

Q And where would that come, about? Will you indicate on your own body, Doctor? A About here (Indicating).

Q Indicating a point about midway between the arm pit and the hip? A Yes, sir; a little above midway. And the part where the abrasion was on the chest was very tender to the touch. He had also an abrasion, about two inches in length, on the back, just over the shoulder blade on the right side.

Q Above the shoulder blade on the right side? A Yes, sir. The abdomen didn't show any bruises, but both legs---the skin over

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the shin bone was badly bruised. That is the extent of the injuries.

Q And you say this was a quarter to ten in the morning?

A Yes, sir; about that time, as near as I can remember.

Q Well, what treatment did you give him if any? A Well, I told him to go upstairs and I gave him a solution with which he wet the parts.

Q And did you see him again after that? A Yes, sir.

Q How frequently? A Well, in the course of making my rounds, I saw him.

BY THE COURT:

Q You did not send him to the hospital? A No, sir; I didn't send him to the hospital.

Q You would not characterize those injuries as serious bodily harm, would you? A No, sir.

MR. EDWARDS: That's all.

CROSS EXAMINATION BY MR. PALMIERI:

Q You didn't put any stitches in him, did you? A No, sir.

BY THE COURT:

Q Could you form any opinion as to how those injuries were caused, for instance, on the eyes? A They seemed to have been caused by some instrument.

Q Could not a fist have caused them? A No, sir.

Q Why not? A It didn't look as if a fist had caused them. They looked as if they had been made by some hard substance, like

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a dish, or cup, because there were breaks in the skin, and were so numerous, especially through the clothing, that they could not have been caused by the fist.

Q I asked you about the eyes. You have heard of "black eye" have you not? A term frequently used? A Yes, sir.

Q And a fist could have caused those? A Yes.

BY MR. PALMIERI:

Q Now, Mr. Napolitano said, didn't he, that he had been injured in his mouth? Did you examine his mouth? A I didn't examine his mouth. He said that he had received a blow.

Q Now, did you examine him, Napolitano? A No; I only heard his statements.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q In your opinion, Doctor, could those bruises have been caused by the sole of a shoe? A Yes, sir.

THE COURT: I may say now, Mr. Edwards, in the present state of the proof, I will submit the case to the jury as assault in the third degree, if there is no further proof on the subject of the injuries, proof tending to show that grievous bodily harm was inflicted. Otherwise I should have to set aside any verdict unfavorable to the defendants, on that ground. The Appellate Division has held that it is for the Court to say on the proof whether a case of assault shall be submitted as any particular degree of assault, and the Appellate Division, in a well known assault case, recently said that the Court should have submitted

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it to the jury as assault in the third degree.

MR. EDWARDS: But the Doctor has said that there were numerous cuts through the skin, or abrasions, and I should think that would constitute griveous bodily harm.

THE COURT: Well, that is a question of law for the Court, the Appellate Division has said.

MR. EDWARDS: And I submit that, if the Doctor has been asked to express an opinion on a question of law, it is improper, and I object to it, and move to strike out the answer.

THE COURT: The motion is denied, and, if there is no further proof of injuries, I will submit it to the jury as assault in the third degree. I say it now for your information.

MR. EDWARDS: And I submit that that statement should come from the Court at the close of the case.

THE COURT: No, I make it now for your information.

A B R A H A M R O T H M A N , of 160 Orchard Street, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Rothman, how long have you been confined in the City Prison? A Eleven weeks.

Q And have you been convicted of any crime? A No, sir.

Q You are waiting for trial on some charge there now, are you not? A Yes, sir.

Q And you have been there for eleven weeks? A Yes, sir.

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Q How long were you the cell mate of Bennie Schneider? A
About five weeks.

Q Were you his cell mate on the nineteenth of June? A
Yes, sir.

Q Now, on that morning, at about what hour was it that they
opened the cell doors for breakfast? A About ten minutes after
seven.

Q Did you get your breakfast? A Yes, sir.

Q And did Bennie get his? A Yes, sir.

Q Now, while that was going on, did you see the two defen-
dants, Frank Maestry and John Napolitano? A Yes, sir.

Q And was any one with them? A There was three of them
altogether.

Q Who was the third man? Do you know his name? A I
~~don't know his name, but I will tell him, if I see him.~~

Q He is not here now? A No, sir.

Q Now, tell us where these three men were, the two defen-
dants and the other man, when you first saw them? A They were
right at the cell, right in front of us.

Q Was your cell door open or shut? A It was opened up
when we took our breakfast in, the milk.

Q And they were right in front of the cell, you say? A
Yes, sir.

Q Now, where was Bennie Schneider at the time, in the cell?
A He was sitting right alongside of me.

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Q Now, what did these men say or do, either or any of them?

BY THE COURT:

Q And if you can name the individual who made any statement, or did anything, do so. A They stood right in front of the cell, and they shouted out, "You rat."

BY MR. EDWARDS:

Q Did they all shout together? A No, sir; this one (Indicating Maestry) he hollered out, "You rat, you're a District Attorney's man" and he was trying to get into the cell to beat him up.

THE COURT: No. Strike that out, what he was trying to do.

BY THE COURT:

Q Was the door open or shut at this time? A The door was open.

Q How far was it open? A It was opened up as far as it can go. It was wide open.

BY MR. EDWARDS:

Q Now, what did this other man say or do? (Indicating the defendant, Napolitano) Did he say anything? A Yes.

BY THE COURT:

Q Is it a double door? A No, sir; it's a door on hinges, you know.

BY MR. EDWARDS:

Q A sort of gate? A door with steel bars? A Yes; a door wide open.

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BY THE COURT:

Q Is there only one door on the cell? A Yes, sir.

BY MR. EDWARDS:

Q Now, you have told us what Maestry said, what did the other man say, if anything? A They were holding cups and bowls in their hands, ready.

Q The three of them? A Yes, sir.

Q And what did Maestry have in his hand? A He didn't have anything at all. He just tried to get in first. The other two had the bowls in their hands already, and they wanted to---

Q No, tell us what they did, not what they wanted to do.

A They fired bowls at him.

Q At Schneider? A Yes, sir.

Q And where were you in the mean time? A Right by the cell gate. And I held out my hand, that way (Illustrating) and begged Frank to let him alone.

Q Who is Frank? A Maestry. I said, "Please, Frank, leave him alone."

BY THE COURT:

Q Were you inside of the gate of the cell? A Yes, sir.

Q And they were outside of it? A Yes, sir. And I begged them to leave him alone. I said, "He's going down for sentence Tuesday. Leave him alone."

Q Well, what did they say to that, or what did either of them say? A They said, "We've got to give it to him before he

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goes back for sentence."

BY MR. EDWARDS:

Q Who said that? A Frank. And, in the mean time, Frank pulled me away from the door, and the three of them jumped right into the cell, and throwed bowls at him, and throwed him into the bed.

Q Who threw him into the bed? A Frank did, and the other two. And the other two throwed bowls at him and jumped into the cell, and they beat him up, all beat him up. They got on the bed and was hoofing him, kicking him with their feet.

Q Who did that? A The other two. And Frank went outside, to watch outside for the keeper, so that they would get a better chance, the other two, to beat him up. They were beating him on the bed then, and he was laying "Cheese it" outside for the keeper.

MR. PALMERI: I object to that, if your Honor please, and move to strike it out.

THE COURT: Yes, strike it out. Objection sustained.

BY MR. EDWARDS:

Q Well, what did you see him do, Maestry? A He stood this way, like that. (Illustrating) With his arm, and spoke in Italian. (The witness speaks in Italian) I don't know what that means. And Schneider started to holler for help, and a few keepers came running upstairs.

Q Who were they? What keepers? A Mr. Strauss, and a

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keeper on the next tier, and a Deputy Warden, and they come right in the cell.

Q And where were these three men when they came in? A Two was inside---or one was inside---which Strauss took him out.

Q And where was Frank then? A He was gone.

Q And where was Napolitano? A They were all gone then.

BY THE COURT

Q You mean when the keeper came up, you and Bennie were alone in the cell? A Were alone in the cell.

Q The man that had assaulted him had gone out? A They were inside of the cell until the keepers took them out.

Q Oh, the keepers took them out? A Yes, sir.

BY MR. EDWARDS:

Q Did you see Bennie's condition then? A Well, his eyes was all closed up, and his ~~thrust~~ shirt was torn, and he was all cut up.

Q Did you see any marks on him besides those you have described? A His face was swelled up.

Q Any cuts on his face? A He had a bile on his head.

BY THE COURT:

Q A bile? A Yes, a lump.

Q Then you mean he had a lump on his head? A Yes, sir; on the top. (Illustrating).

BY MR. EDWARDS:

Q Now, had you ever seen these three men before there in the

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prison? A Did I see them?

BY THE COURT:

Q Yes, before that day? A Yes, sir.

BY MR. EDWARDS:

Q How long before that had you seen them around the prison?

A Well, when I come in, they were still in the prison.

BY THE COURT:

Q Well, when did you come in? A I was eleven weeks before the nineteenth of June.

Q And were these men all in there when you got there? A Yes, sir.

Q And you met them during the exercise hours? A Yes, sir; the two hours walk, but never spoke a word to them.

BY MR. EDWARDS:

Q Did you ever hear any of these two men say anything to Bennie Schneider before that morning? A Yes, I heard them call him "Rat".

Q And who did you hear call him a rat? A Frank. And the other man with the sore finger.

Q Did you ever hear Napolitano call him a rat? A No, sir; but he used to curse him in Italian.

Q When was the last time that you heard either of these two men call him a rat? A About two days before. That was the last time I heard it.

Q Well, what did you understand the word "rat" to mean?

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THE COURT: Well, that is entirely improper.

MR. EDWARDS: Well, it is an unusual word, and it was used over in the Tombs, and I think we are entitled to know what it means over there.

THE COURT: I will exclude the question. I will sustain an objection to that question, though none was made.

BY MR. EDWARDS:

Q Had you ever heard that expression used before they used it? A No, sir; but I understood when they called him "A District Attorney's man".

CROSS EXAMINATION BY MR. PALMIERI:

Q You were charged with murder in the first degree, were you not, and indicted for it? A No, I wasn't indicted. I was the State's witness.

Q You became a State's witness? A No, I didn't become a State's witness. I told the truth, what happened.

Q Oh, yes. You always tell the truth? A Yes, sir.

Q And never tell a lie? A No, sir.

Q And so, instead of being indicted, some one else was indicted? A No, I told the truth about it.

Q And so you are a State's witness now? A Yes.

Q The District Attorney said you were charged with a crime, and you said yes? A I was arrested on a homicide, and I turned State's evidence.

THE COURT: You were charged with homicide?

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THE WITNESS: Yes, sir.

BY THE COURT:

Q What he wants to know is whether you were guilty of committing any crime or not? A No, sir; I wasn't.

BY MR. PALMIERI:

Q Oh, of course you would say that. I expected that.

MR. EDWARDS: I object to the comment of counsel.

THE COURT: Objection sustained.

BY MR. PALMIERI:

Q Now, you say Mr. Maestry was in front of the cell door, is that right? A Yes, sir.

Q Now, do you know Keeper Strauss, of the Tombs? A Yes, sir.

Q Don't you know that the keeper came into the cell with Mr. Maestry? Don't you know that? A No, sir.

Q Did you see Strauss and Maestry come? A I seen Strauss come in, and took the other two men out of the cell, when they were beating Schneider, and Maestry was outside, watching for the keeper to come around.

Q Why, the keeper took them out, you say? A But that was after. Before that he was watching for the keeper.

THE COURT: Strike that out.

BY MR. PALMIERI:

Q But it is a fact that, when Keeper Strauss was taking Napolitano and the other man, who is not here to-day, out of the

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cell, he was at the cell door? He didn't run away? A No, sir; he didn't run away.

Q Now, the two men that you say were taken out by Mr. Strauss, were the men that actually put Mr. Bennie Schneider on the bed, and were the men that first threw the cups at him, into the cell, and actually did the work, that is, did the fighting in the cell? A Yes.

BY THE COURT:

Q How many cups do you get with your meals? A Two bowls, two cups, one for Bennie Schneider and one for me, and after we spilled the milk in the cup, after we get it, we put the bowls outside.

Q And so they used your bowls, did they? A Yes, sir.

Q Did you see where the bowls struck when they were thrown? A No, sir.

Q What kind of material are the bowls composed of? A Very heavy white crockery.

BY MR. PALMIERI:

Q Now, the two men that had Schneider on the bed were Napolitano, and the man not on trial, the third man? A Yes, sir.

Q And at that time you say Mr. Maestry was in front of the cell door? A Yes, sir.

Q And, of course, that didn't take very long, the fight didn't take very long, because you began to call for help? A He called for help. I didn't call for help.

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Q Why, Mr. Rothman, your friend was being beaten up by two men? A I didn't interfere at all.

BY THE COURT:

Q How long did the whole fight last before Strauss came there? Can you tell us? From the time they first began to assault him until Strauss came up? A About three or four minutes

Q How high is this bed from the floor, the lower bed? A About as high as this chair. (Indicating the witness chair)

Q And how much space is there between that bed and the one above it? You can't stand up on the lower bed, can you? A No, sir.

Q Was the top bed up or down? A Up.

Q But the lower bed was down? A Yes, sir.

MR. EDWARDS: The upper bed folds up against the wall, your Honor, but the lower one doesn't, as I understand.

BY THE COURT:

Q The lower one does not fold? A No, sir.

BY MR. PALMIERI:

Q Now, Mr. Rothman, do you remember when Mr. Strauss came into the cell and took Napolitano and Filloa out, and, finding you right there, said, "Mr. Rothman, do you know anything about this case?" And you said, "I don't know nothing about it." A No, sir; I said, "I know all about it, and I'll tell the truth, what I seen."

Q Well, did you tell them when you would tell the truth?

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A I told the truth and I will now.

Q Did you tell Mr. Strauss the truth then? A Yes, I told him that I would tell the truth, that I would corroborate the story right then.

Q And was Maestry present at the time? A No, sir.

Q Didn't you just say that he was at the door? A He wasn't there when I said "I'll tell the truth."

Q Oh, then he wasn't there when you said that? A No, sir.

Q Where was Maestry at that time? A The three of them went away, after they beat him up.

Q Didn't you say, a minute ago, that when Keeper Strauss came in to take those two men out of the cell, who had beaten up Mr. Bennie Schneider, that Maestry was in front of that cell? Didn't you say that? A Yes.

Q Then Mr. Maestry was in front of that cell when Schneider came there? A When Schneider came there?

Q I mean when Strauss came there? A Yes.

Q And at that time when he came there did Strauss ask you any questions while Maestry was there, and in his presence? A Did he ask me any questions?

Q Yes? A Yes.

Q What did he ask you? A He said, "Did you see anything?" And I said, "Yes, I seen it all."

Q And Maestry was there? A I don't know whether he was there or not, when Strauss asked me that, because the three of

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them run away.

Q Did you hear what Maestry said? A No, sir, because the three of them ran out. Two of them were taken out of the cell.

Q Two of them were taken out of the cell? A Yes, sir; after Strauss took them out the three of them walked away from the cell.

Q Now, how about Maestry? Did he speak to Mr. Strauss?
A Which one?

Q Frank Maestry? A I didn't hear him speak to him.

MR. PALMIERI: That's all.

MR. EDWARDS: Now, Mr. Palmieri will you be good enough to show me where that is that you read into your question?

MR. PALMIERI: Did I say I read it into the question?

MR. EDWARDS: Is it there? (Indicating ~~the~~ a book).

MR. PALMIERI: I am not answering your questions.

MR. EDWARDS: Then I offer this book in evidence.

MR. PALMIERI: I have no objection to it, but I have got a right to read from any book when I am cross examining, but I don't claim there is anything in the book.

MR. EDWARDS: But you gave the impression to the jury that it was in the book when you appeared to read from the book in asking your question.

THE COURT: I do not think the book is admissible, and I will exclude the book. But, if counsel claimed that there was something in the book that is pertinent in the case, why, then, I

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would admit it, to show that it was not so. But counsel says that he never intended to create the impression that the statement was written in that book, so, therefore, it is unnecessary to put the book in evidence.

MR. PALMIERI: Oh, yes, I beg your Honor's pardon about the book..

THE COURT: Now, let us have a clear understanding about it. Don't leave anything in doubt. That book is not admissible in evidence against the defendants. The entries made by a third person cannot be used against them. The only purpose for which it could be offered would be that it contains a statement alleged to have been made by this witness, and even then it would not be admissible in evidence.

Any further questions?

MR. PALMIERI: Will your Honor permit me to ask your Honor a question?

THE COURT: Well, I don't think you need any help from the Court. That book is not admissible on any theory that I can conceive of, except for one purpose. If there was a statement there alleged to have been made by this witness, the book might be shown to the jury, to show that the statement was not contained in the book, but the book itself is not evidence.

MR. PALMIERI: All right, sir.

THE COURT: Unless this witness wrote in the book. Any writing or statement made by him would be admissible.

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MR. PALMIERI: That is all, sir.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q Now, just what was it that Maestry did when he first came to the door, and called Schneider a District Attorney's man and a rat. What did he do, Frank Maestry? Just to clear this matter up? A What he done?

Q Yes. A When he called him a rat, Bennie Schneider didn't listen to him.

Q No. Just tell me what Maestry did? A He wanted to get right in the cell, which I held my hands out, (Illustrating) and stopped him, and pleaded to him and I said, "Please, Frank, leave him alone, which he is going away Tuesday," and he said, "Well, if he goes away Tuesday, I've got to beat him up before he goes down for trial" and so Frank pushed me on the side, and he come over and threw Bennie on the side of the bed, and the other two throwed bowls at him.

Q That is, Maestry himself took hold of Bennie and threw him down on the bed? A Yes, sir.

RE-CROSS EXAMINATION BY MR. PALMIERI:

Q Now, we have Maestry throwing him on the bed, have we?

MR. EDWARDS: Yes, and he said that in the first instance.

BY MR. PALMIERI:

Q And then Maestry walked out after he threw him on the bed? A Yes. And he said something in Italian. (The witness speaks in Italian.) I didn't understand what he meant.

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Q Now, have you forgotten anything at all? A No, sir.

Q You haven't talked it over with Mr. Bennie Schneider? A No, sir; not a word. I've got my own troubles.

Q Well, you have been with him in a cell since the nineteenth of June, haven't you? A No, sir.

BY THE COURT:

Q How long after the assault did you stay in the same cell with him? A We went up to 54th Street Court right away, the same day.

Q And are you in the 54th Street Court Prison together? A Yes, sir.

Q In the same cell? A No, sir; on the same tier.

Q And you see him every day? A Yes, sir.

BY MR. PALMIERI:

Q And yet you never talked with him about this case? A No, sir; because I never had it in my own mind. I have my own troubles.

FREDERICK FASSIG, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Mr. Fassig, you are a keeper of the City Prison? A Yes, sir.

Q And you were such keeper on the nineteenth day of June?

A Yes, sir.

Q Do you recollect what cell this defendant Maestry was con-

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fined in on that day? A Yes, sir.

Q What cell was it? A 205.

Q And what cell was Napolitano in? A He was in 211.

Q And what cell was Fiola in? A (No answer).

BY THE COURT:

Q How far apart are the two cells that you have just mentioned? A About half a block. In walking around, it is a circle of about half a block.

MR. EDWARDS: That is, the cell tier is divided into two sections, the north end and south end?

THE WITNESS: Yes, sir.

BY THE FOREMAN:

Q About how many feet?

THE COURT: Well, he can come to that later.

BY THE COURT:

Q Now, were these two cells in the same section of cells?

A No, sir; they are not. One is on the west side, 205, and 211 is on the east side of the tier.

BY MR. EDWARDS:

Q But they are both on the south end of the same tier? A Yes, sir.

Q And there is a passageway running along, a gallery, on the outside of the cells? A Yes, sir.

Q And then you come to the passageway that cuts the tier in half? A Yes, sir.

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Q And then you come to another gallery running around the other side? A Yes, sir.

Q So that to get from one cell to the other, you would have to walk around that circle? A Yes, sir.

Q Now, what cells were Rothman and Schneider in? A 210.

Q And that was how near to 211? A Well, it is a space of one or two feet.

Q Right next door to it? A Yes, sir.

Q And 205 was nearly as far from 210 as it was from 211? A Yes, sir; on the opposite side.

Q Now, just tell us how you gave the prisoners their breakfast on the morning of June 19th. You were a keeper on that tier, that morning? A Yes, sir.

Q Now, please tell us? A That morning the cell doors were opened. We generally don't open the cell doors until we receive an "All right" bell, which shows that everybody is on duty and then after that, of course, the tier man deposits the breakfast before each cell. But the breakfast is served around first.

Q Now, who was on that tier with you? A George Strauss. That is done by the tier man.

BY THE COURT:

Q Well, you say it was put all around. You put it right outside of the cell doors, do you? A Yes.

Q And in what kind of a receptacle or receptacles is the food or drink put? A Well, we call them "Nappies", big heavy

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bowls.

Q And is there one bowl for each prisoner? A Yes, sir.
Each one gets a separate bowl.

Q And the food is put in that? A Yes, sir; and then, of course---

Q Each prisoner opens the door and takes his bowl inside?
A Well, prior to that the inmate in every cell places his cup, which he has in the cell, by the cell door.

Q Outside? A Yes, sir; right by the cell door, inside.
And the tier man goes around with a spout bowl, and pours in his coffee, and then, after that, when the keeper who is on the tier knows that everybody has been served, why, then, they go right around the tier and open the cell doors, and they take in their food.

BY MR. EDWARDS:

Q And that is done after the food is all distributed? A Yes, sir.

Q And how long are the cell doors kept open? A Until nine o'clock.

BY THE COURT:

Q Are those cups made of the same material as the bowls?
A Yes, sir; very thick, heavy china.

BY MR. EDWARDS:

Q And did you have all the cell doors open on that morning?
A Yes, all but one, cell 203.

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Q And that was around the other side of the block? A That was two cells away from Frank Maestry's cell.

Q Well, now, what happened while you were opening that cell door? A Well, there was some difficulty about getting that lock open, that morning.

BY THE COURT:

Q Which one was that? The door of Maestry's cell? A No, sir; 203, another cell near his. And it seems that the lock was not in proper working order.

Q Well, that was not the lock on the cell door in which Bennie Schneider was? A No, sir.

BY MR. EDWARDS:

Q Now, what happened while you were working at that lock? A So my partner said, "You had better go down and get another key."

Q Now, don't tell that. A Well, finally we unlocked the cell, and, while doing so we heard some screams of "Help", and of course we rushed to the scene as quick as possible.

Q Where did you go to? A We ran right around to where we heard the screams from, 210 cell.

Q That was the cell occupied by Schneider and Rothman? A Yes, sir.

Q And when you got there what did you find? A Well, the crowd had congregated, all the inmates on the tier. Of course, myself and my partner both ran into the cell, and, of course, we

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saw that Schneider was laying on the cot, and complained of being assaulted.

Q And who else was there? In there, if anybody else? A Well, when we got there, any amount of them ran out.

Q Who got there first, you or Strauss? A Strauss.

Q Where was he when you got there? A He was in the cell.

Q And who was in the cell with him? A Well, it's hard to say, just to discriminate. They were all there, any amount of them, all the inmates, and I, being a new man on the tier, that morning, really didn't know the inmates on the tier.

Q Did you see Frank Maestry there? A Yes; and I noticed all of them around the cell door inside.

Q Did you see Napolitano there? A Yes.

Q Were they around that cell when you got there? A Yes, sir.

Q Now, what did you do? A And we made the crowd disperse and asked him who struck him, who assaulted him.

Q Now, you cannot give us a conversation with him, unless the defendants were there. Were these two men there when you talked to Schneider? (Indicating the defendants) A No, sir.

Q Well, then, you can't tell us what Schneider said to you. But what did you do with the other prisoners? A Why, we made them continue on your walk, made them get away from the cell, and by that time the Acting Head Keeper came on the scenes.

Q And what was done? A And cross questioned the inmate

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that was assaulted.

Q Now, what was done? Not any conversation. The law will not allow you to give the conversation, Fassig. Where did you take Schneider? A By orders of the Deputy Warden, he was removed to the other tier.

BY THE COURT:

Q Well, did you take him to see Dr. Lichtenstein? A That was done later on.

BY MR. EDWARDS:

Q Did you go with him to Dr. Lichtenstein? A Yes, sir.

Q Now, when you got into that cell, what was the condition of Schneider, as you saw him? A Why, from appearances, I considered that he was somewhat abused.

Q Well, tell me what you saw? A Well, his eye was somewhat out open at one side, and his body looked somewhat red, as if he had been struck, either by hand or by---

Q Well, don't tell me what he had been struck with. How did his body look? A It looked very red.

Q And how was he dressed? A Why, he was only in his under shift, partly torn off him.

Q Partly torn off him? A Yes, sir.

Q Did you notice anything else about him? A Well, in a very excited condition, of course.

Q Very excited, was he? A Yes, sir; crying.

Q He was crying, you say? A Yes, sir.

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Q Have you told us all about this, now? A I believe I have, District Attorney.

Q Did you see Frank Maestry? A Yes, I saw him on the tier.

Q Did you see anything about him that attracted your attention? A No, sir.

Q Did you notice anything about Napolitano? A No, sir.

Q Or Fiola? A No, sir.

Q They didn't have any marks or cuts or bruises on them? A No, sir; not that I saw.

Q By the way, where was Mr. Strauss, the other keeper? A He is away sick. He reported sick, yesterday, and was ordered home by the Doctor, I believe. He was on duty in the morning.

Q And he hasn't been back, to-day? A No, sir.

MR. EDWARDS: You may examine.

CROSS EXAMINATION BY MR. PALMIERI:

Q Did you examine Napolitano with a view of ascertaining what his injuries were? A No, sir; because I didn't think they were of any consequence.

THE COURT: Strike that out. I do not see how that is material. The defense is not self defense, is it?

MR. PALMIERI: No, sir.

BY MR. PALMIERI:

Q By the way, when you got there, Maestry told you what had occurred? A Who had told me?

Q Did you talk with Mr. Frank Maestry? A No, sir; I didn't

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talk with him.

Q You didn't talk with him at all? A No, sir.

Q Oh, Strauss was the first man to get there, wasn't he?

A Yes, I believe Mr. Strauss spoke to him.

Q And he is sick to-day, I think you said? A Yes, he is sick.

MR. EDWARDS: It is conceded on behalf of each defendant that the defendant John Napolitano was convicted by his plea of manslaughter in the first degree, on June 11th, 1915, and that Frank Maestry pleaded guilty in the Supreme Court on June 3rd, 1915, of the crime of manslaughter in the first degree, and that John Napolitano was sentenced on his plea to Elmira Reformatory, and that Frank Maestry is now awaiting sentence. I think that is a correct statement, is it not?

MR. PALMIERI: Yes.

MR. EDWARDS: The People rest.

THE COURT: Well, I would suggest, Mr. Edwards, that, if there is a claim that any weapon was used other than the hands and feet-

MR. EDWARDS: The proof is that bowls were used.

THE COURT: Well, then, why not produce some of those bowls before the jury. I will allow you to do that. That may be done this afternoon, after recess.

MR. EDWARDS: Yes, sir.

MR. PALMIERI: May I be permitted to see the face of Mr. Bennie Schneider again, because, if he claimed that he was in-

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jured by any of those instruments, I would like to see whether there are any traces of it.

THE COURT: Yes, you may recall him.

MR. EDWARDS: I will produce one of those cups and bowls this afternoon.

THE COURT: Well, do you wish to have Schneider recalled before or after recess?

MR. PALMIERI: I would like to see him right now, sir.

THE COURT: Very well. He may be recalled.

BENJAMIN SCHNEIDER, being recalled by counsel for the defense for further cross examination, testified as follows:

CROSS EXAMINATION (Continued) BY MR. PALMIERI:

Q Mr. Schneider, you say you were hurt by three men on that day. Will you show me any marks that you claim are the result of those injuries, on your face or body, to-day? A I had a black eye, and my lip cut.

Q No, I mean to-day.

BY THE COURT:

Q You are not suffering now from any of the injuries that were inflicted upon you on the nineteenth of June, are you? A Well, I was in the hospital nineteen days.

MR. PALMIERI: Now, show me some marks, if there are any.

BY THE COURT:

Q Are there any marks that you can show? A I don't know.

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May be on the back there is a mark from the bowl that I got in the back, and may be it is healed up now.

BY MR. PALMIERI:

Q But you have no mark on your face to show where a bowl struck you? A No, sir.

Q Now, you say that a bowl struck you on the back? A Yes, sir.

MR. PALMIERI: Now, may I see this man's back, where he says he was struck in the back by a bowl?

THE COURT: Yes, you may see this man's back. He may remove his clothing.

THE WITNESS: Right here, some place. Of course I couldn't see my back.

BY MR. PALMIERI:

Q Now, where do you claim you were hurt? A I was hurt right here. I was nineteen days in the hospital. I only came from the hospital a week ago.

THE COURT: Now, will you stipulate that there is no mark visible on his person now?

MR. EDWARDS: Well, the point indicated by the Doctor is about the shoulder blade, above the right shoulder blade, and also at the fourth rib. And there is a mark, a very decided mark, which is a healed abrasion. (Indicating).

MR. PALMIERI: Do you call that a healed abrasion?

MR. EDWARDS: I do. And there is no mark over the fourth

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rib on the right side.

THE COURT: Well, the jurors have made their observations and they may determine whether there is any mark or not.

BY THE COURT:

Q Now, you said something about the hospital. I understood you to say that you had just come out of the hospital? A Yes, a week ago.

Q And how long had you been there? A Nineteen days.

Q Well, you didn't go into the hospital then on the 19th of June? A No, sir.

Q You didn't go to the hospital until twenty-nine days ago? A Yes, sir.

THE COURT: That would be about what day in July?

MR. EDWARDS: You came out a week ago? yesterday, did you not?

THE WITNESS: Yes, sir.

BY MR. EDWARDS:

Q And do you say that you went to the hospital on account of the injuries that you received on that day? A No, sir.

Q That hospital visit had nothing to do with this beating? A No, sir.

Q Had nothing at all to do with it? A No, sir.

Q The day after this happened, or the same day, you were transferred to the 54th Street Prison? A Yes, sir.

Q And Rothman was also transferred to that prison? A Yes,

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sir.

Q And you didn't go to the hospital until July, about the 8th of July? A Yes, sir.

THE COURT: Well, he says that his visit to the hospital was not connected with this case.

BY MR. RAMO:

Q How many bowls were you struck with, Mr. Schneider? A I couldn't say which bowls hit me. They were all throwing them, the three of them.

THE COURT: Now, Mr. Edwards, I suggest that you do not rest until two o'clock.

MR. EDWARDS: Yes, sir; I will produce one of the bowls and cups at two o'clock.

THE COURT: Very well.

(The Court administed the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess until two o'clock.)

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AFTER RECESS.

THE COURT: (Addressing the defendant Napolitano) Where is your attorney?

MR. PALMIERI: If your Honor please, he has asked me to try these two defendants together, with your Honor's permission, to represent them both.

THE COURT: Very well. You may ask the defendant Napolitano whether he is ready to go on with you, without his own lawyer?

MR. PALMIERI: I did ask him and he says he is perfectly satisfied.

THE COURT: Well, let the Interpreter ask him.

THE INTERPRETER: Yes, he says he is willing.

THE COURT: I only do that to keep the record straight, so that there may be no irregularity, Mr. Palmieri.

MR. PALMIERI: Very well, sir.

FREDERICK FASSIG, being recalled by the District Attorney, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Mr. Fassig, have you produced at my request a cup and a bowl such as you use in the Tombs to feed the prisoners? A Yes, sir.

Q This which you now hand me is one of the cups and this is one of the bowls? (Indicating) A Yes, sir.

Q And are they the same kind of bowl and cup as were used in feeding the prisoners on the second tier on the 19th of June?

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A Yes, sir.

Q They were all alike? A Yes, all alike.

MR. EDWARDS: I offer them in evidence.

MR. PALMIERI: Well, if your Honor thinks they are proper evidence, I won't object.

THE COURT: Do you know that the Statute defines assault in the second degree as an assault that results in grievous bodily harm, with or without a weapon, or an assault with a weapon likely to inflict grievous bodily harm, even though, in fact, it does not inflict it.

MR. PALMIERI: Well, we have the opinion of the doctor that the injuries were not grievous injuries.

THE COURT: Not only the opinion of the doctor, but the evidence. I said that on the evidence, considered only as regards the injuries, I would be obliged, as a matter of law, to say that there was not grievous bodily harm. Now, this is another branch of the case.

BY MR. ~~FASSIGNI~~ EDWARDS:

Q Now, Mr. Fassigni I omitted to ask you, this morning, when you went into this cell in which you found Schneider, on the morning of the 19th of June, did you find anything in the cell besides the man? A Well, broken crockery.

Q Broken crockery? A Yes.

Q Whereabouts did you find it? A It was scattered all around the cell and also outside of the cell door, on the tier.

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Q How far out? A Well, the tier is only about---

Q Only a narrow gallery? A Yes, about three or four foot.

BY THE COURT:

Q By the tier, you mean the passageway that runs in front of all the cells? A Yes, sir.

Q And what cell was this that you went into? This was the cell in which the complaining witness was confined? A Yes, sir.

Q It was his cell? A Yes, sir.

Q And not the cell of these defendants? A No, sir.

BY MR. EDWARDS

Q Can you tell me how many of these cups and bowls were broken? A Well, I should judge about two of each.

MR. EDWARDS: That's all.

CROSS EXAMINATION BY MR. PALMERI:

Q Did the cell of Napolitano and Fiola adjoin that of Schneider? A Yes.

Q Well, the broken crockery was between the cells? A It was scattered out in front of the cell. There was more broken crockery in the cell of Schneider than there was out on the tier.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q Can you give us an idea of the size of the pieces of broken crockery that were found outside? A Well, some were larger and some were smaller, and, being that the floors are concrete, it didn't take much violence to break them.

Q If you throw one of these on the floor, it breaks? A

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A Yes, sir.

MR. EDWARDS: They are offered in evidence, if your Honor please.

MR. PALMIERI: No objection.

(They are admitted and marked People's Exhibit 1, the cup; and People's Exhibit 2, the bowl.)

MR. EDWARDS: The People rest.

THE COURT: I will submit this case, in view of this additional proof, on assault in the second degree and assault in the third degree, Mr. Palmieri.

MR. PALMIERI: Well, I make the formal motion, at this time, that there is no evidence tending to establish that any assault in the second degree was committed by any of these defendants, assuming that the assault was committed by them; and that it appears established now by the evidence of the prosecution, that no grievous bodily harm, as a matter of medical testimony, was inflicted upon the body of Mr. Schneider.

THE COURT: Well, that would make it assault in the third degree, if there was an assault, unless there was a weapon used. Now, if a weapon be used, or an instrument or force capable of, or likely to produce grievous bodily harm, it is assault in the second degree. I will read the words of the Statute to you, Mr. Palmieri. The fourth subdivision of Section 242 says:

"A person who wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to

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produce grievous bodily harm, is guilty of assault in the second degree."

Now, if there was an assault committed with a bowl, even though the bowl did not strike the complaining witness, it would be assault in the second degree.

MR. PALMIERI: Well, I respectfully except.

THE COURT: That is a question of fact for the jury, as to whether that bowl was used or not. But, so far as the injuries are concerned, the case would be simply assault in the third degree.

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THE DEFENSE.

JOHN J. HANLEY, Warden of the City Prison, a witness called on behalf of the Defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q Now, Mr. Hanley, you are the Warden of the City Prison, and as such receive complaints, and, under the rules of the City Prison, impose punishments, after hearing both sides as to what should be done on those complaints? A Yes.

Q And do you remember having a hearing in the case of Bennie Schneider in the Tombs on the 20th day of September of this year?

MR. EDWARDS: I object to that.

THE COURT: Objection sustained.

MR. PALMIERI: Now, may it please your Honor, I propose to prove that, for a long time, Bennie Schneider---

MR. EDWARDS: I object, if your Honor please, to this offer of proof. He should ask questions, and not say what he intends to prove.

THE COURT: I think he is within his rights.

MR. PALMIERI: I propose to show, may it please your Honor, the conduct of Bennie Schneider while on that tier, for a long time prior to this assault; that he was troublesome for a long time, calling out to other prisoners bad names, and others on the tier.

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THE COURT: Well, that might be proper if it was claimed that he was a man of good character, but there is no pretense here that he is a man of good character. That is not admissible in evidence at all.

MR. PALMIERI: Very well, then, I respectfully except. What I wanted to show was---

THE COURT: I understand. And I have said that this is not proper proof. I have sustained the objection of the District Attorney to that question, and you may ask any other question.

MR. PALMIERI: Well, I would like to---the only object of asking any further questions would be to prove the very thing that your Honor has excluded.

THE COURT: If any witness here has made any statement to the Warden which is contrary to any statement made here, to-day, you may prove that.

MR. PALMIERI: I want to do that, sir. Schneider says he was punished innocently.

THE COURT: Well, that really has nothing to do with this case. There defendants had no right to assault Schneider, if they did assault him, except in self defense.

MR. PALMIERI: Yes, that is a correct statement of the law, but we want to show that we were assaulted first.

THE COURT: Well, that is a question of fact, concerning which the Warden knows nothing, as I understand it.

BY THE COURT

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Q Do you? A No, sir.

MR. PALMIERI: But we want to show that he did it to other prisoners.

THE COURT: No, this is not competent.

BY MR. PALMIERI:

Q Is Keeper Strauss under your supervision? A Yes, sir.

Q And where is he, to-day? A He's away, off duty.

Q Is he a sick man? A The doctor sent him away yesterday?

Q Because he was sick? A Yes, sir.

Q And, therefore, he is unable to be in Court? A Yes, sir.

MR. PALMIERI: Thank you. That's all.

MR. EDWARDS: That is all, warden.

JOHN BROOKS TAYLOR, of 238 West 52nd Street, a witness called on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q Mr. Taylor, I wish you would speak loud enough for the Judge and the last juryman to hear you, so that we can all hear you. You are an inmate of the City Prison? A Yes, sir.

Q And you happen to be so unfortunate as to be charged with a crime? A Yes, sir.

Q And you haven't been tried yet? A No, sir.

Q You are awaiting trial? A Yes, sir.

Q And you have been there since the nineteenth of June or long prior to that? A Yes.

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BY THE COURT:

Q How long have you been there? A I have been there going on three months, your Honor.

Q But I mean before the nineteenth of June? A I came there about the seventeenth of May.

Q And what tier were you on? A The second.

Q The same tier as the defendants? A Yes, sir.

BY MR. PALMIERI:

Q Where is Maestry's tier with regard to Schneider? A On the second.

Q All on the same tier? A Yes, sir.

Q Now, Mr. Taylor, can you state to the jury what you observed on the nineteenth of June, without my asking you a single question? A Yes.

Q Just go ahead. A This morning, after we come out from the cell, we were walking around, and I was walking with Maestry and we heard shouts of "Help" and Maestry ~~exit~~ stepped ahead of me and run around to the cell where the hollering came ~~thru~~ through from, and Maestry separated the four men that were fighting on the threshold of the cell, and I helped, too, to separate them, and the keeper came and I walked away, and Maestry just stayed there.

Q Now, you say that Maestry ran towards where the cries of "Help" came from? A Yes, sir.

Q And was he with you on the tier? A Yes, sir.

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Q And where were you with respect to these cells, when you heard the shouts for help? A Right opposite, on the opposite ~~xxxx~~ side.

Q Is that where Maestry's cell is? A Yes, sir.

Q On the opposite side? A Yes, sir.

Q And did you and Maestry run to the cell where the shouts of help came from? A Yes.

Q Now, when you got there, did you help in separating, as well as Maestry? A Yes.

Q Now, who were the men that were fighting? -Can you give the names? A (No answer).

BY THE COURT:

Q Did you go into the cell? A It wasn't in the cell, your Honor, the fight, it was on the threshold, in the doorway of 210.

Q Whose cell was that? Do you know? A Schneider's.

BY MR. PALMIERI:

Q Now, Schneider was one of the fighters, was he? A Schneider and the Italian fellow over there (Indicating the defendant Napolitano.)

Q Napolitano? A Yes. And the little fellow that stays in the cell with Schneider.

Q That is, Rothman, is it not? A Yes; Rothman and Schneider and this Italian fellow and another Italian fellow.

Q And do you know whether the other Italian fellow was Fiola, the cell mate of Napolitano? A Yes.

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Q Can you describe how they were fighting? A They were struggling around, and everybody was punching each other.

Q Did they have a weapon of any kind in their hands? A No, sir. There were pieces of broken cups on the tier there, on the floor of the tier.

Q But they didn't have anything in their hands? A No, sir they were only fighting with their hands.

Q And you don't know who caused the breakage of the crockery? A No, sir.

CROSS EXAMINATION BY MR. EDWARDS:

Q Have you ever been convicted of any crime? A Yes.

Q What was it? A Petty larceny.

Q When? A A year ago.

Q Is that the only conviction? A No; I have been convicted twice of petty larceny.

Q When was that? A Three years ago.

Q I think you told Mr. Palmieri here, a moment ago, that you had never been convicted of any crime? A No, I meant this case that I am arrested for now.

Q Well, you are locked up on another charge on which you haven't been tried? A Yes, but not even indicted.

Q Now, just tell us what these men were doing when you got to the entrance of the cell? A 210 cell?

Q Yes. A There was a free for all fight when I got there.

Q And who was fighting? A The four men.

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Q And what were their names? A Schneider was one of them, and Schneider's cell mate.

Q What was his name? A I don't know their names.

Q You just used it to Judge Palmieri. A Well, I've forgotten it again.

Q You have forgotten it already? A Yes, sir; and two Italian fellows.

Q What are their names? A I don't know what their names is.

Q Both of them are in the room? A Yes; there is one of them there. (Indicating)

Q The other one isn't here? A No, sir.

Q And anything---was there anything about the other one that would lead you to recognize him if you saw him again? A Yes, I know him from on the tier.

Q Well, who was hitting the other? A They were all hitting each other.

Q Did you see any one strike Schneider? A No, sir.

Q Did you see any one strike Napolitano? A No, sir.

Q Did you see the other Italian strike any one? A No, sir; they were just wrestling when I got there.

Q You didn't see any blows struck? A No, sir.

Q And where was Schneider when the keepers got there? A He was in between them all.

Q Now, if I were to tell you that one of the keepers said

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that when he got there, he found him on the bed, inside of the cell, would that agree with your recollection of what occurred there?

MR. PALMIERI: Well, that was after the fight was over, I submit.

THE COURT: Well, I do not think the question is proper, anyhow. You must not ask him to characterize the testimony of any other witness. He is to give his best recollection.

BY MR. EDWARDS:

Q Well, did you see any one strike Schneider while you were there? A No, sir.

Q Now, on which side of the tier were you when you heard these cries? A On the opposite side.

Q The east side? A The east side, yes.

Q And was anybody else on the tier with you and Maestry? A Yes, the whole tier was walking around, in the morning.

Q And where were the keepers? A They were down there, at their desk. The desk is on the opposite side, in the middle of the tier.

Q On the same side that 210 is on? A Yes.

Q The desks are over there? A Yes, sir.

Q Just where the fight took place? A No, sir; not exactly. At the end of the tier, at the center.

Q And could they see the fight from where they were? A No, sir.

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Q Could you see it from where you were standing? A No, sir.

Q And there were no keepers on your side at all? A No, sir.

Q About opposite what cell were you? A 207, and I heard this holler for help.

Q And there were no keepers near you? A No, sir.

Q Weren't there two keepers opening the lock of 205? A No, sir.

Q There was no one there? A No, sir.

BY THE COURT:

Q What time did you get out of your cell in the morning? A About nine o'clock, your Honor.

Q Well, what time do you get breakfast? A Before the cell is opened.

Q Well, what time? A I don't know, your Honor.

Q About seven o'clock, don't you? A Yes, sir.

Q And after you finish breakfast, the bowls and things are taken away before you are locked up? A Yes.

Q Well, how did you happen to be out in the corridor before breakfast was over? A The tier was out for a walk then.

Q Well, that must have been after nine o'clock? A I'm not positive of the time. It was slightly after breakfast. The doors were open, and we were walking around. Some times the doors are opened early and some times late.

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Q Well, what is your regular exercise hour over there?
From eleven to twelve? A No, sir; from about half past eight to
half past nine in the morning. I am not positive of that, your
Honor.

Q Well, you have been there three or four months, you say?
A But I am not positive.

BY MR. EDWARDS:

Q What time did this thing happen, did I understand you to
say? A I don't know; about ten minutes after the doors were
opened.

BY THE COURT:

Q Well, the doors are open at seven o'clock, are they not?
A Well, then, your Honor, if that is so, it was about ten minutes
past seven.

Q Well, you said it was around nine o'clock? A Well, I
didn't really notice the time.

Q Well, you cannot take your bowls of food in until the
doors are opened? A No, sir.

Q Now, your door is opened so that you can take in your
bowl? A Yes, sir.

Q At seven o'clock in the morning? A Yes, sir.

Q And then they are left open until nine, the doors? A Yes,
sir.

Q But you take your exercise after that? A As soon as
breakfast is set down they open the door, and you can take it,

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or walk around.

RE-DIRECT EXAMINATION BY MR. PALMIERI:

Q Now, when you said to the prosecutor that you saw no blows struck, do you mean that you couldn't distinguish the blows?

A They were all wrestling, Judge, and hustling around as if they were trying to push out of the cell, or into it.

Q It was a general melee? How did you describe it Before?

A It was a free for all fight.

BY MR. EDWARDS:

Q Didn't you tell me just now that it was a wrestle and no blows were struck? A Yes.

Q Well, now, what do you mean? Do you mean what you have just told Judge Palmieri, or what you have told myself? A Well, it was a free for all fight. They were all trying to strike blows.

Q Did you see any one else strike anybody else? A No, sir.

Q Or kick any one else? A No, sir.

Q Did you see any one kick at anybody else? A Yes, sir.

Q Who was that? A I don't know; fists were flying and they were all kicking.

Q But you didn't see a blow struck? A No, sir; I didn't see nobody get hit.

BY MR. PALMIERI:

Q Well, you mean that you can't tell the name of any one

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that you saw struck a blow?

MR. EDWARDS: I object to that.

BY MR. PALMIERI:

Q Now, tell us what you saw.

THE COURT: Well, he has already told us that. You may ask him if he wishes to modify the statement.

BY MR. PALMIERI:

Q Well, can you explain your statement any clearer, Mr. Taylor? A I followed Maestry around to the cell, and these four men were all struggling, they were all punching and kicking at each other, but no one seemed to get hit; and, when Maestry got to them, he tried to pull them away and said, "Why, you're crazy" and I tried to help him pull them apart and I walked away when the keeper came and Maestry stood there.

Q And Schneider wasn't on the bed at that time, was he?

A No, he was at the door.

Q And where did the fight occur? A At the threshold of the cell.

Q And not on any bed? A No, sir.

BY MR. EDWARDS:

Q Who was the keeper that got there first? A The old keeper.

Q Well, what was his name? A I would know his name if I heard it, but I don't remember it now.

Q Well, who came after the keeper that first came there?

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A Well, that's all I seen then. There was other keepers on the tier, but I didn't pay any attention to them.

Q Why, didn't keepers run up from every tier, and didn't the Deputy Warden come up too? A Yes, but I seen him after it was all over.

BY MR. PALMIERI:

Q Now, the first keeper that got there, and the only one that you saw at the time, was Mr. Strauss? A Yes.

Q And he is an old man? A Yes.

Q And then other keepers came? A Yes, sir.

Q But the fight was all over then? A Yes, sir.

M I K E P R E M E R, of 407 Fifth Street, a witness called on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q Mr. Premer, you are an inmate of the City Prison, you are in jail? A Yes, sir.

Q Your case wasn't tried yet? A No, not yet.

Q You have been in jail how many months? A About two months.

Q Were you there on the nineteenth of June last? When this fight occurred; were you in the jail? A Yes.

Q In the City Prison? A Yes.

Q Did you see what took place there? A Yes, I seen.

Q Just tell the jury in your own way what you saw? A First thing in the morning, when I started to walk, all the gates was

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open, then I started to walk, and then I meet that guy there, Frank (Indicating the defendant Maestry).

Q Frank Maestry? A Yes. He was in front to me, and I was walking behind him, and I heard somebody hollering, "Help, help." And he heard it and then he goes in the cell and he makes so, like that, "Don't fight." (Illustrating).

Q Do you know how many people were fighting in the cell?
A I don't know; I can't tell, because I passed there.

Q You didn't count the people fighting in the cell? A No, just I seen him, only he makes "Don't fight". (Illustrating).

Q Before you saw Frank separate the people, where did you hear the words "Help, help" come from? A The first call.

Q Do you know whether that was Schneider's cell? A No, I don't know that.

Q But you know it now? A Yes, I know it now, because I heard somebody hollering "Help" and he heard it, and he get in first and make them separate.

Q Mr. Maestry did? A Yes, I mean Frank.

Q Mr. Frank Maestry? A Yes.

Q Do you know who was x hollering for help? A I don't know who was hollering for help, and then I go away and then keepers come right away and just took them fellows.

Q Did you see Mr. Strauss? Do you know the name of the keeper that came there first? A No, sir; I don't know his name.

CROSS EXAMINATION BY MR. EDWARDS:

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Q How long have you been in this country? A I am three and a half years.

Q Where did you come from? A Austria.

Q What? A Austria.

Q Austria? A Yes, sir.

Q What part of Austria? A It is Galicia.

Q And what do you work at? A I work in a restaurant.

Q Where? A Uptown.

Q And who was your last employer? Where was your last job?

A Uptown.

Q Who did you work for? A 168th Street.

Q For whom? A Mr. England, I think his name is.

Q And how long did you work there? A About two months.

Q And how often have you been convicted of crime? A (No answer).

Q Have you ever been convicted? A What do you mean?

Q Have you ever been tried for any crime and convicted for it? A No, no trial yet.

BY THE COURT:

Q Were you ever in prison before? A No, no; this is the first time.

BY MR. EDWARDS:

Q When did you first meet Frank Maestry? A (No answer).

MR. EDWARDS: Can we have an interpreter? I think he will understand the questions better.

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THE COURT: Yes.

(Samuel Meratchnek is duly sworn to act as interpreter).

BY MR. EDWARDS:

Q Now, when did you first meet Frank Maestry? A Which man do you mean?

Q That man there? (Indicating the defendant Maestry) A I didn't have any conversation with this defendant when I met him first. He was going first and I was going after him and then the keeper opened the door, and then we heard some quarrel was there.

BY THE COURT:

Q No, that is not responsive. He was asked when was the first time he ever saw Frank Maestry. A The first time I saw him in jail.

Q Well, what day? How long before the nineteenth of June? A I couldn't tell you.

Q How long before the day on which this fight occurred? A About five days or a week.

BY MR. EDWARDS:

Q What tier is your cell on? A Second.

Q And that is the tier on which all these defendants and Schneider and Rothman were on, too? A They were on the same tier, but they were on one end and I was on the other end.

Q What was your cell number? A 229.

Q What time did this fight happen? A After seven o'clock

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in the morning.

BY THE COURT:

Q Well, how close to seven o'clock? A About fifteen minutes after seven o'clock.

Q Well, how do you fix that time? A Because the keeper opened the cell at that time. That was seven o'clock in the morning, and from that time until this occurred, I think it was only a quarter of an hour.

BY MR. EDWARDS:

Q And had you finished your breakfast? A Yes, sir.

Q And were you out, taking a walk after breakfast? A Yes, sir.

Q Now, where were you walking when you saw Frank? A When I left my cell I went from my cell up to the other corner, and that's where this quarrel came in.

Q Well, outside of what cell were you when you saw Frank Maestry, just a little ahead of you? A From the first cell from the other corner. I think it was 212.

Q Was that on the same side of the prison as 210, where this fight was? A No, I was on this side and this happened on the other end? (Illustrating).

Q Why, this happened at cell 210, didn't it? A About 210 or 212; I couldn't remember that exactly.

Q Were you standing at 212 when you saw this fight? A I was within about two doors from that cell when this happened.

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It must have been about 212.

Q And where did Frank come from when you saw him? A Frank walked ahead of me and I followed him.

Q Well, where was Frank coming from? A Frank walked out of his own cell, and he was ahead of me and I followed him.

Q What was the number of Frank's cell? A I can't remember that.

Q Well, isn't it 205? A Yes, about that.

Q Well, that is no where near 212, is it? A No, that was away. He came from his own cell and he had to walk around before he came to the other cell.

Q Did you see him coming out of the cell where the fighting occurred? A No, sir; I seen him walking ahead of me.

Q Who was he walking with? A He was alone.

Q Are you sure of that? A I am not positive of it.

Q Well, can you tell us who was with him? A No, Frank was ahead of me, not far away, and when this fight commenced he tried to prevent this fight.

Q Now, please answer my questions, was anybody walking with Frank or was he walking alone, when you saw him? A I couldn't tell you. I don't remember.

Q Well, what attracted your attention to Frank? A I heard somebody was hollering "Help, help".

Q And what did you do when you heard that shout? A Frank was ahead of me, and he went in among the fighters and tried to

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separate them, one from the other.

Q Well, which way were you and Frank walking? A Frank was ahead of me and I was following him.

Q Well, in what direction was he walking? A Why, every one was walking in one direction, and he was with us.

Q Now, you say you were near cell 212. Were you walking towards 210 or 214? A I walked away from there, and then we went over to the Bridge, and then the keeper came there and disbanded us, told us to get away.

Q Before you saw this fight, when you first heard the shout "Help, help" were you walking towards cell 214 or towards cell 220? A We walked---we passed the cell 219 at the time.

BY THE COURT:

Q Well, did you have your back to the cell that you heard the cry from or were you looking towards that cell? A I had to turn away because the keeper told me to get away from there.

Q No. But before the keeper came there, when you heard the cry of "Help" there was no keeper there, was there? A No, the keeper wasn't there.

Q Well, did that cry come from behind you or in front of you? A From in front of me.

BY MR. EDWARDS:

Q And then you went right towards cell 210, did you? A Why do you want to know whether I went to 219 or 210?

Q Well, did you walk towards the cell where the trouble

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was or away from there? A I went away from there.

BY MR. EDWARDS:

Q Well, could you see anything that happened, if you went right away? A I have seen Frank. He was ahead of me and I have seen that he went in there and tried to separate them and prevent this fight.

Q Well, where did he go? A In where?

Q Frank was trying to separate them and I walked away.

Q Well, where were they? A Right in front of the cell where the fight occurred.

Q Well, what was the number of that cell, do you know? A I couldn't tell you.

Q Whose cell was it? A They told me afterwards that the man that they had a fight with was in the cell, but I don't know.

Q And you had been there in the Tombs how long then? A About a week or so.

Q And who was in the fight? A All the people were fighting. I couldn't tell you their names. All that I could tell you is that Frank was over there, trying to separate them.

Q Well, do you see in the Court Room now any one who was in the fight? A No, sir.

Q There is not one of them in the Court Room, is there? A The only man I can tell you about is Frank.

Q Whendid you and Frank first talk about this case together?

A I didn't have any conversation with Frank; I didn't have any

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dealings with him.

Q Well, has he spoken to you at all since this happened on this morning in June? A No, sir.

Q Well, how did he find out that you saw anything of this at all? A I was, Monday, in Court when my trial was to take place; that's all.

Q No, I want to know how Frank Maestry found out that you knew anything about this case. A At the time when I came to Court, the other day, and they told me my trial was postponed to some other day, there was a man in cell 213, and I asked him, "What kind of a case has this Frank got?" And he said, "Don't you know that he was there at the time when there was fighting here?" And I told him that I was present and saw that and I told him what I saw.

Q In what part of the Court were you when you met this man that you speak of? A In Part III.

Q When you went to the cell with Frank, did you see any broken dishes or cups? A After the fight was over, yes.

Q Now, when you saw these people fighting that you say Frank tried to separate, did you see any broken dishes then? A No, I didn't.

Q Who was the first keeper that arrived there? A I couldn't tell you his name.

Q Did you see more than one keeper come? A Two of them.

Q What was the name of the second one, if you know? A I

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couldn't tell you; I don't know.

BY THE COURT:

Q Who is your cell mate? A Do you mean at the present time or that time?

Q At this time? A Solomon Hoffman.

Q Well, who was your cell mate at that time? A The same one.

Q He didn't see this trouble, did he? A No, sir.

Q He was in the cell, was he? A Yes, your Honor.

Q What time in the morning was it? A About fifteen minutes after seven.

Q Well, who told you it was that time? A Because the bell rings at seven o'clock and we were let out at seven o'clock and it took only fifteen minutes before this thing happened.

Q Well, you ate your breakfast before you went out, didn't you? A I had had my breakfast.

Q Well, how long did you take to eat your breakfast? A About ten or fifteen minutes.

Q Well, are not all the bowls collected before you are let out? A No.

BY MR. EDWARDS:

Q Did you see Schneider after the fight was over? A They showed me the man but I don't remember what happened.

Q Did you see him go down to the doctor? A No, I didn't.

Q Did you see Frank right afterwards? A I seen when the

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keeper took him and locked him in the cell.

Q Do you know John Napolitano? A No, I don't.

Q You don't know him at all? A No.

Q Did you see this man sitting there, Napolitano, that day at all? A Yes, I seen him that day.

Q Did you see him on the 19th of June? A I couldn't tell you. I don't remember.

Q Was he in that fight? A I couldn't tell you. I don't remember. I don't remember anything except seeing Frank, and they took me and locked me in the cell.

Q Well, did you see Frank walking along in front of you?

MR. PALMIERI: I object to that.

THE COURT Overruled.

MR. PALMIERI: Exception.

A Then I have seen him, I told you, and I don't remember anything more and I didn't see anything more.

FRANK MAESTRY, of 930 East 178th Street, one of the defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q Mr. Maestry, how old are you? A Twenty-three.

Q Twenty-three years old? A Yes, sir.

Q Where were you born? A New York.

Q New York City? A Yes, sir.

Q And have you lived in New York City all your life time?

A Yes, sir.

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Q You have been in jail how long now? A All told, two years.

Q Two years in jail? A Yes, sir.

Q On this same charge? A Yes, sir.

Q Well, why has it been so long to dispose of your case?

MR. EDWARDS: Well, you can put that on the record by concession, if you want to. He was convicted and the Court of Appeals reversed the conviction.

BY MR. PALMIERI:

Q Well, you pled guilty to manslaughter in the first degree after the Court of Appeals reversed the conviction? A Yes.

Q Now, can you tell this jury in your own way what took place on that day? A Yes, I can prove my innocence.

Q Well, go on. A Gentlemen of the jury, at June 19th, I was in cell 205, opposite 210, and that is the east side---the west side of 210, where Bennie Schneider is.

When the officer come around to open our side of the cells first he came to my cell and opened my cell. That was exact seven o'clock.

And when he opened our cell---I don't take any of the City Prison meals; I buy my own meals---and I stepped out myself, and walked around; and the men was walking around. Some young man named John Taylor, I walked around with him.

And we heard a couple of shouts, "Help, help" and that was near the turn, down there, the turn of the tier, and I went to

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the cells 211---no, 210--- and I seen four men fighting, punching away at each other.

Q What are the names? A Frederick Fiola, Bennie Schneider, Bennie Rothman and John Napolitano. And I tried to avoid the struggle and pleaded to them, and when the officer come there, he helped me to separate them, and I tried to talk to the officer and explain to the officer, and this Bennie Schneider implicated me, I don't know what for. That's all I know.

Q Had Bennie Schneider been a witness against you, or given any information against you or any of your friends? A No, sir; I had no hard feelings against the man.

Q So far as you know he had nothing to do with your case? A No, sir.

Q Had you had any information that Bennie Schneider was a stool pigeon for the District Attorney? A I don't know, your Honor. I have my own affairs to attend to.

Q Had you seen him in there or known him by sight? A Yes, about four months. I never talked to the man.

Q It has been stated by Mr. Rothman that you first entered Bennie Schneider's cell and then knocked him on the bed, and then stood in front of the cell with your arms folded (Illustrating) while Napolitano and the other man beat him up? A No, sir; I tried to separate them, to separate Schneider and Fiola.

Q Before they fought at all did you enter Schneider's cell at all? A No, sir; I didn't know what happened.

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Q And you don't know what caused the fight, or anything?

A No, sir.

Q You remember this fight occurred on the nineteenth of June? A Yes, sir.

Q And you were to be sentenced by Judge Shearn when? A A day or two after. I'm not positive sure.

Q And were you sentenced a day or two afterwards? A No, sir.

Q And that was caused by this case?

MR. EDWARDS: I object to that. How could he know?

THE COURT: It is entirely immaterial.

BY MR. PALMIERI:

Q Now, did you take any part in this assault, other than that of a peacemaker? A I tried myself to avoid trouble.

BY THE COURT:

Q Did you take any part in this assault other than that of a peacemaker? A No, sir.

BY MR. PALMIERI:

Q And did you, on that day, make the same statement?

MR. EDWARDS: Objected to.

THE COURT: Sustained.

MR. PALMIERI: That's all.

CROSS EXAMINATION BY MR. EDWARDS:

Q Now, Maestry, how often have you been convicted of crime?

A This is my second time.

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Q What was the first time? A Burglary in the third degree.

Q And when was that? A Eight years ago.

Q Before what Judge? A O'Sullivan.

Q Before Judge O'Sullivan? A Yes, sir.

Q And you pled guilty, after the Court of Appeals reversed the verdict of the jury on a murder charge, you pled guilty before the Supreme Court, to manslaughter in the first degree? A Yes, sir.

Q And what was the date of that plea, about? A (No answer).

BY THE COURT:

Q Well, how long prior to the nineteenth of June? That is the important thing? A Some day in May, but I cannot remember the date.

BY MR. EDWARDS:

Q And are those the only convictions that you have ever had? A Yes, sir.

Q You were on the second tier, which is the one that your counsel says is called the homicide tier? A Yes.

Q And Taylor was on that tier too? A Yes.

Q What was his cell? A 209.

Q And that was four cells from yours? A Well, I should judge so.

Q And, on this morning, what part of the tier were you walk-

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ing on? A I was walking on the part that my cell was on.

Q And did you see any keepers there? A Two cells away, 203, trying to open the door.

Q You saw them, did you? A Yes.

Q And so that you were there, and saw them trying to open the door? A Yes, when I was sweeping out my cell.

Q Well, they were right out there in this three foot gallery, weren't they? A Eh?

Q (Question repeated) A Yes.

Q And that gallery is only about three feet wide? A Yes, about.

Q And Strauss was one of the keepers, a great big man? Didn't you know him by sight? A Well, he isn't such a big man.

Q And Fassig was the other one? A I don't know him. I don't know anything about him.

Q Well, the witness that was on the stand here, the keeper who was on the stand here? A Oh, yes, he was there.

Q And how were you walking? In what direction? Towards 210 or away from it? A Well, I was on my side of the tier at the time I heard the shouts.

Q Well, were you at that time on your way, walking towards 210? A I was walking towards 210 cell.

Q And when you heard the cry did you run? A Yes, I ran to the cell.

Q And who did you see fighting? A The four defendants.

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Q And who were they? A Bennie Schneider, Abe Rothman, John Napolitano and Frank Fiola.

Q And then you did ten days in solitary confinement? A Yes, sir.

MR. PALMIERI: I object to that upon the ground that it is incompetent.

THE COURT: What is the particular thing to which you object?

MR. PALMIERI: The fact that he served ten days in solitary confinement.

THE COURT: Well, that is no evidence that he did anything there in violation of law. We are not bound by that. Mr. Palmieri wished to plead that as former jeopardy, and I told him that it did not constitute former jeopardy, that it was merely the opinion of the Warden that he had violated the rules, which is not evidence in this case, and has nothing to do with this case, and you are to decide this case on the evidence that is submitted to you, gentlemen.

BY MR. EDWARDS:

Q How long did it take you to get to cell 210? A I don't know. I didn't have a watch.

Q How far did you have to go? A Half a block, half an avenue block.

Q Why, the whole prison is only a block long? A No, sir; it's three blocks, I should judge, all around.

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Q Why, it is all built inside of one City Block. A That I didn't know.

Q Why, you have been in there for four months? A Yes, but I didn't measure the length.

Q Well, how many cells did you have to pass to get from where you were to 210? A Well, from 205 to 209, that's the last cell on this side.

Q Yes? A I should judge, four cells, and then on the other side---

Q The cells are seven feet wide? A No, sir; four feet wide. And then you get to 210 cell. At a rough guess, eight or nine cells.

Q About fifty feet? A That I don't know. I didn't measure it.

Q Now, when you got there; what did you see? A I saw four men in a clinch, fighting, punching away at each other.

Q Were they hitting each other? A Why, certainly.

Q Well, who hit whom? A Well, through the excitement they were all punching each other, and, in trying to separate them I got a few blows myself.

Q Did Napolitano strike any blows that you saw? A Well, they were all striking blows.

Q (Question repeated) A I suppose he must have.

Q Well, did you see him strike any blows? A Well, all of them were striking blows at the time.

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Q Well did you see him strike any blows? A Well, through the excitement, I couldn't say.

Q Well, did you or did you not? A No, sir.

Q Did you see Fiola striking a blow? A Well, they were all striking blows. They were so close together.

BY THE COURT:

Q Did you see Fiola striking a blow? A No, sir.

BY MR. EDWARDS:

Q Did you see any one of them strike the other? A No, sir.

Q Or kick any other person? A No, sir.

Q Well, where were they, whereabouts? A Well, at the start, when I tried to avoid the trouble, they were right in front of the cell. They all went in in a body.

Q In where? A In the cell.

Q You pushed them in? A No, sir.

Q Did any one fall down when they were in? A No, sir.

Q Did you see Strauss arrive on the scene? A Strauss?

Q Yes, the keeper, Strauss? A Yes, he tried to separate them.

Q And where were you when he got there? A I was separating the men from hitting blows.

Q And where was Schneider at the time? A They were striking blows at the time.

Q (Question repeated) A In the cell.

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Q Not outside, but inside of the cell? A Yes, sir.

Q Whereabouts in the cell? A I couldn't judge, then.

Q You couldn't see? A Yes, but on account of the excitement, you didn't notice, you couldn't notice, and the officer came and helped me to separate them.

Q Before Keeper Strauss got there, who was with you? A Nobody.

Q Where was Napolitano? A They were in the cell, punching at each other.

Q I thought you said you separated them? A Yes, I did.

Q But when Strauss came there, what were the men doing? A They were striking each other.

Q And where were they then? A In the cell.

Q And you say you were outside? A Not at the time, not at that moment.

Q Well, I asked you where each one of you was when Strauss got there? A They were in the cell.

Q And where were you? A Outside of the cell.

Q Well, how could you separate them, if you were outside of the cell? A Well, when he got there, they all broke away.

Q And where was Schneider at the time? A He was in the cell.

Q Well, didn't you see Keeper Strauss arrive on that scene, and Schneider lying on the bed, and Napolitano standing over him, striking him? A No, sir.

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Q And weren't you and Fiola standing about two feet away, just breaking away? A No, sir; I was talking to Mr. Strauss.

BY THE COURT: ?

Q Well, you could not have been speaking to him before he came there. He said when Strauss came there? A No, I separated them. I tried to separate them.

Q And how long had you been out in the corridor when Strauss arrived? A Just a few seconds.

BY MR. PALMIERI:

Q And at that time they had broken away? A Yes, sir.

THE COURT: Now, Mr. Palmieri, please.

BY MR. EDWARDS:

Q Did you see any broken china around there? A After they were fighting.

Q But you were pulling them apart. A There was no china there then.

Q But did you see any broken china at all? A Yes, out on the walk.

Q You didn't see any inside of the cell when you went in to separate the men? A No, I didn't take notice.

Q You were in there; weren't you? A Yes, I was trying to separate them.

Q You followed them in to separate them? A I didn't follow anybody. I seen four men right on the outside of the cell, punching away at each other, and I tried to separate them, and

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they all fell in a bunch into the cell.

Q How long have you known Rocco Carnivale? A I never knew him.

Q Didn't you talk with him in the Tombs? A No, sir; I didn't.

Q You never spoke to him in the Tombs? A No, sir.

Q What makes you so angry about my asking you that question? A I ain't angry.

Q Now, isn't it a fact that your friend Rocco Carnivale asked you to beat up this man because he wouldn't give him the information that he wanted as to what LaSalle was going to say about him on his trial? A No, sir.

Q Now, isn't that a fact? A No, sir.

Q Now, have you told us all that you saw in this case? A I told Mr. Strauss, the officer---

Q No, have you told us here all that you saw of this case? A Yes, sir.

Q How often had you heard Schneider called a "rat" and "The District Attorney's Informer" before this morning? A I never heard such a word.

Q You never heard a word of it in your life? A No, sir.

Q How often had you heard the keeper call out for him to get ready to go to the District Attorney's office? A I never took notice where he went.

Q Did you never hear that done? A I never took notice.

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BY THE COURT:

Q Well, did you or did you not hear it done? A No, sir.

BY MR. EDWARDS:

Q And how long have you been in the Tombs? A Four months.

MR. EDWARDS: That's all.

THE COURT: Any re-direct examination?

MR. PALMIERI: Now, I am going to ask the District Attorney to disprove the statement that he was asked to beat Schneider up, because he wouldn't give Carnivale some information that he wanted. I ~~want~~ move to strike out that question and answer.

THE COURT: No, the motion is denied. The question is perfectly proper, and, if you had desired to object to it, it should have been done at the time, but I should have overruled it, if you had objected. Now, that protects your rights.

MR. PALMIERI: No further questions.

JOHN NAPOLITANO, of 2613, corner of 103rd Street, one of the defendants, being duly sworn and examined through the official interpreter, Mr. Mustachi, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q You pleaded guilty to the crime of manslaughter? A Yes, sir.

Q And have you been sentenced yet? A Yes, sir.

BY THE COURT:

Q Whom did you kill? A man or a woman? A A man.

BY MR. PALMIERI:

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Q How old are you? A Twenty years old.

Q How long have you been in this country? A Four years.

Q Now, can you tell your own story to the jury as to what occurred on that day? A Yes.

Q Go ahead? A Five days before this, this complainant, Bennie Schneider, when I go past his cell, he will go like that with his lips (Illustrating) and he called me a Dago son of a bitch, and he did that for five consecutive days, and I said to him, "Don't do that to me again, because I will report you to the Warden". And he said, "I don't give a damn. I have got the District Attorney as a friend of mine."

Q Now, can you say that in English? A Yes.

Q Then say it in English. A I told him, "Don't do that. I tell the warden", and he said, "I don't give a dam if you tell the warden. I am the District Attorney's friend."

Q Now, go on with the interpreter. A Then, in the morning, they brought in my milk, one of these bowls full of milk, and I took it in my cell, and I and my companion in the cell drank it together.

And then I replaced the bowl outside, and, while was placing the empty bowl outside, this Bennie Schneider said, "Why are you looking, you Dago son of a bitch?" And I said, "I am not looking at you."

Then he threw this cup at me, and I do aged it, and I have got the mark yet on my elbow, on my right elbow. (Indicating)

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And then he seized hold of me, and he struck me with his clenched hand on my mouth, and loosened my tooth, and I struck him back, and we clinched each other, and exchanged blows, and then his companion came and struck me also and I shouted "Help".

Then my companion, an Italian, who is in the cell with me, came to my rescue.

Then Maestry, the defendant, came and separated us, he tried to separate us and he said, "Don't have any quarrels, be good."

And then he said, "If you do that, you will not receive any of the family, or any visitors any more."

I am innocent of having done anything wrong. I didn't know the man. I had to defend myself when he struck me.

And I am very weak in my lungs, and am a great sufferer with headaches, and I don't indulge into fights, that's all.

BY MR. PALMIERI:

Q When you were putting your dish out of your cell, did your head get near to the cell of Mr. Schneider?

THE COURT: Well, why lead the witness. You asked him to tell his story and he has told it. If you wish to bring out anything new, bring it out.

BY MR. PALMIERI:

Q When Schneider threw the dish at you and you caught it with your elbow, did you, in turn, throw a dish at him?

BY THE COURT:

Q Yes or no? A Yes, I did. I threw the dish, but I

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didn't hit him.

BY THE COURT:

Q Well, where did you throw it? A I threw it at him.

Q Where was he when you threw it at him? A By the side of my cell.

Q How far away from you? A From this chair to the end of that table. (Indicating the District Attorney's table).,

Q And how many feet is that?

MR. EDWARDS: I should say just about four or five feet.

Mr. Foreman is it not four or five feet?

THE FOREMAN: About four or four and a half feet.

BY THE COURT:

Q You were about four or four and a half feet off when you threw the bowl at him? A Yes, sir.

Q And he was not in his cell, but near your cell, you say?

A We were side by side, next to his cell.

Q You told me it was next to your cell. Now, which was it? Next to your cell or his cell? A He was in his cell and I was in my cell when I threw that dish.

Q Now, how could you throw a dish from your cell into his cell? A Oh, we placed our heads out of the cell, and we had our heads both out of the cell.

BY MR. PALMIERI:

Q Then when you began to clinch, where was Rothman? A He was near me.

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Q And where was Fiola? A He was in my cell.

Q And did he come out and take part in this mêlée? A Yes, when he saw me---when he saw I was getting hit, he came out to help me.

BY THE COURT:

Q Came out of where? A You say you didn't go out of your cell. You say that you were in your cell and Bennie Schneider was in his cell? A Then, after I threw the dish, we got out, and he punched me in the face outside of the cell, and my friend came outside of the cell to help me.

Q After you threw the dish, you came out of your cell, is that it? A He was the first one to come out. He came out and struck me and I struck him back.

Q And that was after the dishes were thrown? A Yes, sir.

BY MR. PALMIERI:

Q Well, the dishes were thrown then as a preliminary to this general mêlée, as I understand it? A Yes.

Q Now, can you say in English to the judge and jury the conversation that you had with Mr. Schneider?

THE COURT: Why, I think that is a matter of cross examination.

MR. PALMIERI: It does not matter whether he can say it in English or not. You have asked him to tell his story and he told it.

(Mr. Edwards began his cross examination in English).

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CROSS EXAMINATION BY MR. EDWARDS:

Q You speak English pretty well, don't you, John? A A little bit.

Q You have been here four years? A Yes, sir.

Q And the whole family is over here? A No.

Q Your brother is here? A Eh?

Q (Question repeated) A Yes.

Q And what was it that Schneider said to you two days before? A (No answer).

(The question is repeated by the Interpreter.)

A In American.

Q Well, what did he say to you? A He called me, "You Dago sucker, I going to kill you."

Q Well, what else did he call you, five days before? A I walked around and he saw me---

Q What did he call you? A "Dago bastard." I don't know what the hell he talk about.

Q And what did you call him? A Me?

Q Yes? A I no call him nothing, and I tell him I don't want him to talk to me.

Q Well, he's a smaller man than you are? A (No answer)

(The question is repeated through the Interpreter)

A You see me now, if he is a smaller man.

Q And is that all he called you? A A repetition of the same words all the time.

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Q You didn't call him anything whatever? A No, that's all.

Q Did you ever say anything to him? A I only said to him, "I'm going to report you to the Warden."

Q Yes. Did you ever do that? A No, I didn't. I didn't want any trouble.

Q And you never called him anything, did you? A No.

Q You never called him a "rat" in your life? A No.

Q You never called him a "stool pigeon" did you? A No, sir.

Q You never called him a "District Attorney's witness", did you? A No.

Q You never knew that he went over to the District Attorney did you? A No, I didn't.

Q You never heard him called for by the Keepers, up and down the tiers there, to get dressed to go over to the District Attorney's Office? A No. I am in my cell. I can't know what's going on.

Q And you never heard anybody call him a "rat" or a "squealer", did you? A No.

BY THE COURT:

Q How does this door open, into your cell or out into the corridor? A This way (Illustrating).

Q Well, when the door of your cell is opened, does it open out into the corridor or into your cell; does it swing in or out

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of the cell? A It slides in and out.

Q Oh, the door slides in and out? A Yes, sir.

Q In a groove? A Yes.

Q And where is the bowl placed? A Right in front of the door.

Q Well, why did you look into his cell when you were taking your food? A No, I didn't look. It was a coincidence that, when I put out my dishes, he happened to look out too, and he thought I was looking at him, and he had the cup in his hands, and threw it at me, sudden, when I was putting my dishes out.

Q And how far away from you was he then? A From one cell to the other.

Q Well, how far was that? A I didn't measure it, your Honor.

Q Well, can't you indicate, for the benefit of the jury?
A From 208 to 211.

Q And what cell were you in? A 211.

Q And he was in 211, wasn't he? A Yes.

Q Well, what did you say about 208? What has that got to do with it? A I meant to say 210 and 211.

Q Yes, they were right next to each other? A Yes, sir.

Q Well, now, where did that cup of his go, when he threw it at you? A It hit me right on the elbow. (Indicating the right elbow). I've got the mark to show, your Honor.

BY MR. EDWARDS:

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Q Did that break the cup? A It didn't break against my elbow, but against the iron railing.

BY THE COURT:

Q Well, where did the pieces go? A I don't know.

Q You never had the doctor treat your elbow, did you? A I came to the doctor afterwards.

Q But did the doctor ever treat your elbow? A After he made the charge against me, I---

Q (Question repeated) Yes or no? A Yes.

Q Well, the doctor says he never treated you? A He examined me here. (Indicating the mouth).

Q I am not speaking of your mouth now, I am speaking of your elbow. A He didn't look at it.

BY MR. EDWARDS:

Q Now, what article of crockery did you throw at Bennie Schneider. Was it like this? (Indicating the bowl in evidence)

A Yes.

Q And where did that go in his cell? A It went against the railing of his own cell.

Q Did it go into his cell? A No, in front of the iron bar there.

Q It didn't go into his cell at all? A No, sir.

BY THE COURT:

Q Well, do you mean the railing of the corridor or the railing of the cell? A The cell door.

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Q Then you mean to say that it smashed against the cell door when you threw it, is that it? A Yes, sir.

BY MR. EDWARDS:

Q And did you throw anything more at him after that? A No, sir.

Q Did you see anybody else throw anything at him after that? A No.

BY THE COURT:

Q Now, when you threw that, how far was he away from you? I will ask you that once more. A From this chair to that table. (Indicating the District Attorney's table). The distance between one cell and the other.

Q Well, I want that distance in feet. The jury cannot understand that illustration. A From the end of that table to the edge of this chair.

THE COURT: That is about four and a half feet?

MR. EDWARDS: Yes, sir; about that.

BY MR. EDWARDS:

Q And did you go into his cell at all? A No. Outside of the cell we seized each other.

Q Did you go into his cell at any time? A No.

Q Where were you when Frank tried to separate you? A Between the entrance of his cell and the corridor.

Q Well, did you get inside of his cell at any time? A No, sir.

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Q Did Fiola get inside at any time? A I didn't see him. We were all clinched.

Q Well, don't you know whether any of you got into Bennie Schneider's cell, number 210? A We seized each other in front of the cell, and we didn't know whether we went in or out.

Q Can't you tell whether you got inside of Bennie Schneider's cell or not? A I couldn't tell you that.

Q Where were you when Keeper Strauss got there? A I found myself in front of the cell of Frank, where Frank was telling us, "You're crazy that you are doing those things," and just at that moment the guard came.

Q Weren't you outside of Bennie Schneider's cell when Keeper Strauss got there? A No.

Q You are sure of that; are you? A No, I was not.

Q Weren't you inside of Bennie Schneider's cell, and didn't you have him down on the bed, and weren't his legs around you? A No.

Q And didn't Keeper Strauss come up and pull you and Frank and Fiola away, and separate Schneider's legs from around you, and pull you away and send you back to your cells? A No.

Q Now, what did you say to Bennie Schneider when he said to you, "What are you looking at, you Dago son of a bitch?" A I said, in English, "No look you." I said "No look you".

Q Is that all you said to him? A Yes. That's all.

Q Did you see any broken china in Bennie's cell? A No, I

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didn't.

Q How many times have you been convicted? A This is the first offence.

Q This is the only one; is it? A Yes.

MR. EDWARDS: That's all.

THE COURT: Well, it is after the time of adjournment now, and so we will have to take a recess until tomorrow morning at half past ten o'clock.

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case until Wednesday morning, August 4th, 1915, at 10:30 o'clock.)

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THE PEOPLE VS. FRANK MAESTRY AND ANO.

TRIAL RESUMED.

New York, August 4th, 1915.

THE COURT: Has the defense rested?

MR. PALMIERI: I simply want to have on the record the date as to when the indictment was found, and, also, I desire a concession from the District Attorney, otherwise I shall prove it, that, before the finding of this indictment, there was no arrest on a Magistrates' warrant, or any preliminary hearing.

THE COURT: That was entirely unnecessary.

MR. EDWARDS: Of course. There could not have been and there was no occasion for it.

MR. PALMIERI: Well, I know that we can't get an indictment without going to the Magistrates' Court, but this man was able to get an indictment, by ~~gixing~~ getting the ear of the District Attorney.

THE COURT: Well, you have nothing to do with the finding of indictments, Mr. Palmieri. That is the business of the Grand Jury.

MR. PALMIERI: Yes, I know that, but this man got the ear of the District Attorney, and the District Attorney had it found.

THE COURT: Yes, and that is what the People elected him for.

MR. EDWARDS: The indictment was found on the 22nd of June, 1915.

THE COURT: Your rights are protected by the statement, and

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I tell you that it is my duty to decide the law. A Magistrate has no jurisdiction in a felony case, and the Grand Jury may indict whenever evidence is brought before them by the District Attorney, or at the suggestion of any one else.

MR. PALMIERI: The point I want to have upon the record is---

THE COURT: Whether the defendant has been previously arraigned in the Magistrates' Court or not.

MR. PALMIERI: The duty of the Magistrate is to hear, in a preliminary hearing, an alleged felony case, and he has a right to hold or discharge a man for felony.

THE COURT: That is all very true.

MR. PALMIERI: And the point is this---probably I did not make myself clear to your Honor---my clients were not afforded a hearing before the Magistrate.

THE COURT: Well, they were not entitled to it under the law. I think I have made that perfectly plain to you.

MR. PALMIERI: And I respectfully except.

THE COURT: Mr. Becker was never arraigned before a Magistrate, and his case was tried and disposed of, and sustained by all the Courts.

MR. PALMIERI: Of course, the District Attorney had a right to indict these men, but they rushed this man, without my clients knowing anything about it, before the Grand Jury, and get these men indicted. It shows the favor and protection of this complain-

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ant.

THE COURT: No, there is no protection or favor about it. The District Attorney has wisely used the discretion given to him by the law. Now, that is a broad statement, and it is on the record.

MR. PALMIERI: Yes, I think it is pretty broad.

THE COURT: Yes. And the case is now before you, to be disposed of, gentlemen of the jury, according to the law as the Court gives it to you, on the evidence given in your presence by the witnesses. That is all. Do you rest, Mr. Palmieri?

MR. PALMIERI: Yes, sir.

MR. EDWARDS: Now, I want to say to the Court that I sent a special man, up last night, to see Keeper Strauss, at his house on 134th Street, and he reports to me that Strauss is ill in bed, and unable to come down here. Now, the counsel for the defendant has said a good deal about wanting Strauss as a witness, and the People will be perfectly willing, and will consent, that his testimony be taken at his bedside by counsel for the defense and counsel for the People, if counsel for the defendants desires it, and I will go there at once with counsel, if counsel desires it, and have that evidence taken in deposition form. I don't want to deprive the defense of that evidence, if they want it.

THE COURT: What have you to say to that?

MR. PALMIERI: Well, the only way I would take that testi-

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mony is to have it given before the jury.

MR. EDWARDS: Well, I supposed Mr. Palmieri really wanted the testimony, but, if he doesn't want it, under the circumstances, he can go without it.

MR. PALMIERI: These defendants are entitled to be confronted with any and every witness in the case, and I don't propose to waive any legal rights. I have myself endeavored to get Mr. Strauss here, but, on account of his illness, I cannot. I proved that by the Warden, yesterday.

THE COURT: Well, when will Mr. Strauss be ready to come, Mr. Edwards?

MR. EDWARDS: The doctor said that he could not allow him out on a day like this. He has what is commonly called the "Summer complaint", he has diarrhea and some temperature from working in the heat. If it had been a clear, bright day, he might have come out to-day, but the doctor did not think it was safe to let him come out in this storm. He is an elderly man, but a big healthy man. The Warden says he has never been sick a day before this. I think he would be a very valuable witness in the case, because he was the first keeper on the scene, and I was not aware that he was not available when I started the case, yesterday.

THE COURT: Well, shall we adjourn the case until tomorrow, to get Strauss here, or try to?

MR. EDWARDS: Yes, sir; I think that would be advisable.

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Do you consent to that, Mr. Palmieri?

MR. PALMIERI: I would consent to anything in reason.

THE COURT: Well, both sides appear to desire Mr. Strauss to be here, and, if he can be produced, without too much risk to himself, I think the wish of both sides should be indulged.

MR. EDWARDS: I am perfectly willing to see that he is brought down here in a closed conveyance, if necessary.

THE COURT: Of course, the proper thing to do would be to send a physician, and have a report from him.

MR. EDWARDS: Well, I was relying on his own physician. I assumed that we could do that.

THE COURT: Well, why not get his own physician on the 'phone, and see whether there is a chance to have him here tomorrow?

MR. EDWARDS: I will do that, sir.

THE COURT: And I suggest that you had better talk to him yourself, Mr. Edwards, because you can put the matter more clearly to him than a subordinate.

MR. EDWARDS: Yes, sir; I will do that at once. I will go up to the telephone in our office, and speak with the Doctor.

(Mr. Edwards returns to the Court Room, and counsel on both sides confer with the Court.)

THE COURT: As I understand it now, Mr. Edwards, from information that you have received, you feel quite certain that you will be able to produce the witness Strauss, tomorrow morn-

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ing?

MR. EDWARDS: I feel that there is a very good chance of it, yes.

THE COURT: And, Mr. Palmieri, you are equally anxious to have him, as I understand?

MR. PALMIERI: Yes, sir.

THE COURT: Then I think it best to take an adjournment until tomorrow morning, to give both sides an opportunity to produce him.

Now, Gentlemen of the jury, you have heard what has been said, that it is, in the opinion of counsel, advisable to have Mr. Strauss produced here as a witness, and he was taken ill in the discharge of his duty, but the illness, it seems, fortunately, is of a temporary nature, and from the information that the Court has received from Mr. Edwards, I believe that he will be in a condition to come here tomorrow; and we will, therefore, take a recess until tomorrow in this case.

Meanwhile, you will be extremely careful not to discuss this case with any one; you must not talk about it with any stranger or among yourselves; and you must not form any conclusion as to the guilt or innocence of these defendants, until you hear everything that is to be said in the case by both sides, and until the Court submits it to you for your decision. In other words, keep your minds open until the Court has charged you, until you have heard everything in the case, and until you retire to the

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jury room. That is the time to make up your mind, and not before.

Now, you may go until tomorrow morning, at half past ten.

(The further trial of the case was then adjourned until Thursday Morning, August 5th, 1915, at 10:30 o'clock.)

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THE PEOPLE VS. FRANK MAESTRY AND ANO.

TRIAL RESUMED.

New York, August 5th, 1915.

REBUTTAL.

GEORGE P. STRAUSS, a witness called on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Mr. Strauss, you have been ill since Monday, have you not?

A Yes, sir.

Q And to-day is the first day you have been out of bed?

A Yes, sir.

Q And you are a keeper in the City Prison, are you not? A Yes, sir.

Q And have been for how many years, Mr. Strauss? A I have been twenty years in the business, this month next coming.

Q Now, on the 19th day of June were you on duty in the City Prison, Mr. Strauss? A Yes, sir; on the second tier.

Q And were these two defendants, Frank Maestry and John Napolitano on that tier? A Yes, sir.

Q Can you tell what cell Maestry occupied? A Maestry occupied 205.

Q And Napolitano what number? A 211.

Q And who was Napolitano's cell mate? A Frank Firola.

Q Did you have two prisoners on that tier named Bennie Schneider and Abraham Rothman? A Yes, sir.

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Q And did they occupy a cell together? A Yes, sir.

Q And what cell was that? A 210.

Q Now, do you remember the morning of June 19th?

THE COURT: Well, why not bring out the relation of Schneider's cell to their cells?

BY MR. EDWARDS:

Q How near was Schneider's cell to Napolitano's? A The next cell to it.

Q And those cells are seven or eight feet wide, are they not? A Six or seven, seven and a half, I don't know exactly.

Q And the doors of those cells are grated doors, weren't they? A Yes, sir.

Q And the doors slide, don't they? A Yes, sir.

BY THE COURT:

Q That is, it is really only a half door? A Yes, sir.

Q Half of it is stationary and half of it slides in over the other part? A Yes, sir.

Q And these two cells were right adjoining, you say? A Yes, sir.

Q There was no space at all between them? A No, sir.

BY MR. EDWARDS:

Q Now, on the morning of the 19th of June, at what hour did you open the cells for breakfast? A About seven o'clock.

Q And while breakfast was being eaten by the inmates, what were you doing, Mr. Strauss? A We had a cell, Number 203,

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that we couldn't unlock, and Mr. Fassig said, "I'll go downstairs and get another key," and he went and got it, and just as we opened the door Sam Walser came running up and said---

Q Well, you can't tell what was said. A And said, "There is a fight in 210."

MR. EDWARDS: No, you can't tell what anybody said in the absence of the defendants.

MR. PALMIERI: Well, I don't object to this at all. I want him to tell everything that was said and done.

A (Answer continued) And I went right around to 210.

BY THE COURT:

Q How far were you from 210 at that time? A About fifty-five feet.

Q That is, 203 is about fifty-five feet from 210? A Yes, sir.

BY MR. EDWARDS:

Q And 210 was Schneider and Rothman's cell? A Yes, sir.

Q When you arrived at 210 what did you find? A I found Schneider laying on the bunk, hollering, and Rothman was standing near the toilet, and Frank Firola was standing in the middle of the cell, and Maestry was standing just inside of the door, and Schneider had his legs around Napolitano's legs, and I pulled his legs off, and threw him over on the bunk, and I said, "Are you hurt?" And he kept on hollering.

Q Now, describe, if you will, a little more particularly,

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if you will, the position of Schneider and Napolitano? A Schneider was laying on the bunk, crosswise, partly, and Napolitano was standing up, and he had his legs wrapped around Napolitano's legs, and I took hold of his leg and pulled it off, and threw him over on the bunk, and I said to the boys, "Go to your cells."

Q Now, did you notice whether there was any broken crockery in the cells? A There was.

Q Can you give us an idea of how much? A There was two broken cups and one broken bowl. One broken cup was broken outside, and there was a cup and a bowl broken inside.

BY THE COURT:

Q Inside of the cell, do you mean? A Yes, sir.

Q You mean that the fragments were in the cell? A Yes, sir.

Q And the fragments of one cup were in the corridor? A Yes, sir.

BY MR. EDWARDS:

Q Now, what was done with respect to Schneider, Mr. Strauss?

A He was taken off the tier immediately, and placed on the first tier, and shortly after that, some time within an hour or two, he was sent to 53rd Street.

Q Did the doctor examine him there in the Tomba, if you know? A He sent him on the first tier. I didn't see him examining him.

Q No, you were not there then? A No, sir.

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Q Now, have you told us all that you know about this, of your own knowledge, Mr. Strauss? A That's all I know about it.

CROSS EXAMINATION BY MR. PALMIERI:

Q Mr. Strauss, it took you to travel from where you were, fifty-five feet, before you got to the cell where the fight took place? A Yes.

Q Now, before you got there, Mr. Strauss, could you tell the jury about how many prisoners had run to that cell, if you know? A Well, I couldn't tell you exactly how many, probably twenty-five or fifty. There were about seventy men on the tier there.

Q And was there a crowd in front of the cell when you got there? A Yes, they crowded up each way.

Q So that you had to break your way through that crowd to get into the cell? A I told the men to move on, and they pushed right along, and Mr. Fassig came along, and started them away from the cell in the other direction.

Q And when you told Napolitano and Maestry to go to their cells they went immediately? A Yes, sir.

Q They obeyed you at once? A Yes, sir.

Q Now, do you remember that Napolitano, when he saw you, put his finger up to his tooth? (Illustrating) And he asked you to look at it, as his tooth was dangling? A He said he had a loose tooth.

Q And did he tell you that Schneider had inflicted that

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injury upon him? A I don't remember that he said that Schneider had done that.

THE COURT: Well, it is immaterial whether he said so or not. That is what is known in law as a self serving declaration. Your client can testify to that, if he desires to do so.
BY MR. PALMIERI:

Q Did you examine his mouth? A No, sir; but he said, "Mr. Strauss, I have a loose tooth."

THE COURT: Well, what Napolitano said in his own behalf at that time, being a self serving declaration, is not evidence. But anything that is against interest is always admissible in evidence.
BY MR. PALMIERI:

Q Do you remember that, at that time, in the presence of Maestry, fifteen or twenty prisoners said, "Mr. Strauss, we saw Maestry separating the men?"

MR. EDWARDS: Objected to.

THE COURT: Excluded. The jury will not be influenced by any alleged statement made by any inmate of the Tombs at that time, it being an unsworn statement, and the same would apply to any other institution, or even to this Court Room. You take only the statements of witnesses sworn and examined here, and not the statements of men at that time in the Tombs, who may have had a motive to make statements at the time that were false, and at a time when they were not sworn witnesses, subject to cross examination.

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BY MR. PALMIERI:

Q Do you know anything more about this matter, Mr. Strauss

A No, sir.

Q Now, Mr. Strauss, you saw Maestry near the door of the cell. I think you said that, didn't you? A Just outside of the door, he stood just inside of the door of the cell.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q Where is the toilet in that cell? A In the rear of the cell, right at the end of the cot.

Q In the rear corner of the cell? A Yea, sir.

Q At the end of the cot? A Yes, sir.

MR. EDWARDS: We rest.

MR. PALMIERI: Now, may it please your Honor, I respectfully ask that your Honor take away from the consideration of the jury assault in the second degree.

It appears from the uncontradicted evidence in this case that a cup, the fragments of a cup, were found on the tier, which practically corroborates the story of Napolitano, that a cup had been thrown at him, and, in return, another plate had been thrown back into the cell.

May it please your Honor, I respectfully submit that a plate is not, as a matter of law, a dangerous instrument, within the contemplation of our code.

THE COURT: Well, I heard nothing about a plate being thrown by anybody.

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MR. PALMIERI: Or a bowl. I made a mistake. I beg your Honor's pardon. I wish to change that to bowl.

THE COURT: Now, the jury can determine whether those articles there (Indicating the exhibits in evidence) are things---I believe the Statute so reads---likely to produce grievous bodily harm, and they may say whether, if they were applied to their own heads, they would think that the result would be grievous bodily harm.

MR. PALMIERI: But there is no pretense that they struck the mark.

THE COURT: It makes no difference whether they hit him or not. If it was thrown by Napolitano at the complainant, that would be an assault, if the other man's, the complainant's attack upon him had ended. Napolitano had no right then to throw a bowl at him, if the complainant's alleged attack on him was ended. That a bowl was thrown at him was no justification for him throwing a bowl at the other man, the complainant, if the danger of the assault was over.

MR. PALMIERI: Well, but Napolitano says that Schneider ran at him like a tiger, immediately afterwards, immediately after the bowl was thrown.

THE COURT: Well, I will instruct the jury as to self defense, and, if this was done in self defense, if it was done to ward off an attack, the defendant Napolitano is entitled to an acquittal. But there is sufficient evidence before the Jury to

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submit the case to the jury as assault in the second degree, and it is for the jury to determine the sufficiency of that evidence.

MR. PALMIERI: Your Honor, as I understand, then will submit this case as assault in the second degree and assault in the third degree?

THE COURT: Yes.

(Mr. Palmieri then summed up the case for the defense, and Mr. Edwards closed the case for the People.)

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THE PEOPLE VS. MAESTRY AND NAPOLITANO.

THE COURT'S CHARGE.

MULQUEEN, J:

Gentlemen of the Jury:

It is alleged that the defendants made an assault upon Benjamin Schneider, with their hands and feet, and with a weapon or instrument, to the grand Jury unknown, but which was a weapon or thing likely to produce grievous bodily harm, that they did inflict grievous bodily harm upon him, and that, therefore, they are guilty of assault.

The indictment charged that they intended to kill schneider, so that the Grand Jury charged them with assault in the first degree. There is not sufficient evidence to warrant such finding, and, therefore, I shall submit the case as one of assault in the second degree or assault in the third degree.

This is not an action between Benjamin schneider and Frank Maestry and John Napolitano. The case is entitled "The People of the State of New York vs. Frank Maestry and John Napolitano," and by the term "People of the state of New York" is meant organized society in this state. There are ten million people living within the borders of this state, and they have to protect themselves in the enjoyment of their lives their liberties and property; they have a government, a union, or society, they have made laws to protect every member of society, every one who visits the state, from unjust or unlawful interference on the part of others; they have declared that one who wishes to live in the

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State of New York, must obey the law, or be regarded as a criminal.

The laws are clear and plain. It is not a hard condition to impose that, if you wish to be in New York state, you must obey the law. In the case at bar the law is that you must not wilfull and wrongfull assault any one. section 242 of the Penal Law says:

"A person who wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon, is guilty of assault in the second degree."

That is, if these defendants wilfully and wrongfully inflicted grievous bodily harm upon schneider, with or without a weapon, that is, using their hands and feet, the natural weapons, you might say, they would be guilty of assault in the second degree.

In order to simplify this matter, I charge you that there is not sufficient proof that schneider did actually receive grievous bodily harm, such harm as would justify a finding of assault in the second degree, under that particular subdivision. But, there is another subdivision, which says that one who wilfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm, is guilty of assault in the second degree.

It will simplify the case for you if you keep in mind, that, if schneider was wrongfully assaulted by these men with a thing

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that was capable of or likely to produce grievous bodily harm, then that assault was assault in the second degree, whether it did, in fact, inflict grievous bodily harm or not.

As part of the proof here, a bowl and a cup have been introduced. It was agreed by both sides that such bowl was put in front of the door of each cell, two bowls, in fact, in front of every cell in which there were two men; also that there were two cups, for the coffee; and it is the claim of the People that these defendants assaulted the complainant with similar bowls, and cups; not these identical bowls or cups, because the bowls and the cups that were thrown, were smashed; but cups or bowls exactly like these, in every particular, of the same material and weight, and hurled them at schneider, wilfully and wrongfully. If they did that, they would be guilty of assault in the second degree, whether they hit him or not.

Now, it is for you to determine whether or not those were the things that caused the injuries claimed to have been received by the complaining witness, and whether, in your opinion, after seeing and examining them, they are things likely to cause grievous bodily harm to any one at whose head or body they should be thrown, with violence, from a distance of four and a half feet. You remember that I endeavored to get the distance from which these things were thrown, and Napolitano said twice that he was about four feet and a half from schneider when he threw a bowl at him. If he was not justified in

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throwing that bowl, he would be guilty of assault in the second degree, if that bowl did, in fact, cause grievous bodily harm, or if, in your opinion, it was a thing likely to do grievous bodily harm.

I want to make the law perfectly plain to you. If there was an assault committed on that occasion, but it was not of the grade of assault in the second degree, it would be assault in the third degree. Any battery, any assault is assault in the third degree, unless it is of a higher degree. So that here I am only submitting to you the second degree or third degree of assault, and, if it was not the second degree, it would be the third degree.

You understand that there is a sharp line of division between the duty of the court and your duty in a criminal action. It is the duty of the court to see that the defendants receive a fair trial, that is, a legal trial, under the laws of the State of New York, which exist for every man in the state. No man is so exalted as to be above the power of the law, and no man so lowly as to be without the protection of the law. Therefore, if these men have been tried according to law, then they have had a fair trial, and that is my duty, and I have tried to discharge it.

It is also my duty to tell you the law governing the case, and then my work is done, and your work begins, and you are made the sole judges of the facts, and the credibility of the wit-

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nesses.

In weighing the facts, you must remember that the law provides that these defendants are presumed to be innocent, and that they must be acquitted, unless the evidence produced here before you satisfies you, beyond a reasonable doubt, that they are guilty. You must view the evidence from that standpoint, that they are not guilty men, seeking to escape, but that they are men whom the law regards as innocent, and they are entitled to be discharged on this indictment, unless you are satisfied from the evidence, beyond a reasonable doubt, that they are guilty, and the burden of proving that they are guilty, is on the People, who make the charge.

Now, what is meant by reasonable doubt? That is a term which, if you will consider it for a minute, explains itself. It is a reasonable, not a an unreasonable doubt; it is a doubt based on reason, and not on prejudice, or sympathy, or a desire to avoid doing your duty, if it should happen to be disagreeable.

You know that this court is not intended to be a pleasure resort, it is not intended to make people happy. It is intended to maintain order, the law, so that all of the decent men of this county, all the decent men and women who come here, may live their lives without unlawful interference from others. You are an essential part of the court, discharging a most important duty. So that you are not to consider whether a thing is pleasant or unpleasant, agreeable or disagree-

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able. That is not the attitude you should have. You should feel, "I must do my duty." That should be the thought, the feeling of every man who serves as a juror, no matter what the consequences of his verdict may be to any one.

When you approach the solution of this question which is submitted to you now, in that spirit, and, after weighing the evidence, you are firmly convinced to a moral certainty that these men did assault Schneider, and that they were not justified in law in assaulting him, then you must pronounce them guilty, and you must fix the degree of the crime.

If Schneider had been giving information to the District Attorney, he was doing something that the law commends. He had killed a man, and that the law condemned. But, if he aided in the administration of justice, that is something of which all good citizens should approve, and these defendants derived no legal right on that ground to assault him. They do not claim that they had a legal right on that ground, but, they say that Schneider was the aggressor; that he became conceited and arrogant, on account of the fact that he was having interviews with officials of the District Attorney's office, and that he assaulted them.

Now, those are the two theories placed before you. If he did assault them, you must acquit them, because a man is justified in fighting back, if he is unlawfully assaulted. This affair only took a short while; it was over in a short

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while from the time the keeper heard the shouts, until he went fifty-five feet to the cell where it occurred.

It is not every provocation which will justify an assault. The law is clear upon that subject:

"To use or attempt or offer to use force or violence upon or towards the person of another is not unlawful, when committed either by the party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense."

A man who starts a fight can never claim the benefit of self defense. It is the man that is attacked who has a right to defend himself, and he has a right to use sufficient force to ward off the danger, and to protect himself. But, if a man should assail you by calling you "A rat," or, "the District Attorney's rat," that would not justify you in assaulting him with a weapon. If he goes further, and throws a bowl at your head, then you have a right to defend yourself, and, if you threw another bowl at him in reply, quickly, at the same instant, that would not be an unlawful assault, that would not be a wilful and wrongful assault.

But, if these defendants had a grievance against Schneider, as I told you, that was no legal basis for assaulting him, and

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if they assaulted Schneider to punish him, then they are guilty of assault either in the second or third degree, just as you view the character of those instruments or things which are admitted to have been used. If they are sufficient, in your opinion, to cause grievous bodily harm, it would be assault in the second degree, to use them in the way described in this case, and, if not, assault in the third degree.

I have tried to state the matter very clearly to you. Find out, if you can, who the aggressor was, and you are the sole judges of the facts, and of the credibility of the witnesses.

Now, what is that word "credibility?" What does it mean? It means "worthiness of belief." Who was worthy of belief here? You will have to decide that. Do you believe Mr. Strouse, do you believe Mr. Fassig, or do you believe Mr. Young and the other prisoner who were called here?

Under our law, a man who has been convicted of a crime may testify as a witness. There was a time when he was not allowed to do so, but in more modern times a convict may testify. But you have the right to take into account when you are determining whom you will believe, the character of the witness. You are to act, as it were, as credit men. To whom will you give credit, credence? You must not disbelieve a man solely because he has been convicted of crime, but you may consider that fact, and take it into account as one element in determining whom you are going to believe.

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Schneider and Rothman say that the fight took place in the cell of the complainant, Schneider; these defendants deny this. But the Keeper found them in there. It is in evidence that the fragments of a bowl and a cup were found in the cell, and also there were fragments of a cup found in the corridor as well. Now, which side do the circumstances that you deem established by the testimony, in which you have complete confidence, to which side does that testimony lean? To the defendants or against them?

Weigh the circumstances, take each man's testimony in connection with all the facts and circumstances of the case. You have the right to consider the manner of the witness on the stand, the relation of the witness to the controversy, whether he is neutral or interested on one side or the other, his motive, if any, which the witness may have had in giving false or true testimony.

Are these witnesses animated by disinterested motives, or are they men who have committed a crime, and who are now trying to deceive you in order to avoid punishment for it? Is Schneider a truthful man or is he seeking to send men away unjustly? Is he animated by revenge? And you may consider the motive of every witness in the case as well, and see how it impresses you upon the question of their credibility.

Do not misunderstand me. Simply because a man may have something to gain by his testimony, that circumstance does not

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give you a sufficient reason for rejecting his testimony. You must not reject the testimony of these men simply because it may benefit them, if you believe it. That is not the proper way of procedure. But you may take that as an element in determining their credibility. In other words, you are the sole judges of the facts. The facts must be proved by witnesses, and you may believe all of the testimony of any witness or reject it all. You may believe part of it, or reject part of it. You must perform your duty in a careful and rational way. You must not jump at conclusions, you must not be influenced by prejudice. You must carefully analyze all the testimony, selecting what you think ought to be believed, and rejecting what you think is unfit for belief, not entitled to belief. Then, if you are firmly convinced beyond a reasonable doubt that there was an assault committed on Schneider, and that it was not justifiable under our law, that Schneider was not the aggressor, but was being punished because he was unpopular, then these defendants, if they took part in that assault, are guilty of assault; and, if the grade of the crime is assault in the second degree, if you are convinced from the evidence that it was assault in the second degree, you should convict them of assault in the second degree. If you have a reasonable doubt as to what the degree of the crime was, you can fix it only as assault in the third degree. If Maestry was not concerned in the assault except as a peacemaker, you

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must acquit him, or if you have a reasonable doubt on that subject, but you may convict Napolitano, notwithstanding that acquittal, if you believe that he was guilty on the evidence. If you find Maestry is guilty, you can convict him only as a first offender. If Napolitano is found guilty by you, you may find him guilty as a second offender, because it is alleged and has been proved that he has been convicted, and sentenced to Elmira Reformatory on a felony charge, and, under our law, under those circumstances, one who commits a crime may be indicted and convicted as for a second offence.

Now, I have tried to make the matter very plain to you. It is admitted that there was an assault. It is claimed on one side that that assault was committed by these defendants upon Schneider, and they, on the other hand, claim that Schneider began the assault, and that they acted only in self defense.

Weigh all the circumstances, as honorable men, seeking to do your duty, and render a verdict according your conviction as to the facts, as found from the testimony of the witnesses, either of guilty or not guilty, and, if you find them guilty, fix the degree of the crime. And remember that you may find one not guilty and the other guilty, or both not guilty, or both guilty.

THE COURT: Mr. Palmieri, Mr. Edwards thought that assault in the third degree could not be found as a second offense, but I think it can. That question has been considered.

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I do not know that there is any decision on it, but it was the consensus of opinion of Judge Rosalsky and myself that it could be, and I do not see any reason why it should not be. It is an offence, a crime. The difference between misdemeanor and felony merely relates to the place of imprisonment.

MR. PALMIERI: Well, if Mr. Edwards only requests the submission of assault in the third degree---

MR. EDWARDS: No, I did not make any such request.

THE COURT: Well, the jury may find him guilty of a first or second offence.

MR. PALMIERI: Then I would like to ask your Honor to charge the jury in reference to Napolitano, because his defense is in this case that he acted under provocation.

THE COURT: I have so stated to the jury, that that is his claim.

MR. PALMIERI: Yes, sir. That, if they find on the whole case that they entertain a reasonable doubt whether Napolitano was justified in committing the assault on Schneider, they must acquit him.

THE COURT: I so charge. His guilt must be established beyond a reasonable doubt, before he can be convicted, as I have said.

MR. PALMIERI: And I ask your Honor to charge the jury that, in determining Napolitano's strength and ability to commit an assault, they may take into consideration the fact,

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which has been uncontradicted, that he is a sick man, and he has described his condition.

THE COURT: Well, he says that he was able to throw that bowl at Schneider, and did throw it at him, from a distance of four and a half feet.

MR. PALMIERI: Yes, sir; after the cup had been thrown at him on the tier, which is verified by Strouse.

THE COURT: No. There is no verification by Strouse. Strouse testified only that a cup was found on the tier, a broken cup.

MR. PALMIERI: Yes, sir; a broken cup, and he corroborates my client as to the cup being thrown.

THE COURT: No, Strouse has not corroborated your client on that point, unless the jury believe that his testimony that there were fragments of a cup on the tier, corroborated defendant's claim that a cup was thrown at him by Schneider. Schneider says he threw no cup, that he did nothing, and that each of these defendants had in his hand a bowl or cup, which had been left at or in the cell of Firola, who was confined in the adjoining cell, and that these defendants threw the cups and bowls.

Now, have you any other request, Mr. Palmieri? I think I have given a fair charge. I have tried simply to put the law before the jury, and I expect the jury to do their duty, and render an honest verdict.

The vindication of our law, gentlemen of the Jury, is an

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honest verdict. A dishonest verdict, whether of acquittal or of guilt, is not the way to uphold the law, and promote respect for it. A jury should be honest, fearless and free, and render an honest verdict.

MR. PALMIERI: Yes, without any fear of the District Attorney.

MR. EDWARDS: Or of you, either.

THE COURT: Well, they have no fear of either of you, I presume. Is there any further instruction on the law that you desire, gentlemen? I will be happy to give it to you if you do?

THE FOREMAN: No, sir.

THE COURT: With the consent of the defendants, the jury may have the exhibits. Maestry, do you consent that they take the bowl and cup in evidence into the jury room?

THE DEFENDANT MAESTRY: Yes, dr.

THE COURT: Do you, Napolitano?

MR. PALMIERI: Well, I would like to know whether the jury want them or not, before that question is answered.

THE COURT: Do you object to their being taken into the jury room, Mr. Palmieri?

MR. PALMIERI: Well, I can only answer yes or no by finding out whether the jury wants the exhibits.

THE COURT: If the jury want them, are you willing to let them have them?

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MR. PALMIERI: Yes, sir.

THE COURT: Now, ask Napolitano whether he is willing. I believe he does not speak English. Maestry has answered in English.

MR. PALMIERI: Yes, sir; he says that he is willing.

THE COURT: Then you may take those exhibits along with you if you want them, gentlemen of the jury.

THE FOREMAN: Yes, sir; we will take them along.

(The jury retired at 1:10 P.M.)

(The jury returned to the Court Room at 4:15 P.M. The Foreman states that the jury have not agreed upon a verdict).

THE COURT: Well, I sent for the jury because I received a communication, some little while ago, from them, that they could not agree, and asking to be dismissed. Do you think that any further consideration of the case would bring about an agreement?

THE FOREMAN: It didn't seem so. We tried our best to do it, before writing.

THE COURT: Is there any further instruction on the law that the Court can give you? Do you understand the law clearly?

THE FOREMAN: Well, I think so.

THE COURT: It is not a dispute about the law, then, which divides the jury?

THE FOREMAN: No. There is no dispute about that.

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THE COURT: The question is as to the facts?

THE FOREMAN: Facts.

THE COURT: Well, what do the other jurors think about it? Do you believe, gentlemen, that, if you retire again and go over the evidence, you may be able to come to an agreement?

THE EIGHTH JUROR: Your Honor, it seems absolutely impossible.

THE COURT: Well, is that the general opinion of the jury?

THE FOREMAN: Yes, sir.

THE COURT: You think that there is an irreconcilable conflict as to the facts? Is that so, gentlemen?

SEVERAL OF THE JURORS: Yes, sir.

THE ELEVENTH JUROR: I don't see any possibility of coming to an agreement in this case.

THE COURT: Well, then, in view of these circumstances, Mr. Edwards and Mr. Palmieri, unless you desire that the jury should continue their deliberations, I think it would be proper to let them go.

MR. PALMIERI: I agree with your Honor.

MR. EDWARDS: I also agree.

THE COURT: Then, gentlemen of the jury, you are excused from your service in this case, with the thanks of the Court.

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