

COURT OF GENERAL SESSIONS OF THE PEACE.

City and Country of New York, Part IV.

THE PEOPLE

vs.

FRANK MAESTRY alias FRANK
MILLER and JOHN NAPOLITANO

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

New York, August 11th, etc., 1915.

Indicted for assault in the first degree, as a second offense.

Indictment filed June 22nd, 1915.

Appearances:

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

JOHN PALMIERI, ESQ., FOR THE DEFENSE.

SECOND TRIAL

TRANSCRIPT OF STENOGRAPHER'S MINUTES.

Frank S. Beard,

Official Stenographer.

THE PEOPLE'S TESTIMONEY.

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 Schneider how old are you?

A Twenty-five.

Q And how long have you been in the Tombs?

A Fifteen months.

Q Do you remember when you were arrested?

A I was arrested in 1916***, the 11th of May, 1914.

BY THE COURT:

Q Well, you are not in the Tombs now, are you?

A No, sir.

Q How long have you been away from the Tombs?

A Since that trouble on the nineteenth of June.

Q So that you were thirteen months in the Tombs, and two months in the other place of confinement?

A Yes, sir.

BY MR. EDWARDS:

Q You are now at the 54th Street Prison, are you not?

A Yes, sir.

Q And when were you transferred there?

A The nineteenth of June.

Q This last June?

A Yes, sir.

Q Now, you have pled guilty to a crime, haven't you?

A Yes, sir.

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Q And what crime was that?

A Manslaughter in the first degree.

Q You pled guilty before Judge Davis, in the Supreme Court?

A Yes, sir.

Q Have you ever been convicted of any other crime?

A No, sir.

Q That is the only crime you have ever committed?

A Yes, sir.

Q Have you been sentenced yet?

A No, sir.

Q During the fifteen months that you have been in the Tombs, have you been coming over to see the District attorney?

A Yes, sir.

Q For how long?

A Seven or eight months.

Q And during that time you have given him certain information, have you not?

A Yes, sir.

Q Which he has been investigating?

A Yes, sir.

Q That was in connection with what cases; do you recollect?

A One was a homicide case, a murder case.

Q Yes.

A The man took a plea already, and the rest was Union affairs, of Union Leaders.

Q Now, when did you first see these two defendants?

A I seen them about four months ago.

Q Was that when they were first admitted to the Tombs?

A Yes, sir.

Q And you were there already?

A Yes, sir.

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Q Now, what tier were you on there?

A The second.

Q And what tier were they on?

A The second.

Q Did you know the man named Firola? Or Ferone?

A Yes, I could point him out, but I don't know his name exactly. I always get mixed up on those Italian names.

Q He isn't here to-day?

A No, sir.

Q What cell did you occupy?

A 210.

Q And that is on the second tier?

A Yes, sir.

Q And what cell did Napolitano occupy?

A The next cell to me.

Q 211?

A Yes, sir.

Q Do you know what cell Maestry was in?

A No, sir; it was on the other side, and I don't know the number.

THE COURT: Well, that will be conceded, that it was 205?

MR. PALMIERI: Yes, sir; there will be no dispute about that, 205.

BY MR. EDWARDS:

Q Now, on the nineteenth of June of this year what time was it that your cell doors were opened?

A Seven o'clock in the morning.

Q And is that what is done every morning?

A Yes, sir.

Q And what did you do after the cell door was opened?

A I took my breakfast in the cell.

Q How was that breakfast served to you? In what sort of dishes?

A They put them bowls down outside, and they put

in coffee or milk, and we take them bowls inside.

Q And where is the cup?

A The cup is inside the cell.

Q That is, you keep the cup in the cell?

A Yes, sir.

Q Well, now, who was your cell mate at that time?

A Abe Rothman.

Q And was he in the cell on that morning?

A Yes, sir.

Q Who took in your breakfast first, your or Rothman?

A The two of us. And then I was going to sit down to eat the breakfast, and I seen them three fellows. I was inside in the cell, but I seen them coming over to my cell.

Q Now, was the door open or shut at the time?

A The gate was open.

Q As I understand, those are grated doors, that slide?

A Yes; and it was open.

Q And about how wide is the doorway?

A About that wide. (Illustrating).

Q About three or four feet?

A Yes, sir.

Q And which one of the three men did you first?

A I seen the three of them, but this man grabbed me by the throat. (Indicating Maestry).

Q Now, was anything said before that?

A They said, "You rat, you District Attorney's man, you squeeler." And so this Abe Rothman, he blocked the gate (Illustrating). He didn't want to let them in. He stopped the with his hands (Illustrating) and he says, "Leave that fellow alone. He is going down

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for sentence, on Tuesday. What do you want of him?" And he said, "Well, we want to make sure of him before he goes down, that District Attorney's rat".

And then that same fellow grabbed Rothman, and shoved him away, and they come right in the cell, and he hit me here. (Indicating) and I fell back on the bed, and the three started to kick and beat me.

Q What did Napolitano do?

A He kicked me with his foot and hit me with his hands. I felt the kicking right here. (Indicating the right side).

And Abe Rothman was at the door when them three fellows fired the bowls and cups into the cell at me.

Q Who did that?

A The three of them. And I fell down on the bed. And the keepers came in, and I was unconscious.

Q And how long were you unconscious?

A I couldn't tell; about a couple of minutes.

Q And was anybody in your cell when you recovered consciousness?

A Yes; the Deputy Warden and the Keeper from the second and third tier.

Q Did you see Keeper Strouse there, that morning?

A Yes, after, when he took one fellow out from the cell.

Q Now, what was your condition at that time? How did you feel?

A I feel I was all beat up---I feel very bad, and my face is all swelled up and I was bleeding from my mouth, and my back was cut from where I got hit.

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Q And how were you dressed at that time?

A A little summer under shirt and pants.

Q And did anything happen to the under shirt?

A The whole shirt was torn off in pieces.

Q And did you go to a doctor that day?

A Yes, they took me down to the Warden's Office, and he sent for the doctor right away.

Q What doctor was that?

A Dr. Linchenstein, of the Tombs.

Q And he examined you, did he?

A Yes.

Q And what was done with you?

A Then they took me down to 54th Street.

Q To the 54th Street prison?

A Yes.

Q Did Rothman go up there too?

A Yes, sir.

Q Had these defendants ever said anything to you before this day?

A They bothered me on the walk. I always laid in my cell, because they always bothered me, because I turned State's evidence, and them people don't like men like that. They always bothered me.

MR. PALMIERI: I object to that and move to strike out the answer, as irresponsible.

THE COURT: Yes. Strike it out.

BY THE COURT:

Q Did they ever assault you before that day?

A They called me names, but didn't assault me.

BY MR. EDWARDS:

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Q Who called you names?

A The three of them.

Q Did you ever call them names?

A No, sir.

Q Or strike them?

A No, sir.

Q On this morning of the 19th of June, did you throw any cups or dishes at them?

A No, sir.

MR. EDWARDS: He is your witness.

CROSS EXAMINATION BY MR.: PALMIERI:

Q How long Do you know Napolitano, this young man here?

A About four months.

Q About four months in the Tombs?

THE COURT: No, he did not say four months in the Tombs.

BY MR. PALMIERI:

Q Where?

A In the Tombs.

BY THE COURT:

Q Well, you have not been in the Tombs during the last four months, have you?

A No, sir.

Q You have been out of the Tombs for the last two months, have you?

A No, sir.

Q You have been out of the Tombs for the last two months, haven't you?

A Yes, sir.

BY MR. PALMIERI:

Q How long have you been in the Tombs?

A Thirteen months in the Tombs.

Q Well, you knew Napolitano in the Tombs?

A Yes, sir.

Q And for a period of four months?

A No, sir. I have been out of the Tombs two months now.

Q Before that day did you and Naplitano ever have a fight

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A No, sir.

Q Did you and Napolitano ever have a misunderstanding?

A No, sir.

Q Did you ever report Mr. Napolitano to the keepers before that day?

A No, sir.

Q Now, did you ever have occasion to report him to the keepers before that day?

A No, sir.

Q Now, with reference to Maestry, did you, before the day of this alleged assault, ever have any trouble with Maestry?

A No, sir.

Q Never had any fight of any kind?

A No, sir.

Q And you never reported him to the keepers for any alleged assaults or words?

A No, sir.

Q And he never gave you any cause for reporting him to keepers; did he?

A What?

Q (Question repeated)

A No.

Q And you have known Mr. Maestry for how long?

A Who?

Q (Question repeated)

BY THE COURT:

Q Well, did you know Maestry before you went to the Tombs?

A No, sir.

Q You met him in the Tombs, too, for the first time?

A Yes, sir.

BY MR. PLAMIERI:

Q Now, at the last trial, do you remember testifying as

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follows:

THE COURT: No, I will not allow any reference to the last trial, with this exception, that you have a right to show that this witness, at any time or any place, made statements which differ from the statements he made here to-day. So that, if you wish to call his attention to any discrepancy in his testimony, I will permit you to do it, or to any contradiction, but not otherwise, and please confine yourself to the contradiction, if any.

MR. PALMIERI: Yes, sir.

BY MR. PALMIERI:

Q Did you state, during the last trial --- do you claim now that you stated at the last trial that Mr. Maestry said to you, when he came to your cell, "We have go to give it to him before he goes down for sentence."?

THE COURT: I will exclude that, as immaterial, whether he said that or not at the last trial. Now, you may show any contradiction of this witness, if you desire to do so.

MR. PALMIERI: Well, then I will read his evidence on the last trial.

BY MR. PALMIERI:

Q Did you testify on the last trial as follows ---

THE COURT: On that particular point you may read it, if you say that he said anything different.

BY MR. PALMIERI:

Q Now, listen to this:

"Q (By Judge Mulqueen) Now, first tell us what Maestry did, if anything.

A He came over and he says---and he started to holler, and he say, `We are going to give it to this rat, this stood pigeon.' Rat, you know, Judge---

Q Now, did you make that answer at the last trial?

A Yes, sir.

Q Now then, did you forget to say, at the last trial, "We have to give it to this man before the goes down for sentence?"

" Did you forget to say that?

A Yes.

Q Now, after the last trial you remembered this in your cell, and you went over this evidence, and you remembered that Maestry said, "We have got to give it to him, before he goes down for sentence?"

A Yes, sir.

Q And so, on the second trial, you say it? You heard the jury disagree in the last trial?

A I forgot to show, the last trial, the mark where I got cut here. (Indicating under the right eye.)

Q Now, you claim that, at the last trial, you forgot to tell the jury that Maestry said, when he came to your cell, "We have got to give it to him, before he goes down for sentence."?

THE COURT: Well, I will exclude that. That is repetition.

BY MR. PALMIERI:

Q And do you mean to say that you didn't know whether the jury disagreed or not?

MR. EDWARDS: Objected to as immaterial.

THE COURT: Excluded.

BY MR. PALMIERI:

Q Well, you know that you are trying this case over again don't you?

A Yes.

Q And, therefore, you feel that you ought to remember everything that you forgot on the last trial?

A I just told what I before, in the last trial.

Q Now, your memory is fresh, and you are going to tell us everything that happened?

A Yes, just the truth.

Q Oh, yes; I know you are telling the truth. But forgot something else, didn't you? You said that you forgot to tell the jury something about the marks. You remember when I asked you, at the last trial, to show the marks on your face, and you said you hadn't any?

A No, I said my face was all swelled up, but I didn't show the mark under my eye.

Q Do you remember that I told you to stand up, at the last trial, and show the jury the marks, and you said you had no marks on your face, and you say your memory was bad on that, and you have a mark to show the jury now?

A Yes.

Q Now, show it to the jury.

A Here. (Indicating under the right eye.)

Q And that's that mark that you didn't show the jury at the last trial, and you say that this mark existed on the last

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Trial?

A Yes, sir.

Q And when I asked you to show me the mark, you said that you had none, and you say now that you forgot it.

A Now, you didn't ask me about my face.

MR. EDWARDS: Now, ask counsel to point out in the record where that appears, where he said that there was no mark on his face.

THE COURT: Now, Mr. Palmieri, I told you that the only use you can make of any statement made by him at the last trial is to show that it differs from any statement made by him today, and the best way to do that, legal way, is to point it out in the record.

MR. PALMIERI: Well, if my learned friend will let me have the record, I will show that he said he had no marks on his face.

MR. EDWARDS: You may have the record.

THE COURT: And I would remind counsel that I ruled, at the last trial, that the injuries suffered by the complainant, in themselves, would not amount to assault in the first degree. I did charge that, if these cups and bowls that were introduced in evidence might, in the opinion of the jury, cause grievous bodily harm, if the jury believed that they were capable of doing grievous bodily harm, they might convict him, if all the other elements were present, of assault in the second degree.

BY MR. PALMIERI:

Q Now, listen to this: Are there any marks that you can show?" And the Judge himself asked that question.

"A I don't know. 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." Did you make that answer to that question, his Honor's question?

A Yes, sir.

Q Now, listen to this :

"Q (By Mr. Palmieri) You have no mark your face to show where a bowl struck you?

A No, sir." Do you remember that?

A Yes.

Q Now, you are not accustomed to receive blows on the face very often, are you?

A No, sir.

Q And how did you come to forget to show that mark under the eye to the jury on the last trial?

A Because I showed the marks on my back, and I forgot to show it on my eye.

Q Now, then, show the jury that mark.

A (The witness indicates to the jury a place under his right eye).

THE COURT: This is all a waste of time, Mr. Palmieri. There is but one issue here. You admit that an assault was committed. Now, the only question is whether your clients were the aggressors or were not.

MR. PALMIERI: But I want to show that this man is simply magnifying his injuries, to win your Honor's sympathy.

THE COURT: No, there is no question of sympathy whatever, on the part of any one here. I think you have gone far enough on this line.

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MR. PALMIERI: Very well, sir.

BY MR.: PALMIERI:

Q Now, you have no mark on your other eye, have you?

A No, sir.

Q Now, what do you call that mark under your eye?

MR. EDWARDS: I object to that. He is asking him to characterize a mark on his own face.

THE COURT: Well, do you mean how that mark was caused?

MR. PALMIERI: Yes, sir; if it is a mark.

BY MR. PALMIERI:

Q Do you call that a mark?

A Yes, sir.

Q What caused it under your eye?

A I don't know; I couldn't tell you with what.

BY THE COURT:

Q You got that wound in this fight, you say?

A Yes, sir.

BY MR. PALMIERI:

Q Well, you call it a wound, do you?

A Yes, it was open, that time, it was bleeding. The doctor saw it.

Q Now, did you forget anything else to tell the jury on the last trial that you want to tell this jury?

A I didn't forget anything else.

Q Now, did you forget to tell the jury on the last trial that, for money, you were hired by a Union to kill people? Did you tell the jury that?

MR. EDWARDS: I object to that. There is no such evidence

In this case.

THE COURT: Excluded. There is no evidence of that.

BY MR. PALMIERI:

Q You were hired by a Cloakmakers' Union, weren't you?

A Yes.

Q And you pled guilty to manslaughter in the first degree for killing a man?

A Yes.

Q With what weapon?

A With a revolver.

Q And you killed that man by orders of your Union, did you not?

A No, sir.

Q By whose orders?

A By order of "Joe the Greaser", Joe Rosensweig.

Q And so you were an assassin for hire; you killed people on orders, for hire?

A It was for no hire. I didn't get no money. I did it because this man was looking to kill me, and "Joe the Greaser" came around and told me to kill him, and I killed him.

Q And you killed him because "Joe the Greaser" told you to kill him?

A Yes.

Q Now, was that affair connected at all with the Maestry affair?

A No, I don't know those people at all, and don't know nothing about them.

MR. EDWARDS: We will concede that it was not.

BY MR. PALMIERI:

Q And you have given no information about them, about these

defendants, to the District Attorney?

A No, sir. Excuse me. I know one thing. When I was walking around the flats, one time, they were talking to "Rocks" Cornell, and this "Rocks" Cornell called me over and he says---he said he wanted to find out if the La Salle brothers turned State's evidence against him. And I passed around the tier and they were talking to "Rocks" Cornell. He was on the first tier below, and he called me over, and he said, "Now, listen. What have the La Salle brothers to say?" And I said, "I don't know. I don't trust them and they don't trust me." And he said, "I know the reason. You are a rat and they are rats." And they were standing talking to him, to Cornell, at that time, and since that time they were after me all the time.

BY THE COURT:

Q How long before the alleged assault was this talk with Cornell?

A About three weeks.

BY MR. PALMIERI:

Q Did you ever say a word about this on the last ***

A I made my statement.

Q Will you answer that yes or no?

THE COURT: Well, I will exclude the question.

THE WITNESS: I made my statement.

THE COURT: One moment, please, I will exclude it.

MR. PALMIERI: I respectfully except.

THE COURT: If you can show what he was asked any such

question, and gave a different answer, I will allow it.

BY MR. PALMIERI:

Q Didn't you volunteer this evidence?

THE COURT: No. The Court will rule that you brought out that response. Go on.

MR. PALMIERI: And I except. And I move to strike out all his evidence upon this point, upon the ground that this was a volunteered statement of the witness.

THE COURT: The motion is denied.

MR. PALMIERI: And I except.

BY MR. PALMIERI:

Q Now, how far was the defendant Maestry from where you were talking with "Rocks" Cornell?

A Just passing by*** They were standing talking on the flats, and I passed by***

Q You just passed by?

A Yes, sir.

BY THE COURT:

Q This was in the Tombs?

A Yes, sir.

Q And you are speaking now of parts of the corridors where you exercise or walk?

A Yes, sir.

BY MR. PALMIERI:

Q What corroder was it? What tier was it?

A The second tier.

Q And you were walking on the second tier?

A Yes, sir.

Q Did you speak to---did you stop to listen to what they were saying?

A No, they called me over.

Q When you say "they" called you over, where were they?

A They were downstairs, with "Rocks" Cornell, and they were talking there.

Q Did anybody else call you over except "Rocks" Cornell?

A No, sir; and they were standing there talking to him.

Q Who do you mean by "they"?

A I mean to say he called me over.

Q and when you say they were standing, who are "they"?

A This fellow and the other one. (Indicating the two defendants) and the other fellow in the Tombs.

BY THE COURT:

Q Do you mean Firola, the third alleged assailant?

A Yes, sir.

BY MR. PALMIERI:

Q Did you volunteer this statement on the last trial, or make it?

MR. EDWARDS: Objected to.

THE COURT: Sustained.

A I wasn't asked about it.

BY MR. PALMIERI:

Q Now, did you talk to Maestry when you were talking to Cornell?

A No, sir.

Q Did you say anything to Maestry, after you got through talking to Cornell?

A No, sir.

Q Did you say anything to Napolitano, after you got through

Cornell?

A No, sir.

Q Or to Firola?

A No, sir.

Q Now, where were the La Salle Brothers at the time you had that talk with Rocks Cornell?

A In 54th Street.

Q You weren't in 54th Street, were you?

A Now?

Q At that ti me?

A No, I was in the Tombs.

Q You were in the Tombs?

A Yes, sir.

Q And you want us to believe that "Rocks" Cornell wanted to know from you what these people had said in 54th Street, while you were in the Tombs?

A No. He wanted to know before his trial was going on, because I was talking to the La Salle brothers, and he wanted to know what they said. They took them away two days before his trial.

BY THE COURT:

Q There they in the Tombs at that time?

A No, sir; they had been taken away just the day before.

BY MR. PAOLMIERI:

Q And you had seen "Rocks" Cornell that day, bad you not, the day of the alleged assault?

A Yes, they took me down to the flats, and he said, "What are you going to do? Are you going to tell the District Attorney?"

Q Did you have a fight with "Rocks"?

A No, sir.

Q He simply called you "District Attorney's rat"?

A He never called me that, only be called me that time, when I walked down from the flats. He didn't call me that name. He only

Called me that name when he called me over and I refused to give him any information from the La Salle brothers.

Q Did he call you anything else?

A No, sir.

Q Did you at that time report this to the keeper?

A No, sir.

Q You kept it to yourself for three weeks?

A Yes, sir. Because I didn't want to make trouble.

Q You are a peaceful fellow?

A Well, I'm not looking for any trouble.

Q And you say, after three weeks, Maestry and two other people came to your cell, and almost half killed you; is that right?

A Yes, sir.

Q Can you show me the mark that you got on the back there?

THE COURT: Well, what is the use of going into these marks, Mr. Palmieri? Haven't I given your clients the benefit of the ruling that the injuries that he suffered are not an issue in this case?

MR. PALMIERI: I will bow to your Honor's ruling.

THE COURT: Well, he says he had a mark on the back. Now, whether it is a big or little mark is immaterial. You will admit that he showed a mark at the last trial?

MR. PALMIERI: He showed a mark which, I contend, is three years old, your Honor, and he knows it better than I do.

THE COURT: No, sir; I don't.

THE COURT: Well, no one can tell that. Dr Lichtenstein

Will testify to his injuries. I merely want to save time, and I wish to keep the issue clear before this jury. It is admitted that these men assaulted him, and, if they were not justified, legally, why then they are guilty of assault in some degree, and, if they were justified legally, they are guilty of no crime whatever. That is a simple issue, and I am not going to take three or four days to try it, this time.

BY MR. PALMIERI:

Q Now, you say that Maestry came and placed you on the bed?

A Yes, sir.

Q And choked you?

A Yes, sir.

Q And Napolitano kicked you?

A Yes, sir.

Q And Firola punched you?

A They put me down on the bed and the three of them started in to beat me.

Q And when Strouse came you were nearly dead?

A Well, I was laying there.

Q Did you see Strouse come in?

A Yes, I seen him come in and this fellow (Indicating the defendant Maestry) was just going to get out of the room when Strouse come in.

BY THE COURT:

Q Well, which one are you speaking of now?

A Maestry.

BY MR. PALMIERI:

Q Who was punching you, if any one, when Mr. Strouse came in?

A The fellow with the finger (Illustrating).

Q And he is not on trial now?

A No, sir

Q And that was Firola, was it not?

A Yes, sir.

Q And how many blows did he give you?

A I couldn't tell you.

Q But you are sure when Strouse came in, Firola was punching you?

A Well, I can't be sure that he was punching me, but he was on my bed, on top of me.

Q Oh, he was on top of you, assaulting you, when Strouse came in?

A He was right on the top of me, and I was laying in the bed, when Strouse came in.

Q With Firola on top of you?

A Yes.

Q And didn't you, at that time, when Strouse came in, --- is it not a fact that no blows were struck at all, no fight was going on when Mr. Strouse, the keeper, came in ; isn't so?

A Why wasn't there no fight? He was right on my bed, kicking me. He was right on top of me. I was laying like unconscious, and I couldn't say that.

Q Now, isn't it a fact that when Strouse came in you, with your legs, were keeping Napolitano near you, with your legs crossed about his legs?

A I don't know that.

Q Will you swear that you didn't have your legs crossed over Napolitano's legs?

A I couldn't swear to that. I don't know.

Q You didn't go over this matter for the second trial, did you, and so you don't remember that?

A No, I don't remember that.

Q Now, isn't it a fact that Maestry was near the door when Strouse came ***

A What?

BY MR. PLAMIERI:

Q Is it not a fact that Mr. Maestry was near the door of your cell when Mr. Strouse came in?

A I didn't see him. He wasn't there.

Q You didn't see Maestry?

A I seen him, and then they ran away.

Q Well, when you say they ran away, do you mean to say that Maestry was not near your cell door when Strouse came in?

A I didn't see him when Strouse come in.

Q Well, was Maestry assaulting you from the time the assault took place until Strouse came in?

A Yes, sir.

Q Now, there is no question about that?

A No, sir.

Q You are sure about that?

A Yes, sir.

Q Maestry was the first man to get ahold of you by the throat?

A Yes, sir.

Q And he was assaulting you when Strouse came in?

A I don't know if Strouse seen it or not, but he was assaulting me.

Q In other words, you don't know whether Strouse would stand by you, by what you say, or not?

MR. EDWARDS: Objected to.

THE COURT: Sustained.

BY MR. PALMIERI:

Q Now, where was Maestry when Strause came in?

A I don't know; I didn't see him. I was laying on the bed.

Q Well, then, after Maestry got a hold of you by the throat what else did he do?

A He hit me right in the chin (Illustrating) and I fell down on the bed, and they started to hit, the whole three of them hit me.

Q Were you ever in the hospital on this case?

A I wasn't in the hospital on this case, no, but I was in the hospital---

Q You were just about to say that you were in the hospital, but not about this case?

A Yes, sir.

Q Before this occurrence, did you know a fellow by the name of "Red-headed-Curran" in the Tombs?

A No, sir.

Q Now, just try and think?

A No, sir; I don't know him.

MR. PALMIERI: Well, the Tombs book was brought here for me, your Honor, and I hard it was here.

THE COURT: Well, you can use it with your own witnesses, in your own case. You have gone far enough into your defense with this witness.

MR. PALMIERI: Well, then, I will ask him this question.

"Q Were you ever sentenced to five days---

A For peddling without a license---

THE COURT: Strike out the answer. Wait until the question is asked you.

BY MR. PALMIERI:

Q Were you ever brought before the Warden of the City Prison, upon the complaint of two keepers, I think it was, for shouting, hollering, calling other prisoners out of their names and after you were heard, and after the Keepers' complaints were heard, were you sentenced to five days lost of privileges?

MR. EDWARDS: I object to that as immaterial.

THE COURT: I will allow it.

MR. EDWARDS: The question as to whether he did the act might be competent, but not an accusation.

THE COURT: Well, I will allow it.

BY MR. PALMIERI:

Q Is that a fact?

A Yes, sir.

MR. PALMIERI: That's all.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q Tell us what was the occasion of that hearing before the Warden?

A Eh?

Q (Question repeated)

A I don't understand.

BY THE COURT:

Q Well, how did it happen that you got the five days? Tell us all about it. That is what Mr. Edwards wants to know.

A Well, the fellows right next to me were calling other fellows names, and the keeper just happened to pass by, and I had just hollered up for a newspaper then, and the keeper says. "Now I've got you," and the Keeper says he will make a complaint against me.

Q And is that the only complaint that was made against you?

A Yes, sir.

RE-CROSS EXAMINATION BY MR. PALMIERI:

Q Then the keeper was mistaken?

A Yes, he was mistaken.

Q And you didn't shout or holler?

A I only hollered up for a paper; that's all, for a newspaper.

THE COURT: Now, that is all on that subject, Mr. Palmieri. Please go on with something else. He has explained it, and the jury may consider his explanation, and give it the weight they consider it entitled to.

BY MR. PALMIERI:

Q Now, have you forgotten anything?

A No, sir.

Q Do you want to volunteer any more statements?

A No, sir.

Q Do you want to say anything else?

A No, sir.

Q Have you told us all?

A Yes, as much as I know.

BY MR. EDWARDS:

Q Since the first trial of this case, have you been to the District Attorney's office, or had any one talk to you about this case at all?

A No, sir.

Q Have you seen the testimony you gave on the first trial?

A No, sir.

MR. EDWARDS: That's all.

MR. PALMIERI: Oh, may I ask one more question?

THE COURT: Yes, he may come back.

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BENJAMIN SCHNEIDER, being recalled, for further cross examination, testified as follows:

RE-CROSS EXAMINATION (Continued) By MR. PALMIERI:

Q You and Rothman are in the 54th Street Prison?

A Yes, sir.

Q Occupy the same cell?

A No, sir.

BY THE COURT:

Q But you were in the same cell on the day in question?

A Yes, sir; but I've got a different cell up there.

BY MR. PALMIERI:

Q Well, you came down from 54th Street with him to-day?

A Yes.

Q And you meet him every day on the tier?

A Yes, sir.

Q And haven't you spoken to him a word about this case?

Since the 19th of June?

A No, sir.

ABRAHAM ROTHMAN, 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 prison?

A In the Tombs, eleven weeks.

Q And when were you transferred from the Tombs to 54th Street?

A The same day of the trouble we had in the Tombs.

Q The 19th of June?

A Yes, sir.

Q Have you ever been convicted of any crime?

A No, sir.

Q Are you under any indictment now?

A No, sir.

Q How long were you a cell mate in the Tombs, of Bennie Schneier?

A About four or five weeks.

Q Do you know these two defendants?

A Yes, sir.

Q Where did you first meet them?

A On the same tier where I was.

Q They were on the same tier?

A Yes, sir.

Q You were on the second tier?

A Yes, sir.

Q Now, on the morning of the 19th of June, do you recollect about what time your cell doors were opened for breakfast?

A About ten minutes after seven.

Q And what did you and Schneider do?

A We were just taking in our milk, in the morning.

THE COURT: Well, just explain to the jury how you get your milk?

A At ten minutes after seven, when they open up the gates, we take our milk in, and empty the milk into the cup and then put the bowl out again.

Q And the cups you keep always in your cell?

A Yes, sir; always in the cell.

THE COURT: Have you those cups and bowls here?

MR. EDWARDS: The Keeper has them outside, your Honor.

THE COURT: Then perhaps they had better be brought in so that the jury may see them, and see just what they are.

MR. PALMIERI: I will concede that they be put in evidence at any time.

THE COURT: Go on, Mr. Edwards, then.

BY MR. EDWARDS:

Q Well, after you had taken in your breakfast, that morning, tell us what happened?

A At ten minutes after seven, when the gates opened up, we took our milk in, and put it in the cup, and put the bowl out again.

Q Now, right there. Is that the sort of cup that you have there? (Indicating a cup)

A Yes, sir.

BY THE COURT:

Q Each one of the prisoners had one of those cups or mugs?

A Yes, sir.

BY MR. EDWARDS:

Q And the bowl you have was just like this? (Indicating a bowl)

A Yes, sir.

Q This is the kind of bowl that you referred to as taking your milk in with?

A Yes, sir.

Q And this is the kind of cup that you poured the milk into***

A Yes, sir.

(They are marked People's Exhibits 1 and 2 for identification.)

BY MR. EDWARDS:

Q Now, on that morning did you see these two men here?

(Indicating the defendants)

A Yes, sir.

Q Well, where were they when you saw them?

A Right by the gate of our cell.

Q Was anybody with them?

A There were three of them, and our gate was opened up wide.

Q And did either of them say anything?

A Yes, this Frank here. (Indicating Maestry).

Q Which Frank?

A Frank Maestry. He said, "You dirty rat, you stool pigeon, you are a District Attorney's man." And I got up and I said, "What's the matter, Frank?" And he said, "Well, he's a District Attorney's man. I want to give it to hi, this morning," and so I started to plead to him. I said, "Please leave him alone, Frank. He is going away Tuesday, to get hios sentence" and Frank grabbed a hold of me by the neck and throwed me out of the cell, and then he grabbed a hold of Schneider by the neck, and threw him on the bed, and the other two got right on top of him and, they were firing them bowls at him.

Q Now, where did you see the bowls that they threw at him first?

A The other two had them.

Q Which two?

A Napolitano and the other fellow that isn't here. They had the crockery in their hands; these here bowls and were firing them at him.

Q What did they do with them?

A They threw them at him. They went wild.

Q Was that before or after the was thrown on the bed?

A Before.

Q Well, after Maestry threw him on the bed, what did the

Other two do?

A They got on top of him in the bed, kicking him an hoofing him. (Illustrating)

Q Now, each of you has a cot there?

A Yes, sir.

Q One above the other?

A Yes, sir.

Q Like a sleeping car?

A Yes, sir.

Q Now, were both beds down at that time?

A No, sir; the top one shut up. It's always shut up, and the other one was down.

Q The lower bed was down?

A Yes, sir. And then Frank stood this way outside the gate, (Illustrating) and he said, "go on, give it to him, kill him, kill him. He's a District Attorney's man."

Q He stood outside there, after he threw him on the bed?

A Yes, sir.

Q With his arms folded, as you have illustrated?

A Yes, sir.

Q And how long did that last?

A Two or three minutes.

Q And what did Schneider do?

A He was crying for help.

Q Well, what did he say?

A He was hollering in Jewish, "Help. They're killing me."

Q And what happened then?

A The keepers came up.

Q What keeper came up; do you remember?

A Freddy, the keeper from the first tier, and Strouse, our own keeper, and then the Deputy Warden came there.

Q Now, where were these two defendants when Strouse came?

A They were in the cell, two of them, but he was at the door, looking out for the keepers to come. (Indicating Maestry).

Q Both of these defendants were in the cell?

A Yes. No. Frank was then outside in the corridor, and the other two was in the cell. He was outside the door watching for the keeper.

THE COURT: No, strike that out, as improper.

BY MR. EDWARDS:

Q And what happened after that?

A Then the keepers took Benny Schneider out of the cell. He was all cut up. They took him down.

Q Well, what did they do with the other two men that were in the cell?

A That's all. They disappeared.

Q Did you see Benny Schneider after the men left him in the bed?

A Yes, she was on the bed.

Q And what was his condition?

A He was laying stretched out. (Illustrating).

Q How was he dressed?

A In his under shirt.

Q Did anything happen to that?

A It was all tore, and he was cut in the back, and his lip was all swelled up and he was cut under the eye. (Indicating the righteye.)

Q Anything else?

A And about two or three lumps on his head.

BY THE COURT:

Q Well, he had a pair of black eyes, did he?

A Yes, sir.

Q You know that a black-eye is?

A Yes, sir.

Q Well, perhaps they hadn't turned black so soon, but they were swollen eyes?

A Yes, sir; I know what a black eye is. I've seen them often.

BY MR. EDWARDS:

Q And have you told us now all that you know about the matter?

A Yes, that's all.

CROSS EXAMINATION BY MR. PALMIERI:

Q Have you gone over this evidence since the last trial?

A Have I gone over this evidence?

Q Yes?

A No, sir.

Q Have you gone over this evidence since the last trial, about keeping your hands that way? (Illustrating)

A No, sir.

Q Have you ever gesticulated in the Tombs, so that you could have your hands that way?

A No, sir.

Q You haven't gone over this dramatic attitude?

A No, sir.

Q It is natural with you?

A No, I stopped them from going in there.

Q And you have talked over this matter with Bennie, haven't you, since the 19th of June?

A No, I've got my own troubles.

Q Why, I thought you were in the Tombs for your health, that you were not indicted?

A I wasn't indicted.

Q What was the charge against you?

MR. EDWARDS: I object to the question.

THE COURT: Sustained. He was lawfully committed to the

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Tombs.

BY MR. PALMIERI:

Q You have been lawfully committed to the Tombs on some criminal charge?

A Yes.

BY THE COURT:

Q A Magistrate committed you there, did he ?

A Yes, sir.

Q To await the action of the Grand Jury?

A Yes, sir.

BY MR. PALMIERI:

Q And you have been there how long?

A Eleven weeks, I have been there.

BY THE COURT:

Q And you had been there about three weeks before this occurrence?

A It was the eleventh week.

Q Then have you been there since?

A No, sir; I am up in 54th Street Court.

Q But there is no charge pending against you now?

A No, sir.

Q You are kept as a witness in this case?

A Yes, sir.

MR. PALMIERI: Well, I want to inquire what the charge is. I don't think this witness could be kept without any charge.

MR. EDWARDS: My recollection is that the charge was dismissed, and he is being held as a witness in this case.

THE COURT: He says he is held as a witness.

MR. PALMIERI: I understand that witnesses, with respect to your Honor's opinion, are kept in the House of Detention.

THE COURT: At times. But the witnesses in the case of Charles Becker were kept in the 54th Street Prison, as witnesses, and there was no evidence against them, except their own statements, and there was no charge against them, and they were kept there as witnesses, with their consent, under an agreement with the Court.

BY MR. PALMIERI:

Q Are you kept there as a witness in this case?

A Yes, sir.

Q But not in any other case?

A No, sir.

Q Are you sure about that?

A This case that I am arrested for?

BY THE COURT:

Q No. This case that you are testifying in now . Your case is ended, you say.

A No, sir; it isn't ended yet. I'm waiting.

BY MR. PALMIERI:

Q So that you expect, if you testify right against these men in this case, for the District attorney, you expect to be discharged in the other case?

A Certainly not.

Q And under those circumstances, didn't you try very hard to think of everything that you could say in this case?

A No sir; because I'm telling the truth.

Q You never killed anybody, I suppose?

A No. sir.

Q Do ou remember upon this trial you just swore that, when Maestry came to the cell, he said, "Kill him, give it to him."

You say he said that?

A Yes, he said that.

Q Did you say that on the last trial?

A Yes, the same thing.

Q You remember this question and answer:

"Q (By Mr. Edwards:) Tell all that they said. Now, what did these men say or do, either of them or any of them? Did they all shout together?

A No, sir; this one (Indicating Maestry) he hollered out "You rat, you are a District Attorney's man," and he was trying to get into the cell to beat him up?" Did you forget to say that the said "Kill him" on the last trial?

MR. EDWARDS: I object to the question, because it refers solely to when Maestry came to the cell door first, and he says he made it after he had thrown him on the bed and the other two were beating him up.

MR. PALMIERI: Now, you have read this evidence and I haven't Mr. Edwards, and I claim now that I am right. If you claim that he said "Kill him" in any part of the record, I'll stop right here.

MR. EDWARDS: May the counsel direct his remarks to the Court, and not to me?

BY MR. PALMIERI:

Q You say you testified at the last trial?

A Yes. He said, "Kill him. He is a District Attorney's man, a ***ool pigeon."

Q Now, then, listen to this question. (By Mr. Edwards)

"Q And these defendants were outside of it?

A Yes, sir. An

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 have go to give it to him before he goes back for sentence.'"

Now, did you say anything about Maestry saying "Kill him"?

A Yes, I said that.

Q Then do you mean to say that when you said that Maestry said, "We've got to give it to him efore he goes back for sentence", that then you claim you added that Maestry said "Kill him", and that the stenographer forgot to take it down?

MR. EDWARDS: I object. The witness has said nothing of the kind.

THE COURT: I will sustain the objection to the question.

MLR. PALMIERI: If the District Attorney admits that he didn't say that on the last tril, I will not go any further.

MR. EDWARDS: I mlake no admission whatever.

MR. PALMIERI: Do you claim that he did?

MR. EDWARDS: And I don't make any claim either.

MR. PALMIERI: Well, I would like to introduce this man's evidence at the last trial.

THE COURT: Well, I will not receive it.

MR. PALMIERI: For the purpose of contradicting him.

THE COURT: Yes, but you must point out the alleged contradiction.

MR. PLAMIERI: I have.

THE COURT: Then you rest, so far as that is concerned?

MR. PLAMIERI: Yes, sir; and I offer in evidence his entire testimony on the last trial.

THE COURT: I will not receive it. The only purpose for which a reference has been made to the last trial is to show that the witness made different statements from those that he makes here.

MR. PALMIERI: Yes, sir; to that he withheld testimony at the last trial.

THE COURT: Well, it is for the jury to determine whether there is a contradiction, or a variance, or whether he did or did not so testify.

BY MR. PALMIERI:

Q Now, you say that Maestry came to the cell---

THE COURT: Now, you have gone all over that. I will not allow you to repeat that. Take up something new. You can harp on that for twenty four hours.

MR. PALMIERI: Very well. I will not ask him anymore.

THE COURT: Well, that is for you to say.

MR. PALMIERI: Well, you can go back and smile in your cell.

MR EDWARDS: I object to that improper comment of counsel.

THE COURT: Yes. Objectio sustained. The jury will disregard all comments of counsel of either ***. Mr. Edwards,

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Have you any re-direct?

MR. EDWARDS: No, sir; and I want the stenographer to take these side remarks of Mr. Palmieri down on the record.

THE COURT: Yes.

MR. PALMIERI: Oh, may I ask a question of him as he stands over there?

THE COURT: No, bring him back here. Now, Mr. Palmieri you may ask him a question.

BY MR. PALMIERI:

Q You are kept downstairs in the same cell where Benny Schneider is, aren't you?

THE COURT: You mean in the same pen?

MR. PALMIERI: Yes, sir.

A. Yes.

BY MR. PALMIERI:

Q And yet you haven't said a word about this case to Benny Schneider, this morning?

A No, sir.

Q Or ever since this thing happened?

A No. What am I going to say?

Q And that is an true as everything else you have testified to here?

MR. EDWARDS: I object to that as argumentative.

THE COURT: Sustained.

BY MR. PALMIERI:

Q Well, you *** not in the same cell with the defendants

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Were you? Or the same pen?

A No, sir. They daresn't keep us together.

THE COURT: Well, strike out the last part of that answer.

MR. PALMIERI: That's all.

FREDERICK FASSIG, a keeper of the City Prison, 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 in the City Prison, are you not?

A Yes, sir.

Q How long have you been keeper?

A Close on to eight years, between seven and eight years.

Q And on the 19th of June, what tier were you assigned to?

A I was assigned on the second tier.

Q And these defendants were prisoners on that tier, weren't they?

A Yes, sir.

Q And Napolitano was in cell all, was he not?

A Yes, sir.

Q With Firola, Frank Firola?

A Yes, sir.

Q And Maestry was in 205?

A Yes, sir.

Q And Benny Schneider and Abe Rothman were in 210?

A Yes, sir.

Q Now, will you tell the jury as briefly as you can what happened on that morning, after you opened the cell doors for breakfast?

A Well, before the cell doors had been opened, breakfast had been served to all the inmates on the tier, and all the cell doors were opened, except 203.

Q When the cells opened?

A About 7: 15. And there was some difficulty in trying to get cell 203 open, and, in working on the lock to get that cell open, we heard a scream of

"Help", and just at that moment, I should judge, My assistant, Mr. Strouse, who was with me, rushed to the scene, and I just about got the lock open when I rushed after him.

Q So he was ahead of you?

A Yes, sir; he arrived at the scene first?

Q He got there first?

A Yes, sir.

Q Now, when you came up to the cell, whom did you see there?

A Well, of course it is hard to distinguish just who were there, mentioning the names.

BY THE COURT:

Q Did you see into the cell, did you go into the cell?

A They had come out of the cell.

Q (Question repeated)

A Oh, yes, I went into the cell.

Q And who was in it then?

A Nobody outside of my partner, Mr. Strouse and Schneider and Mr. Rothman.

BY MR. EDWARDS:

Q And no one else?

A No, sir.

Q And as you came towards the cell, did you see any one coming out of the cell?

A Quite a number were coming out there, were standing there.

BY THE COURT:

Q Well, tell us what you saw. These are plain questions. Don't you understand them?

A Yes, sir.

Q Well, who was coming out of the cell?

A To mention the names?

Q Yes?

A No, sir; I couldn't, because I was a new man on that tier.

Q Did you see the defendants in that cell on that day?

A No, sir.

BY MR. EDWARDS:

Q Well, did you see them going away from that cell?

A Yes, sir.

Q Well, I asked you whom you saw leaving the cell?

A Yes, I saw the defendants leaving the cell.

Q Where were they?

A On the tier.

Q Whereabouts?

A Well, very close on to the cell.

Q Which way were they going?

A We had ordered them to disperse, the crowd.

Q Well, I am talking of a time before you had an opportunity to give any orders, and before you reached the cell. When you were on your way to the cell, what did you see?

A I saw Ae Rothman and Schneider in the cell.

Q And whom did you see outside of the cell, when you were approaching the cell?

A I saw almost all the inmates of the tier.

Q Well, you had to get through them, didn't you?

A Yes, sir; to get to the cell.

Q Well, who did you see that you knew? Whose name you could mention, leaving the vicinity of that cell?

A I seen the two defendants, and I seen Barrett, and I seen Thomas.

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Q Did you see Firola?

A I don't recollect seeing him. There were so many that I saw; it's hard for me to memorize all the names. Any amount of men I saw there.

Q That was before you reached the cell yourself?

A Yes, sir.

Q And was that before you reached the cell, 210, itself?

A Yes, sir, before I got it it.

Q And before you had given any orders to anybody to leave there?

A Yes, sir.

Q Now, did you produce this cup and bowl here this morning? (Indicating the exhibits)

A Yes, sir.

Q This is the type of cup that every prisoner receives with his milk or coffee, in the morning?

A Yes, sir.

Q And this bowl is the type of bowl that is furnished to each prisoner with his food in the morning?

A Yes, sir.

BY THE COURT:

Q And they are put out in the corridor as soon as the bowls are emptied?

A Yes, sir.

Q And you gather them up?

A The trusties gather them up and wash them up and they are ready for dinner then.

BY MR. EDWARDS:

Q Did you see any broken crockery there then?

A Yes, sir.

Q Where?

A Inside and outside of the cell.

Q And how many articles would you say were broken?

A Two bowls and two cups, I should judge.

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Q Well, can you tell us there the parts of the cups were?

A Inside of the cell, and a good deal of it outside of the cell too.

Q And the part of the bowls, where were they?

A Likewise, inside and outside.

Q How large are those cells?

A I should judge about six by eight.

Q Well, is that eight feet wide or deep?

A Eight feet deep, and six wide.

BY THE COURT:

Q The door slides, does it not?

A Yes.

Q It is just a half door?

A Yes.

Q And half of the door is immovable, fixed?

A Yes, sir.

Q And the other half slides into it?

A No, sir; the whole door slides. It's run on a track.

Q Well, where does it slide to? Don't the cells adjoin each other?

A Yes, sir; but it slides right into the cell, on the track.

Q You mean to say that the door revolves around?

A No, sir; you just pull the door open that way (Illustrating). She slides on wheels.

Q But it must go some place?

A It goes right on the inside of the cell.

Q Now, let us understand. Let us suppose this is the cell (Indicating). If I open the door of the cell; it must go

some place.

A It goes on the inside of the cell, Judge.

THE COURT: Well, I cannot understand that, and I would suggest that the jury see the door. There must be some space where the door goes to.

Q How wide is the door?

A Three feet wide.

Q Oh, then, that explains it. And the width of the cell is six feet?

A Yes, sir.

THE COURT: Now I understand it.

BY MR. EDWARDS:

Q Now cells 210 and 211 are on one end of the tier, about?

A Yes, right next to each other, and 205 is on the southwest side and 210 and 211 is on the south east side.

Q Well, what you mean is that the tiers run north and south?

A Yes, sir.

Q And 210 and 211 are on the east side of the tier?

A Yes, sir.

Q And 205 is on the west side of the tier?

A Yes, sir.

Q And to get from one to the other, what is the distance to be gone over?

A About half a block, I should say.

Q How many cells do you pass?

A You pass five cells, two bath rooms and a utility court.

Q And the bath cells are about the same size as the others?

A Oh, they are much larger. They have a capacity of two men to take a bath. And then there is a utility court, as we call it. It is a passageway where all the pipes run through.

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Q And how wide is that?

A That's at least six or seven feet wide.

Q And there would be two of those, one on each side?

A Yes, sir.

Q On the east and west side of the tier?

A Yes; there is a batch cell on each side, and the utility courtruns right through the center of the building, carrying the pipes and electric wires, etc.

Q Now, did you see Benny Schneider's condition when you got into the cell?

A Yes, sir.

Q How was he dressed?

A He was partly undressed; all he had on was an undershirt, and that was partly torn off.

Q And his trousers were on, were they?

A Yes, sir.

Q But the undershirt was partly torn off him?

A Yes, sir.

Q Were there any marks on him that you saw?

A Well, there were marks on his face. He was cut under the eye, and his body looked as if it had received very bad treatment. It was red, and there were little scratches about his body, but nothing that I would consider very serious.

Q Did you look at Maestry and Napolitano?

A Yes, sir.

Q Did you notice any injuries upon them?

A No, sir.

Q Did you see Firola?

A Yes, sir.

Q Did you see any injuries upon him?

A No, sir.

Q What was Schneider doing when you got into the cell?

A Why, he was crying.

Q Yes. Where was he in the cell? By the way, whereabouts in the cells was he?

A He was lying on the cot.

Q And where was Rothman in the cell?

A Right alongside of him.

Q Now, you have told us all that you know about this?

A Yes, sir.

MR. EDWARDS: May we have the cup and bowl marked in evidence, if your Honor please? (Indicating People's Exhibits 1 and 2 for identification)

MR. PALMIERI: No objection whatever.

(They are admitted in evidence and the cup is marked People's Exhibit 1 in evidence and the bowl is marked People's Exhibit 2 in evidence.)

MR. EDWARDS: That's all.

CROSS EXAMINATION BY MR. PALMIERI:

Q When you got to the cell of Schneider and Rothman, there were a great many inmates in front of the door of these men, were there not?

A Yes, sir.

Q About how many, would you say?

A Oh, I should say there were about twenty.

Q And, in order to get into that cell you had to make your way through those men?

A I did, yes.

Q You were the first keeper to get there?

A No, sir.

Q Who was the first?

A Mr. Strouse.

Q Were you immediately behind Strouse?

A Well, the difference

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In time might have been a minute or so. I was working on that lock, to try to get it open.

Q Well, were you behind Strouse as you entered?

A Well, we may have been a little distance apart, getting the people to step aside, so htat I could get to the scene.

Q Just about what distance would you say?

A Well, a distance of about a quarter of a block.

Q And when you go there, Maestry was not there?

A Sir?

Q These defendants were not in the cell?

A No, they were not in the cell.

Q But all the inmates on the tier were congregates around the door of the cell?

A Yes, sir; around the door where the scene had taken place.

MR. PALMIERI: That's all.

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess until 2:15 P.M.)

AFTER RECESS.

MR. EDWARDS: Call in Mr. Strouse.

MR. PALMIERI: If your Honor please, before Mr. Strouse is called, may I get the correct position of Mr. Maestry, at the time Mr. Strouse got there, from the lips of Rothman? As I understand it, I have omitted to ask Rothman that question.

THE COURT: You can send for Rothman, and examine him, after Mr. Strouse goes on the stand.

MR. PALMIERI: All right.

GEORGE P. STROUSE, a keeper in the City Prison, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Mr. Strouse, how do you spell your name?

A S-t-r-o-u-s-e (Witness spells).

Q Mr. Strouse, you are a keeper in the City Prison, are you not?

A I have been in the Department about twenty years.

Q And as a keeper how long?

A Twenty.

Q And how much of that time have you spent in the Tomba Prison, Mr. Strouse?

A The last time I came there was a year ago, the first of last March.

Q Now, on the 19th of June, you were on the second tier, were you not?

A Yes, sir.

Q Now, on that tier, as I understand it Frank Maestry occupied cell 205?

A Yes, sir.

Q And John Napolitano, with Frank Firola, occupied cell 211?

A Yes, sir.

Q And Benny Schneider and Abraham Rothman occupied cell 210?

A Yes, sir.

BY THE COURT:

Q And that adjoins 211?

A Yes, sir.

Q It is immediately adjoining?

A Yes, sir.

BY MR. EDWARDS:

Q Now, on the morning of June 19th, Mr. Strouse, at what time did you open the cell doors for breakfast?

A Not more than five or ten minutes after seven.

Q And who was opening the cells with you?

A Mr. Fassig.

Q I understand you had some difficulty with a cell door, did you not?

A Yes, cell 203. It's on the southwest end of the tier.

Q And all of these cells we have spoken of here are on the south section?

A Yes, sir.

Q And 203 and 205 are on the west side of the south section?

A Yes, sir.

Q And 210 and 211 are on the east side of the south section.

A Yes, sir.

Q And we might call that the south half, might we not?

A Yes, sir.

Q Now, while you and Keeper Fassig were at work on the door of cell 203, what happened?

A We were trying to get the

Door open, and Mr. Fassig said, "I'll do down to the safe, and get another key," and he did, and just then we got the door open and Sam Walser came up just then and said---

Q No, you can't tell that.

MR. PALMIERI: Well, I don't object to that. I don't object to Mr. Strouse telling anything he desires to .

BY THE COURT:

Q You say that some one told you something?

A Yes, sir; that there was trouble in 210.

BY MR. EDWARDS:

Q And Fassig was back at that time?

A Yes, sir.

Q and you were both at 203?

A Yes, sir.

Q And then what did you do?

A I went around on the south side and Mr. Fassig turned and went the other way around. I got to the cell five or six second ahead of him.

Q Now, who got to 210 first?

A I did.

Q And what did you see when you got there?

A I saw---when I go to the cell, Schneider was laying on his back on the cot, with this legs wrapped around Napolitano's legs, and Maestry was standing just in the door. Firola was about half way in the cell, and Rothman was near the toilet.

Q And that is in the back part of the cell, the part furthest*** away from the door?

A Yes, and I told the men to go to their cells and they went to their cells. And I said to Schneider, "are you hurt?" And he didn't answer me; he kept

on yelling, and I said to Fassig, "I'll lock these men in" and Mr. Cummings come up, and had Schneider taken down to the first tier.

Q Who is Cummings?

A He was acting in the absence of Mr. Hanley and Mr. Brennan.

Q He was acting as assistant warden?

A Yes, sir.

Q Now, what was Schneider's condition when you first saw him in the cell?

A Well, he had a scratch on his shoulder, and his shirt was torn, and his face was marked. He had a mark on his face.

Q Now, did you lock Napolitano and Maestry in their cells?

A Yes, sir.

Q Did you observe any marks on them?

A Napolitano said, "Mr. Strouse, he knocked my too*** loose," and he took a hold of his tooth that way (Illustrating) and there was bruise on his face.

Q Did you notice any marks on Maestry?

A No, sir.

Q Or on Firola?

A None that I saw.

Q Was there anything else that you noticed in or about the cell when you got there?

A No.

Q Any crockery of any kind?

A Two cups was broke, and a bowl.

Q Like exhibits 1 and 2?

A Yes, sir.

Q And where was that broken crockery?

A One was on the tier. The cup laid on the inside of the cell near the door, the

Bowl was broke under the cot, partially.

Q Have you now told us all that you saw that morning?

A Yes, sir.

MR. EDWARDS: He is your witness. Now, I want to ask you just one more question.

BY MR. EDWARDS:

Q As you go in the door of the cell, on which side is the cot?

A On the left hand side as you go in.

Q There are two cot, are there not?

A Yes, sir.

Q How was the upper one?

A The upper one was chained up.

Q That is, it was up against the wall?

A Yes, sir.

Q And the lower one was in position?

A Yes, sir.

Q And the toilet was in which corner of the cell?

A In the southwest corner of the cell.

Q And that's where Rothman was?

A Yes, sir.

Q That is the side of the cell furthest*** away from the cot?

A Yes, sir.

CROSS EXAMINATION BY MR. PALMIERI:

Q Just one moment, Mr. Strauss. Was anybody kicking or assaulting Benny Schneider when you e***ered his cell?

A No, sir.

Q Were any blows struck by anybody when you entered him cell?

THE COURT: Do you mean after he entered his cell? *** him if he saw any one strike any one else.

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BY MR. PALMIERI:

Q There was no fight at that time?

A No, sir; not one blow struck after I got there.

BY THE COURT:

Q You did not see any people struck?

A No, sir.

BY MR. PALMIERI:

Q Now, in order to enter that cell, had you to make your way through a crowd of inmates?

A Well, there was only a few of them on this side of the cell. (Illustrating) And I pushed them away, and went into the cell.

BY THE COURT:

Q That is, there were only a few people between you and the cell?

A Yes, sir; about eight or ten.

Q And the crowd that you speak of was in Fassig's way?

A Yes, sir.

BY MR. PALMIERI:

Q And about how many were there all told?

A Well, I should say in the neighborhood of the cell, there were at least twenty-five to thirty people.

MR. PALMIERI: That's all. Now, can I ask Rothman a question.

THE COURT: Well, wait until the People rest. Are you going to call Dr. Lichtenstein, Mr. Edwards? I see he is here.

MR. EDWARDS: Yes, sir.

PERRY M. LICHTENSTEIN, M. D., a witnesses

called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Dr. Lichtenstein, you are a practicing physician and surgeon, duly licensed to practice in this State?

A I am.

Q and you are the assistant physician in the City Prison, are you not?

A Yes, sir.

Q And have been for how long?

A For two years.

Q Now, on the morning of the 19th of June, were you called to see Bennie Schneider?

A I was.

Q Will you state what condition you found him in, and what you found as the result of your examination of him?

A I found---

BY THE COURT:

Q He was brought to your office, wasn't he? You didn't see him in his cell?

A No, your Honor. He was in the Warden's office.

Q And you don't know anything about what happened in the cell?

A No, sir.

BY MR. EDWARDS:

Q Now, tell us what condition he was in when you saw him in the Warden's office?

A He was highly nervous. His pulse was 120. He had contusions of the forehead on both sides.

His face showed abrasions, more marked on the right side, and on the neck he had an abrasion, about one and a half inches

long.

He had also an abrasion---Yes, the lower lip on the right side was out and bleeding---the right side of the chest showed an abrasion about two and a half inches long, just above the fourth rib, and the back showed an abrasion, about two inches long, just over the scapula.

Q Well, show that to the jury on your own body.

A Here (Indicating).

Q What does that mean?

A (There) (Indicating).

Q show it on this officer, please. (Indicating the Crier)

A Right here (Indicating) On the right side, over here, just about the fourth rib, he had an abrasion two and a half inches long, and an abrasion, an inch and a half long here (Indicating).

BY THE COURT:

Q What is an abrasion, Doctor?

A A break in the skin.

Q And they were recent injuries?

A Yes, sir.

Q They were fresh injuries?

A Yes, sir; both eyes were contused, that is, they had a slight blueness about them.

Q Well, they are commonly known as Black eyes, are they not?

A Yes, sir. The lower lip on the right side was cut an bleeding. The abdomen showed no marks, but was tender to the touch. The shin bone on both sides was contused and was very tender to the touch.

BY MR. EDWARDS:

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Q That means bruised, does it not?

A Yes, sir.

Q Now, doctor, can you state, with reasonable certainty, what those abrasions were caused by?

A They appeared to be caused by some blunt instrument.

Q That is, should you say that they could have been caused by the fists alone?

A I don't think so.

Q Well, could some of them have been caused by kicking with the shoe on?

A Yes, that's very likely.

Q And did you examine any of the other men, Firola or Maestry or Napolitano?

A I didn't examine them, but I think it was Maestry told me his mouth was sore.

Q Wasn't that Napolitano? (Indicating Napolitano)

A No. Yes, it was that man. Yes. He told me that his gum was sore. But he didn't mention anything about a loose tooth at the time.

Q Didn't he mention any other injuries at all?

A No, sir; he showed me no injuries at all.

CROSS EXAMINATION BY MR. PALMIERI:

Q Doctor, you have described minutely all the scratches and injuries you observed on Beny Schneider?

A Yes, sir.

Q And you haven't forgotten them?

A No, sir; I have the record here (Indicating).

Q You even made a report to the District Attorney?

A Oh, no; not to the District Attorney. We make out a report ourselves in every case.

Q What was the pulse of Firola?

A I didn't examine either

of them, either of these three men, no one except Schneider.

Q Did you look at Napolitano's face?

A Yes, I passed the cell and looked at his face.

Q Didn't he have a bruise on his face?

A He had no bruise on his face that I saw.

Q Well, Keeper Strouse says he saw one on his face?

A Well, that makes no difference.

BY THE COURT:

Q What time did you see him, doctor?

A On that same day, in the morning.

Q Well, what time did you get there in the morning?

A About ten o'clock. I got there at a quarter to ten, that morning.

Q Well, then, it was after ten o'clock when you saw him?

Q Yes, sir; it was after ten o'clock.

BY MR. PALMIERI:

Q Don't you know that Napolitano told Keeper Strouse that his tooth was dangling?

A No, he didn't tell me that.

BY THE COURT:

Q And you don't know what he told Keeper Strouse, do you?

A No, sir.

BY MR. PALMIERI:

Q Well, did you ask him what injuries he had received?

A I went to his cell---

Q (Question repeated)

A I went to his cell and he told me that his mouth was sore, but he didn't tell me that he had

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a loose tooth.

MR. PALMIERI: I move to strike that out as irresponsible.

THE COURT: Denied.

MR. PALMIERI: Exception.

BY MR. PALMIERI:

Q Did you ask Napolitano---and I repeat the question--- what injuries he had received?

A I did not, because he didn't complain of any injuries, except a sore mouth.

Q And do you think you have got to make an explanation to answer that question?

A I have to; I couldn't answer it otherwise.

MR. EDWARDS: The People rest.

BY MR. PALMIERI:

Q Oh, were those injuries that Mr. Schneider was suffering from such as to, in your opinion. Cause grievous bodily harm?

MR. EDWARDS: That is objected to. It is not a matter for the doctor's opinion.

THE COURT: I will overrule the objection.

A They were not.

MR. PALMIERI: That's all.

Mr. EDWARDS: That's all. The People rest.

MR. PALMIERI: Before you rest, I would like to recall Rothman. I don't want to make him my own witness.

THE COURT: Well, recall Rothman.

ABRAHAM ROTHMAN, being recalled for further

cross examination, testified as follows:

CROSS EXAMINATION BY MR. PALMIERI:

Q Now, Mr. Rothman, I am going to ask you two questions.

A All right, sir.

Q Now, the first question is this: Now, pay attention to me---When Maestry, Firola and Napolitano were beating Benny Schneider, did you shout?

A Now, sir.

Q All right. Now, I'll ask you another question. Where was Maestry when Mr. Strouse came to the cell?

A Where was Maestry?

Q Yes?

A He just ran out; he was just running out.

Q Then he just ran into the arms of Mr. Strouse?

A No. When Strouse was coming in , he ran right out.

Q An how far did he get?

A Well, just past him, and ran right out, and one remained in the cell.

Q Now, you are positive about that?

A Yes, sir.

Q When Strouse came to the cell only one man was in the cell?

A Yes, sir.

Q Maestry had run out of the cell?

A Yes, sir.

Q Passed the door of the cell?

A Yes, sir.

Q And now as there but one man inside?

A Yes, sir.

Q And that man was whom?

A Frank---the fellow with the sore finger. I don't know his name.

Q And you are positive about that?

A Yes, sir.

RE-DIRECT EXAMINATION BY MR. EDWARDS:

Q Where was Napolitano when Strouse got there?

A He just jumped out.

Q Now, when you say that Maestry went out as Strouse came in, do you mean they passed each other at the door?

A No, sir. Maestry was outside.

Q How far from the door?

A Right close to the door, folding his hands that way, from here to here. (Illustrating).

MR PLAMIERI: Well, I would like to have that distance.

THE WITNESS: From here to here (Illustrating)

BY MR. EDWARDS:

Q Now, that is just about the limit of the long, narrow gallery which runs around in front of the cells?

A Yes, sir.

Q Now, were you excited, that morning?

A Yes, sir; I was excited.

Q Have you been promised anything by the District Attorney or any one connected with him in return for your testimony in this case?

A No, sir.

MR. PALMIERI: Pardon me, your Honor. Would you expect him to say yes?

MR. EDWARDS: And I protest against any such remark by counsel as highly improper.

THE COURT: And the jury will entirely disregard remarks.

MR. PALMIERI: Then I object on the ground that it is not proper re-direct.

THE COURT: The objection is overruled, and the question and

Answer will stand.

MR. PALMIERI: Exception.

BY MR. PALMIERI:

Q So you are a witness now, as we understand it, in two cases? You are a District Attorney a office witness in the other case, too, aren't you?

A The District Attorney's witness?

Q Yes?

A Well, I turned State's evidence.

Q And you are a witness in this case for the District Attorney?

A Just that I see, I told. I am telling the truth.

MR. PAMIERI: That's all.

MR. EDWARDS: The People rest.

MR. PALMIERI: I ask your Honor to direct the jury to acquit---to advise the jury to acquit, on the ground that the People have failed to establish the crime of assault in the first degree.

THE COURT: Well, the District Attorney said in his opening that he would submit it as assault in the second degree.

MR. EDWARDS: Yes, sir.

THE COURT: I shall submit it as assault in the second degree and assault in the third degree, to the jury. I will deny your motion to take it from the jury, or to direct a verdict.

MR. PALMIERI: Upon the whole case?

THE COURT: Yes, upon the whole case as it stands now.

MR. PALMIERI: I respectfully except.

JOHN BROOKS TAYLOR, of 238 West 62nd Street, a witness called on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Mr. Taylor, you are in the Tombs on what charge?

A Suspicion.

Q You haven't been indicted yet, have you?

A No, sir.

Q And how long have you been in the Tombs?

A Eight-four days.

Q And, before you were taken to the Tombs on suspicion, I think you were convicted of petty larceny?

A Yes, sir.

Q How many times?

A Three times.

Q For petty larceny?

A Yes, sir.

BY THE COURT:

Q Three times?

A Yes, sir.

BY MR. PALMIERI:

Q Now---

A Suspended sentence, your Honor.

BY MR. PALMIERI:

Q I didn't hear that.

A On a suspended sentence.

Q Well, you haven't been tried on this charge of suspicion yet?

A No, sir.

MR. EDWARDS: There is no charge at all, I take it.

THE COURT: Well, proceed. Go on. You know that that amounts to nothing, Mr. Palmieri.

BY MR. PALMIERI:

Q Now, did you see this fight between Schneider and some of the inmates of the Tombs?

A Yes.

Q What was it?

A Well, the tier is opened and we get breakfast at seven o'clock, but sometimes it's later than that. It's between seven and eight. We had our breakfast.

Q Well, about when was it?

A About ten minutes after we had breakfast, about ten minutes to seven.

Q Were you walking on the tier at the time?

A Yes, sir; with Maestry.

Q On the second tier?

A Yes, sir.

Q Now, tell the jury what you saw and heard, and what Mr. Maestry did and what you did?

A We were walking around the tier. We heard the shouts of "Help". Somebody was screeching "Help". Maestry and I was walking around the tier and we ran around to the cell where there was fighting, and there were four men in the fight, and Maestry started to split them, and I tried to help him, and the keepr came around and I went away.

Q Now, where was the fight? In what cell?

A It was on the threshold of 210 cell.

Q Is that Benny Schneider's cell?

A Yes, sir.

Q And was that Rothman's cell?

A Yes, sir.

Q Now, how many people were fighting in the cell when you and Maestry approached it?

A Four men.

Q And who were they?

A Schneider and his cell mate, I don't know his name.

Q Rothman?

A Yes. And this Italian boy here, and another Italian.

Q Now, how were they fighting? Just describe it to the jury?

A They were in a tussle. I didn't see any blows struck. I seen them kicking and punching, but there was nobody got it.

Q That is, you couldn't distinguish the hands or feet?

A No, sir; They were all huddled together, kicking and punching at each other. It was more of a wrestle than a fight.

Q And you couldn't tell who landed any blows?

A No, sir.

Q But you did see them wrestling and fighting?

A Yes sir.

Q Now, when Keeper Schneider---When Keeper Strouse came there, were you and Maestry there?

A Why, there was a crowd around the call when the keeper come.

BY THE COURT:

Q Now, when Keeper Strouse came there were you and Maestry there?

A Yes.

Q Which keeper got there first?

A Mr. Strouse.

Q And when he got there, where were Maestry and yourself?

A We were in front of the cell, trying to split then apart.

Maestry and I were in front of the cell.

BY MR. PADMIERI:

Q And how many inmates were in front of that cell?

A I should judge about twenty or thirty.

MR. PALMIERI: That's all.

CROSS EXAMINATION BY MR. EDWARDS:

Q How many times did you say you had been convicted of petty larceny?

A Three times.

Q When was the first time?

A That was three years ago.

Q And when was the second time?

A About three years ago.

Q And when was the third time?

A A year ago.

Q And the first time you got a suspended sentence?

A Yes, sir.

Q And the second time?

A Three months.

Q And the third time?

A Nine months.

Q And how long after you got out the last time was it before you were arrested?

THE COURT: Well, the arrest means nothing, Mr. Edwards.

BY MR. EDWARDS:

Q How long have you been in the Tombs now?

A Eighty-four days.

Q When did you go there?

A The middle of May.

Q And how long had you known Maestry?

A Since I have been on the second tier.

Q You were on the second tier then, weren't you?

A Yes, sir.

Q That's one tier above the flats?

A Yes, sir.

Q And how high are the cells between tiers?

A Twelve or fourteen feet.

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Q Is there that much head room in your room in your cell?

A Oh, no, sir.

Q Can you touch the ceiling?

A No, sir.

Q How near can you come to it?

A Within about a foot from the ceiling.

Q And how tall are you?

A Five foot nine.

Q Now, the cells are arranged with a gallery outside? The second third and fourth and fourth tiers?

A Yes, sir.

Q And there is a railing on the gallery?

A Yes. It's all fenced in.

Q And you can see the men when they are exercising on the flats?

A Yes, sir.

Q And you frequently talk to them, don't you?

A Yes, sir.

Q Now, when did you meet up with Maestry; this morning, on your walk?

A Right after breakfast. I ate breakfast and swept out my cell and I walked up towards his cell, and we started walking together.

Q Which way did you walk?

A Here is my cell and here is where the fight was. (Illustrating).

Q And how far did you get before the shouts that you have been telling about?

A Just as I started walking with Maestry we heard the hollering.

Q And near what cell were you?

A Oh, between five and nine?

Q And did you see Maestry come out of his cell that morning?

A Yes, sir.

Q Did you see---had he eaten his breakfast?

A Yes, sir.

Q Did you see him eat his breakfast?

A No, sir.

Q You didn't see him eat it?

A No, sir.

Q Had you eaten your breakfast?

A Yes, sir.

Q When you heard these shouts, what did you do?

A I ran around there.

Q Yes?

A Yes.

Q Well, before you ran around, did you see anybody outside of any other cell on that side of the tier?

A No, sir. We headed the line when we were walking around. The whole tier was walking.

Q Where was the keeper?

A On the bridge, at his desk.

Q Did you see Keeper Strouse?

A No, sir; he was on the opposite side. I had to walk around to see him.

Q Now, your cell is on the same side as Maestry's?

A Yes, sir.

Q Well, you could see that whole west side of the tier, when you came out of your cell, couldn't you?

A Yes.

Q And when you returned to walk towards cell 5, you had a view of it clear up to the division of the two locks?

A No, sir, ---yes, sir.

Q And did you see any keepers there?

A No, sir. Keepers don't stand in the passageway. They stand on the bridge.

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Q And you didn't see, then, either Fassig or Strouse?

A No, sir.

BY THE COURT

Q Are you in the same cell that you were in on that day?

A Yes, sir.

Q And is Maestry there?

A Yes, sir. He locks in 205, just the same.

Q He is still there?

A Yes, sir.

BY MR. EDWARDS:

Q And when you got around the corner of the cell block what did you see?

A I seen the fight.

Q Where?

A The entrance to the first cell. You had to turn around. Here is the tier here (Illustrating) and we were walking along, and , as soon as you turn the corner, that's where the cell is, where the fight was.

Q Who was in the fight?

A This little Italian boy over here (Indicating Napolitano)

Q Do you call Napolitano a little Italian boy?

A Well, yes. And Schneider and his cell mate and another Italian fellow.

Q Who is he?

A I don't know his name. He locks in on the third tier. He was on the third tier but was on the second tier then.

Q Who was his cell mate on the second tier?

A I don't know.

Q How long have you been on that tier?

A I don't know.

Q Well, what was going on?

A They were wrestling, and all huddled together in the door, right on the threshold of the door.

Q Did you see any one get thrown down?

A No, sir.

Q Did you see any one go into the cell?

A No, sir.

Q Did you see all four of them go into the cell?

A No, sir.

Q Did you see them separate?

A When the keeper comes, I walked away.

Q Did you see them separate?

A No, sir; I walked away.

Q When the keeper came did they stop struggling?

A These two Italian fellows backed along the tier, Maestry and this other Italian fellow.

Q Were they in the cell when the keeper got there? Were any of the Italian fellows in the cell when the keeper got there?

A I couldn't tell; I didn't see them. I didn't see any more; when the keeper came I walked away.

Q Did you see whether any of the men who were fighting went into the cell?

A No, sir.

Q Did you see whether Napolitano went into the cell?

A No, sir.

Q Did he go in there, in the cell, while you were watching?

A No, sir; not while I was there.

Q Did the other fellow go into the cell at all?

A I didn't

See no one go into the cell.

Q Did you see Schneider and Rothman back into the cell?

A No, but I seen the other two men split away when the keeper came and I walked away.

Q Did you walk away before Maestry did?

A I don't know. I'm not sure of that.

Q Did you walk away with him?

A No, sir; I walked away the other way. (Illustrating)

Q Did you see him walk away?

A No, sir; I didn't notice at all.

Q You had been helping him to separate these men, hadn't you?

A Yes.

Q Did you make any report to the keeper about it?

A No, sir.

Q Did you tell Keeper Strouse and tell him that Maestry had nothing to do with it and was only separating them.

A I believe he asked me something about it.

Q I asked you whether you told him?

A I think to told him yes. I remember speaking to him about it. He asked me whether I was there when it started, and I said "Certainly I was, and I seen Maestry separating them."

Q Well, were you there when it started?

A No, sir.

Q Well, why did you tell Strouse that you were?

A I didn't

Mean to say that. I only helped Maestry to split them apart, but I couldn't. They were too much huddled together.

Q Did Maestry separate any of them?

A No, sir.

Q Were you struck by anybody?

A No, sir.

Q Did you get any teeth knocked out?

A No, sir.

Q Did you get your face scratched?

A No, sir.

Q Well, where did you go after this happened?

A I kept walking around the tier.

Q Now, when you heard this cry what did you do?

A What was said?

A "Help" I made it out to be, "Help".

Q Well, was it "Help"?

A Yes.

Q Sure of that?

A Positive.

Q Was it an English word?

A I couldn't tell that.

Q Did it sound like a Jewish word?

A No, sir.

Q Or like an Italian voice?

A Well, no, sir; I couldn't ***say. I made out the word "Help" among all the hollering.

Q Well, did Maestry say anything to these men?

A He said, "Why don't you stop that?"

Q Is that all he said?

A Yes, sir.

Q Can you recollect anything else that he said***

A No, sir.

Q Did any one say anything to him?

A No, sir.

Q Did he say that in Italian or in in English?

A In English.

Q How long have you known Napolitano?

A Since I have on the tier.

Q Did he speak English there on the tier?

A Yes, sir.

Q He speaks pretty good English?

A Well, not very.

Q Can you understand him?

A Yes, sir.

Q Never had any trouble in talking to him?

A No, sir.

Q Do you talk to him often?

A Well, no, just good morning or afternoon.

Q Did you talk to F***la, the other man?

A Yes, sir.

Q Did he speak English?

A Yes, broken English.

Q And Maestry is an Italian too, isn't he?

A Yes, sir.

RE-DIRECT EXAMINATION BY MR. PALMIERI:

Q How did you know that Maestry is an Italian? Don't you know that he was bron here?

A Well, I see the way he speaks, I imagine he is an Italian.

Q Now, just one more question. Did you see Maestry strike any blows or hurt anybody?

A No, sir.

Q And before this occurrence, Maestry was with you?

A Yes, sir.

RE-CROSS EXAMINATION BY MR. EDWARDS:

Q Oh, by the way, I forgot to as you a question. Did you ever hear anybody talking to Schneider in the Tombs?

A No, sir.

Q Every hear anybody call him a rat or a squeeler?

A No, sir.

Q Did you ever him sent for to the District Attorney's office?

A No, sir.

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Q Is that a fact?

A Yes, sir.

Q And isn't it a fact that the keepers call out all through the tiers when a man is wanted to go to the District Attorney's Office?

A I couldn't haven't you often heard it called out?

A Well, yes, I have.

THE COURT: Well, you have not objected. If you had objected, I would have sustained he objection.

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

DIRECT EXAMINATION BY RM. PALMIERI:

Q Mr. Maestry, where were you born?

A New York City.

Q How old are you?

A Twenty-three.

Q And you were arrested for, I think---

THE COURT: Well, the arrest means nothing.

BY MR. PALMIERI:

Q It is two years since you were arrested?

A Yes, sir.

Q And you were convicted?

A Yes, sir.

Q And your case went to the Court of Appeals?

A Yes, sir.

Q And was reversed?

A Yes, sir.

Q And you have now pleaded guilty to manslaughter in the first degree?

A Yes, sir.

Q Will you state to the jury what that was?

A Well, me and this man, named James Rimore, we had a quarrel and he shot at me and I shot back at him, in self defense.

Q It was not a crime for which you were paid to kill anybody?

A No, sir. He shot at me and I shot at him.

Q Now, go on and tell your story to the jury, without my asking a single question.

A Gentleman of the Jury---

BY THE COURT:

Q Now, just tell us what happened on this particular morning. That is all we want.

A On June 19th, when this trouble happened, I locked in cell 205.

BY THE COURT:

Q Well, when you say you "locked in", you mean that you are locked in that cell?

A Yes, sir

Q That is your cell?

A Yes, sir.

Q And who was your cell mate?

A I have no cell mate. I'm in cell 205, and the doors were opened at seven o'clock, or a quarter past seven---some times twenty-five minutes past.

Q Well, I can't judge what time it was, this morning, when they opened the cells. I never take that breakfast, prison food, I buy my own food.

When the officer opened our cell, he opened our side, not the opposite side; and when he let us out, I swept out my cell; and this young man, Mr. Taylor came and asked me for a magazine and I gave it to him, and we started to walk around; and we got

to cell 209 --- between 207 and 205, and we heard shouts for help, and we both went around there, and I saw four men fighting by the thresh hold of the cell, and at Benny Schneider's cell, 210, and they were punching away at each other. And I told them they were fools and they would only lose their privileges, and wouldn't get no visits, and they wouldn't pay no attention, and I tried to break them away the best way I could.

The Officer Strouse came and he said, "Break away, break away," and then they finally looked around and seen who it was.

And this Benny Schneider threw himself on the bed when he seen who it was, that it was the officer, and commenced to scream and I walked away.

And I told Mr. Strouse that I wanted to explain it to him, and he said, "Well---?"

BY THE COURT:

Q Never mind what you said to Mr. Strouse. You were not asked that.

A Then that' all I know.

BY MR. PALMIERI:

Q Did you strike any blows, Mr. Maestry.

A No, I had no reason.

Q Did you had any trouble with Benny Schneider before this occurrence?

A No, sir.

Q Did Schneider hit you?

A No, sir.

Q Who were the four men that were fighting when you got there?

A Frank Firola, Napolitano, Rothman and Schneider, and they were clinching most of the time and making kicks and punches at each other. And I even got a few punches in the jaw myself, trying to separate them.

Q Now, during your entire time that you have lived here, the only two times that you were in trouble were the times of this occurrence where the man shot at you and you shot at him?

A Yes. And another time a suspended sentence.

Q When was that?

A Nine years ago.

Q Well, what was that for? You had better tell the whole truth to this jury.

A I was indicted for burglary in the third degree, and I took a plea, and Judge O'Sullivan suspended sentence.

Q What was that burglary?

A Stealing some cheese.

Q Oh, something was said about "Rocks" Cornell. He was never on that tier, was he?

A No, sir I never spoke to the man and don't know him and never heard of him.

Q And, so far as this tier was concerned, "Rocks" Cornell wasn't on this tier?

A No, sir; he was on the flats.

Q Can you say what the flats were, with respect to the tier above?

A Our tier, the second tier, is pretty near one story above the flats, and the passageway is only about three feet and a half wide, and, if anybody stopped there, it would be an interference with the crowd, and the officer keeps everybody

moving.

Q Now, if any one wants to talk to any one on the second tier of the flats, must he shout it out?

A He's got to shout it, and I bet everybody hears it.

CORSS EXAMINATION BY MR. EDWARDS:

Q About how many feet---about ten feet---are the flats from your cell door?

A I couldn't say how many feet it is.

Q Well, isn't it a fact that the prisoners talk between the gratings on that tier to the men on the flats below?

A No, sir; it's against the rules.

Q Well, did you ever hear a prisoner talk to any other prisoner from your tier, the second tier, to another prisoner on the flats?

A No, sir.

Q Now, where did you break in and steal the cheese, in the burglary case?

A I didn't break into the store. I was supposed to be the look out man.

Q And you pled guilty to it, didn't you?

A Yes, sir.

Q Yes, others broke in while you were on the lookout?

A Yes, sir.

Q Now, did you set up the defense of self defense when you were tried for the homicide?

A Yes.

Q And the jury convicted you?

A Yes, sir.

Q And you came back here and pleaded guilty?

A Yes, sir.

Q Although you say you shot in self defense?

A Yes, sir.

Q Who was your counsel in that case? Mr. Palmieri?

A Yes

Mr. Palmieri.

Q Now, on this particular morning---by the way, is that burglary charge the only conviction you ever had, before this manslaughter conviction?

A Yes, sir.

Q You are awaiting sentence now on the manslaughter charge, aren't you?

A Yes, sir.

Q You pled guilty in May, in the Supreme Court, before Justice Shearn?

A Yes, sir.

Q Where were you when you heard this cry for help?

A Between cell 205 and 209, on the opposite side from Bennie Schneider's cell.

Q Yes. That would be on the west side, wouldn't it?

A Yes, sir.

Q And who were you with then?

A Mr. Taylor, Mr. John Taylor.

Q Nobody else around that you knew at the time?

A Well, gradually---the whole tier walls, you know. There is fifty or sixty men on a tier.

Q Well, have you recognized anybody else being near you at the time?

A No, sir.

Q Well, how far did you walk before you heard this call?

A From my cell, 205 to 209.

Q Well, what was the call you heard?

A The shots, "Help".

Q What language was it in?

A English.

Q Did you recognize the voice?

A No, sir.

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Q Did you recognize it as the voice of any one that you knew?

A No, sir.

Q And you went immediately to 210?

A Yes, sir.

Q And where were the four men when you reached 210?

A On the thresh hold of the cell.

Q Well, what do you mean by that? In the doorway?

A No, sir; there is the cell and there is the thresh hold, right there. (Indicating).

Q Do you mean out on the tier?

A No, sir. Three or four inches from the threshold.

Q Well, there were four men there?

A Yes, sir.

Q Were there?

A Yes, sir.

Q And did all of them have their feet on the tier, or were some of them in the cell?

A Well, Benny Schneider and the Rothman was more on the inside of the cell, and the other two was more on the tier. Schneider and Rothman were half way in and half way out, in the center of the thresh hold.

Q Then they were inside, weren't they?

A No, sir; they were on the thresh hold.

Q Well, that would mean that the four of them were actually in the doorway?

A Yes, sir; half way out.

Q Then they were partly in, weren't they?

A Well, half in and half out.

Q Who were out?

A Napolitano and Firola, and the other two were just inside of the door. No, I remember now. All four were

out on the tier, just by the door.

Q Now, when you left your cell, that morning, how long was it after the gates were opened?

A Well, actually, when they all had breakfast, in ten or fifteen minutes the cell doors were opened.

Q Well, the cells are opened before you get breakfast aren't they?

A Yes.

Q And how long after the door was opened did you leave your cell?

A About a minute or two.

Q You hadn't had any breakfast, had you?

A No, sir; I was waiting for the coffee to come around.

Q Now, where did you meet John Taylor?

A John Taylor.

Q Yes?

A He come up to my cell, and asked me for a magazine.

Q Oh, he came to your cell door and asked you for a magazine?

A Yes, sir.

Q And it was then that you came out of your cell?

A Yes, sir.

Q Was anybody else on that side of the tier, when you came out of your cell?

A The whole tier was walking around at the time.

Q Did you see any keepers?

A Well, I seen one officer trying to open cell 203, I should judge.

Q Well, what keeper was that?

A Well, I couldn't tell you what keeper it was.

Q Weren't there two of them?

A No, sir.

Q Well, which was it? Fassig or Strouse? Which was it that you saw?

A I should judge Fassig.

Q Strouse wasn't there?

A No, sir.

Q Well, where was Strouse?

A I think he was by the desk; I am not positively sure. I couldn't swear to it.

Q Well, did you see him?

A No, sir.

Q Then, of course, you can't tell us where he was. Where did you go then?

A We walked up from my cell, 205, to 209 and heard some shouts, and there we ran around to cell 210 where this trouble was.

Q Now, did you see any blows or kicks given by anybody to anybody else?

A Well, they were too close to each other. They kicked and punched at each other but I didn't see anybody kick or punch anybody else. I couldn't tell who the man was, at least.

Q Did you see any kicks given to anybody?

A Yes, sir.

Q Or blows?

A Yes, sir; the four were striking and kicking at each other, but I couldn't tell them apart.

Q Well, did you see Napolitano strike any blows?

A No, sir. While they were kicking and striking at him, he was striking and kicking back.

Q And what did you do then?

A I asked, in a nice gentle way, I asked them to break away, and I said that they would be foolish to get chucked that way, because they couldn't see their families, their folks.

Q Did you say that in English or in Italian?

A In English.

Q Does Napolitano speak English?

A Not very well. I didn't know at that time whether he spoke good English or not.

Q Though you were four months?

A Yes, but only two months at that time.

BY THE COURT:

Q And how many hours a day do you spend outside of your cell?

A Four hours; two hours in the morning and two hours in the afternoon.

BY MR. EDWARDS:

Q Now, tell me whether or not you saw what Strouse did where he got there?

A Mr. Strouse told them to break away and go to their cells, and they obeyed their orders.

Q Did he separate them?

A No, sir.

Q Are you positive of that?

A Yes, sir.

Q Did he try to separate them?

A I didn't look, I didn't notice.

Q Do you remember this testimony on the last trial, do you remember my asking you this question:

Q Did you see Strouse arrive on the scene?

A Strouse?

Q Yes, keeper Strouse?

A Yes, he tried to separate them.

A No, sir.

Q Didn't you give that testimony on the last trial?

A No, sir.

Q Are you sure of that?

A I am positive.

Q Now, did all these four men go into the cell at any time.

A No, sir; I wasn't present when the trouble started.

BY THE COURT:

Q Well, did you see them in the cell at any time? That is what he means?

A No, sir.

BY MR. EDWARDS:

Q Do you remember this question: 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."

Do you remember that testimony? A They were all in a clinch.

Q Do you remember that testimony?

A They were all in a clinch.

Q Do you remember that testimony: Q In where?

A In the cell." Do you remember those questions and answers? A No, sir.

Q Did you give that testimony on the last trial?

A No, sir.

Q You didn't give it at all?

A No, sir.

Q Now, did you see whether Napolitano went into the cell at all?

A No, sir.

Q Well, can you state whether he did go into the cell or not?

A I can't state, because I wasn't present.

Q Do you remember my asking you this question, referring to the time when Strouse arrived. Q Where was Napolitano?

A They were in the cell, punching at each other." Did you give that testimony?

A No, sir.

Q Will you swear that you didn't give it?

A Yes.

Q Now, did you see anything else about the cell?

A No, sir.

Q Didn't you notice any broken china around there?

A There was pieces of a broken bowl on the tier.

Q Did you see that?

A Yes, sir.

Q Did you see them when you were separating them?

A No, sir.

Q When did you see them?

A After the fight.

Q When? I thought you went right to your cell and were locked in?

A Well, just when the officer came, Mr. Strouse, and separated them, I seen pieces of a broken bowl.

Q Did you see any china in the cell?

A No, sir.

Q Do you remember my asking you this question: "Q You were in there, weren't you?"

A Yes, I was trying to separate them?"

A No, sir.

Q Do you remember this question: "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 they all went in abunch into the cell." Did you say that? A The four men was in the front.

Q Did you say that?

A Yes, sir.

Q Is that true?

A Yes, sir.

Q What I just read to you?

A I don't remember.

Q Now, I'll repeat it. "Q You were in there, weren't you.

A Yes, I was trying to separate them and they all fell in a bunch into the cell." Did you say that? A No, sir; I don't remember.

Q Well, is that the fact?

A No, sir.

Q Isn't that what happened?

A No, sir.

Q And did you ever speak to Schneider on that tier?

A Never spoke to the man in my life.

Q Ever call him a rat?

A No, sir; there was no reason why I should.

MR. EDWARDS: That's all.

RE-DIRECT EXAMINATION BY MR. PALMIERI:

Q What did you say on the last trial with reference to four men being together?

A I says that, at the time the four men was in the clinch, and fighting at each other, taking a chance of getting a punch over, Mr. Strouse came along, and he hold them to go their cells, and we went to our cells right away.

Q Now, at the time of this occurrence, had the judge before whom you took a plea of manslaughter in the first degree sentenced you?

A No, sir.

Q And when were you to go down to be sentenced?

A The day after trouble occurred.

Q So that the day after this trouble occurred, you were to receive your sentence?

A Yes, sir.

MR. PALMIERI: That's all.

MR. EDWARDS: That's all.

BY MR. PALMIERI:

Q Oh, what was the name of the other man that testified at the last trial?

A Mike Premer. He was an Austrian.

Q Is he in the Tombs now?

A He was discharged yesterday.

MR. PALMIERI: And, if you have no objection, I will read his evidence.

I understand that he was acquitted from this witness.

MR. EDWARDS: No, he was discharged, he says.

MR. PALMIERI: Now, I ask your Honor that the testimony of the witness be read in this case. He was examined and cross examined, and his testimony has been transcribed. Do you agree to that?

MR. EDWARDS: No, I don't see why I should agree to that.

THE COURT: Well, have you any witnesses to produce here now?

MR. PALMIERI: Yes, Mr. Napolitano, and I can't get the other witness, because he has been discharged. Won't your Honor permit me to read his testimony?

THE COURT: No, that is not one of the times when, under the Statute, it can be read.

MR. PALMIERI: It could be done, if he consented.

MR. EDWARDS: I don't consent.

THE COURT: Well, he does not consent.

JOHN NAPOLITANO, of 2003 East 103rd Street, one of the defendants, being duly sworn and examined through the official interpreter, Mr. Moustachi, testified as follows:

DIRECT EXAMINATION BY MR. PALMIERI:

Q Mr. Nagolitano, you have pled guilty to manslaughter?

A Yes, sir.

Q And the judge sentenced you to Elmira Reformatory, I think?

A Yes, sir.

Q And you haven't yet gone to the Elmira Reformatory on account of this trial?

A Yes, sir.

Q And how many years have you been in this country?

A Four years.

Q And during those four years have you learned a little bit of English?

A Very little.

Q Now, outside of this unfortunate occurrence in your career, have you ever before convicted of crime?

A No, sir.

Q Now, can you tell your own story in your own way to this jury, without my asking a question? You understand that you are charged here with the crime of assault. Now, can you tell your own story to this jury in your own way?

A Yes, sir.

Q Then, go on.

A Four or five days before this happened, I was walking along the pier, and Benny Schneider would go like that to me "Popp" (Illustrating) And he was calling me a son of a bitch.

I said to him, "Now, you had better stop, or otherwise I will report you to the warden." And he said "I don't give a damn about the warden, I am a friend of the District Attorney's.

In the morning, about ten minutes past seven, when the breakfast was brought to the cell door, I stooped down to pick up this dish, with my breakfast, and it was for me and for my cell mate; and, when I tried to put the dishes outside afterwards, Benny Schneider had a cup in his hand, a cup similar to the cup on the table now. (Indicating People's Exhibit 1.) And he said, "What are you looking, you Dago son of a bitch?" And I said, "I'm not looking at you," and he said, "I'm going to kill you," and he threw a cup and hit me on my right elbow, and I've got the mark there yet. I tried to stop it and I got the cup on the elbow.

Q Now, show it to the jury.

A (The witness does so). And then I, in turn, picked up the dish and threw it at him, and the bars of the cell being there, the dish broke up. And then we clinched, and he struck me with his clenched hand on my mouth, and I only struck back again, and his cell mate also struck me.

Q What is his name?

A Rothman?

A I don't know the name.

Q Is that the man that testified here for Schneider?

A Yes, sir.

Q And when Rothman took a hand in this fight, what did your cell mate do, Firola?

A Firola also came into the fight to help me, and we all had a fight all around, we were clinched, and Maestry

runs and placed his hands to separate us, and said, "What are you doing here?" You are going up on your sentence already. Do you want more trouble? If you make any trouble you will remain in solitary confinement for five days here." And I am in consumption. I didn't know that this trouble would have happened, and, if I had fought in the street with any citizen, I wouldn't have got more than a five dollar fine, and here am I now in prison for this fight.

MR. EDWARDS: I object to the latter part of the answer and move to strike it out.

THE COURT: Strike it out.

Mr/Palmieri; We except.

BY MR. PALMIERI:

Q Did you ever day to Benny Schneider, "You are the District Attorney's rat?"

A No.

Q Do you know what "District Attorney's Rat" is in your own tongue?

A (No answer).

MR. PALMIERI: Just step aside for a moment, Mr. Interpreter.

BY MR. PALMIERI:

Q Noq, look at me. What is "District Attorney's rat"?

A I don't understand.

Q Did you ever call him "District Attorney's rat?"

A (No answer).

MR. PALMIERI: That's all.

CROSS EXAMINATION BY MR. EDWARDS:

Q Now, did you see Keeper Strouse when he came there?

A When Strouse came, Benny Schneider was kicking me.

Q Now, won't you please answer my question? Did you see Strouse come?

A I didn't pay attention, because I was taken away. I didn't pay attention.

Q Did you see Keeper Strouse there at all?

A I saw him coming along.

Q Well, where were you when he came along?

A I don't know.

Q Were you in Bennie Schneider's cell?

A No.

Q Did you go into Benny Schneider's cell at all?

A We clinched in front of his cell.

Q (Question repeated) At any time?

A No.

Q Isn't it a fact that, when Strouse came there, Benny Schneider was lying on his back on the bunk in the cell, with his legs joined together behind you, and Strouse had to pull his legs off you?

A I didn't pay attention to that, because I was getting blows after blows, and I wasn't paying attention to what happened.

Q Was Benny Schneider on his bunk in the cell when Strouse got there? And were you inside of his cell?

A We clinched in front of the railings of his cell. I don't know where we were.

Q You don't know where you were when Strouse came up?

A No, I was dazed. I wasn't paying attention to it.

Q And how often did you kick Schneider with your shoes, on his cot?

A No, I didn't kick him.

Q How often did your cell mate, Firola kick him?

A No, there were no kicks, it was with the clenched hands.

Q Can you explain to us how it was that Benny Schneider got all these abrasions, or breaks of the skin, on the body, that the doctor hold us about?

A I don't know. May be going against the railings of the cell.

Q Why didn't you tell the doctor about your elbow?

A I didn't want to bother the doctor, not knowing that it would have ended so serious. Had I known that, I would have told the doctor.

Q Is that the best reason you can give us?

A Yes, sir.

Q No, what were you doing when you say Schneider threw a cup at you?

A I was placing my plate on the floor, after breakfast.

Q And what was it he said to you?

A "What are you looking at, you Dago son of a bitch."

Q And how were you dressed at that time?

A I only had my undershirt on.

Q What did you say when he said that to you?

A I said, "I'm not looking at you. I don't want any trouble, I'm a sickman."

Q And then what did he do?

A And then he threw this cup.

Q And was he in or out of his cell at the time?

A He

was standing right in front of his cell.

Q Was your cell to the right or left of his? A you faced the cell?

A Right in a straight line across.

Q When you are standing outside of the door on the tier, facing the cell, is your cell to the right or left of Benny's cell?

A To the left. (Illustrating).

Q Well, what did you do when he threw the cup at you?

A Then I threw the other saucer at him.

Q What did you throw at him?

A An article similar to that (Indicating People' Exhibit 2).

Q Then you threw a bowl at him?

A Yes, from one cell to the other.

Q Well, but the cells are side by side, aren't they?

A Yes, sir.

Q And did you go outside of your cell to throw it at him?

A It was side by side, that I threw it at him, and, when I wanted to throw it at him it hit the railings and it broke.

Q Well, where did the fragments fall? Inside or outside of the cell?

A It broke in front of the railing to the cell door.

Q Well, that is out on the tier?

A Well, that I don't know.

Q Well, is it not on the tier, outside on the tier?

A Yes, sir.

Q Well, did the cup that he threw at you break?

A Certainly

it broke.

Q And that broke in front of your cell, did it not?

A No, in front of his cell.

Q Were you in front of his cell when he threw the cup at you?

A No, I was in my own cell, in front of my own cell, when the cup hit me.

Q Oh, the cup hit you, did it?

A Yes, certainly.

Q And then did the cup break in front of your cell?

A Yes, it broke afterwards; it struck afterwards on the railings and it broke.

Q And then where did the pieces lie? In front of your cell or Schneider's cell?

A All over there, in the neighborhood.

Q Well, what happened next?

A Then we clinched and we fought. He struck me in the mouth, and I got even my tooth loosened.

Q Well, who struck the first blow, after you threw a bowl back at him?

A Schneider first clinched with me and struck me in the mouth with his fist.

Q Well, who clinched first?

A Both clinched together.

Q And was all the fighting done outside, or did you get into the cell at any time?

A Right in front of the iron bars there, not in the cell.

Q Did you at any time during the fight get inside of Schneider's cell?

A No.

Q Did you see any broken china in Schneider's cell?

A No, sir.

Q Did you, or Firola, or Maestry, throw any china at Schneider in his cell?

A No, sir.

MR. EDWARDS: That's all.

MR. PALMIERI: Well, wait a moment.

RE-DIRECT EXAMINATION BY MR. PALMIERI:

Q Didn't you say that you threw a bowl at Schneider?

A Yes, sir.

Q And where were you when the cup struck you?

A It was right in front of my cell.

Q And your cell is right near Schneider's, isn't it?

A Yes, sir.

Q There is only a couple of inches difference, is there not?

A Yes, sir.

Q So that it is right close to it, is that right?

A Yes, sir.

Q Now, where did the fragments of the cup that was thrown at you by Schneider go?

A Right in front of my cell there.

Q And where did the fragments of the bowl that was thrown at Schneider by you go?

A Right in front of his own cell.

BY THE COURT:

Q How far away were you from Schneider when you threw the bowl at him?

A From the witness chair to that table.

(Indicating the District Attorney's table).

MR. PALMIERI: That's about four feet, Mr. Foreman?

THE FOREMAN: About that.

BY MR. PALMIERI:

Q And how far were you from Schneider when he first threw the cup at you?

A That far. (Illustrating.)

Q Just keep your hands that way for a moment.

MR. PALMIERI: How many feet would you say that is?

THE FOREMAN: About four feet.

BY THE COURT:

Q Well, was he in his cell when you threw the bowl at him? Was Schneider in his cell when you threw the bowl at him? Yes or no?

A No.

Q Well, was he in your cell when he threw the cup at you?

A No. He was then outside.

BY MR. PALMIERI:

Q Now, what is the disease you have been suffering from?

MR. EDWARDS: I object to that.

THE COURT: Well, he has gone into that.

MR. PALMIERI: On the question of the ability to---

THE COURT: He has gone into that. He says he has tuberculosis.

BY MR. PALMIERI:

Q And how long have you had tuberculosis?

A Seven or eight months.

MR. PALMIERI: That's all.

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THE COURT: Any other witnesses?

MR. PALMIERI: None, with the exception of that Austrian, who was discharged.

THE COURT: Well, have the People any rebuttal testimony?

MR. EDWARDS: Well, I am going to recall Schneider for minute.

THE COURT: Well, recall him. I would like to finish all the testimony, this afternoon, so that you may sum up in the morning.

REBUTTAL

BENJAMIN SCHNEIDER, being recalled by the District Attorney, testified as follows:

DIRECT EXAMINATION BY MR. EDWARDS:

Q Now, Schneider---

MR. EDWARDS: Now, before you close your case, Mr. Palmieri, do you want the testimony read?

MR. PALMIERI: I have rested, and I will read it afterwards.

THE COURT: You have rested, you say, except for the testimony of the absent witness?

MR. PALMIERI: Yes, sir; with that exception.

BY MR. EDWARDS:

Q Schneider, did you at any time call this defendant Napolitano a son of a bitch?

A No, sir.

Q Did you go around, making faces and notices at him, like this "Poop" (Illustrating)?

A No, sir.

BY THE COURT:

Q Did you ever call him a dago?

A No, sir; because I never bothered anybody.

THE COURT: Now, just answer the questions put to you; that is all.

BY MR. EDWARDS:

Q Did you ever call Maestry names, or say anything to him?

A No, sir.

BY THE COURT:

Q Did you ever boast of the friendship of the District Attorney?

A I don't understand that.

Q Did you ever say that you were the District Attorney's friend, and could do as you pleased?

A No, sir.

CROSS EXAMINATION BY MR. PALMIERI:

Q How long have you known the District Attorney, how long have you gone from the Tombs to the District Attorney?

MR. EDWARDS: I submit that has all been covered.

THE COURT: Yes, it has been covered.

BY MR. PALMIERI:

Q And you are known on the East Side as "Nigger Benny", are you not?

A Yes, because I'm black.

Q And any little job that is wanted---

MR. PALMIERI: However, I withdraw that. You may go.

THE COURT: Now, I would like to finish all of the testimony, to-day, and then each of you may take half an hour in the morning to sum up and when it may be submitted to the jury.

MR. PALMIERI: The District Attorney will not permit me to read the testimony of the man who was discharged yesterday.

MR. EDWARDS: On a specific condition. On condition that Mr. Palmieri will not require me to call the stenographer at the former trial, who is the stenographer at this trial, and that he will concede that the minutes which I read from in the cross examination of Maestry are a correct transcript of the stenographer's notes, and will permit me to read those portions of the testimony

at the other trial into the record at this trial.

MR. PALMIERI: Yes, I so concede. And then I am to read the testimony of Premer or Presser, the Austrian?

MR. EDWARDS: Yes, you may read the direct examination and I will read the cross examination.

(Mr. Palmieri then read the direct examination of the witness and Mr. Edwards read the cross examination, as follows:)

MIKE PREMER, 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 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 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 cell.

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 hollering for help?

A I don't know who was hollering for help, and then I go away and them keepers come rigly away and just took them fellows.

Q Did you see Mr. Strouse? Do you know the name of the keepers that came there first?

A No, sir; I don't know his name.

CROSS EXAMINATION BY MR. EDWARDS:

Q How long have you been in this country?

A A am three and a half years.

Q Where did you come from?

A Austria.

Q What?

A Austria.

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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.

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, that 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 the 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 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 come 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. It must have been around 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 nowhere 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 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 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 212?

A I walked away from there, and then we went over to the Bridge, and then he keeper came there and disbanded us, told us to get away.

Q Before you saw this fight, when you first heard the about "Help, help" were you walking towards cell 214 or towards cell 210?

A He 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 "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?

A Well, did you walk towards the cell where the trouble 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, in where?

A 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 around there in the Tombs' how long?

A About a week or so.

Q And who was in the fight?

A All the people were fighting. I couldn't tell 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 When did you and Frank first talk about this case together.

A I didn't have any conversation with Frank, I didn't have any dealings with him.

Q Well, was 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 that you knew anything about this case.

A At the time when U 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 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 what 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 the trouble, did he?

A No, sir.

Q He was in the cell, was 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 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 to the doctor?

A No, I didn't

Q Did you see Frank right afterwards?

A I seen when the 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.

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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 anything 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.

THE COURT: Now, what else are you going to read, Mr. Edwards?

MR. EDWARDS: On page 87 is the first one, in the cross examination of Frank Maestry, on the last trial, this question and answer:

"Q Well, where were they, whereabouts?

A We, at the start, when I tried to avoid the trouble, they were right in front of the cell. They all went in a body.

"Q In where?

A In the cell."

And on the same page, a little lower down, this question and answer:

"Q Yes. The keeper, Strouse?

A Yes, he tried to separate them."

On page 88:

"Q Where was Napolitano?

A They were in the cell, punching at each other."

On page 89, these questions and answers:

"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 they all fell in a bunch into the cell."

THE COURT: Any further testimony on either side, now?

MR. PALMIERI: Yes, your Honor.

THE COURT: Those questions and answers were asked and answered at the last trial, according to the People, and the defendant denies that they were asked and answered?

MR. PALMIERI: Yes, sir, but I don't mean that. But I want to show by this very record from which the District Attorney has read, first, that Benny Schneider gave different testimony on the last trial in reference to the man named "Rocks" Cornell.

THE COURT: Well, where is it?

MR. PALMIERI: I offer in evidence the entire evidence of Benjamin Schneider, from page 4 to page 30---to page 20.

THE COURT: I will not receive it. Now, you may take an exception.

MR. PALMIERI: All right. I except. I also offer in evidence the testimony of Abraham Rothman, the entire testimony.

THE COURT: I will not receive it.

MR. PALMIERI: From page 24 to page---

THE COURT: Well, you need not say what pages they are. I will not receive it. The rule is, as you well know, that you may show, on cross examination, that any witness has made different statements, at any other time or place.

MR. PALMIERI: I have.

THE COURT: You have not. Now, please don't interrupt me. The proper way to show that is by confronting the witness with the alleged statement that you think differs from the statement made before.

MR. PALMIERI: I have done that.

THE COURT: No, you have not shown any contradiction in the testimony.

MR. PALMIERI: And I except to your Honor's remarks.

THE COURT: And I repeat it. You have not shown any contradiction in the testimony, such as to justify the Court in allowing you to put in that testimony; but, if you had, I would have allowed you to put in those portions of his testimony. I am not going to have this case beclouded by any false issues.

MR. PALMIERI: Now, I hope your Honor doesn't think that I am doing that.

THE COURT: Well, that would be the effect of letting in all that testimony, unless it was done in accordance with the rules of evidence. The rule of law, gentlemen of the jury, is that you are to pass upon the credibility of witnesses, and, if any witness has made a differing statement, from any statement made here, that must be proved, and the witness must be confronted with the alleged discrepancy, so that you may determine whether it is material or not. Now, I don't recall any discrepancy in the testimony. There was some testimony that you say, Mr. Palmieri, they did not give before, but that is not a discrepancy, it is not a contradiction.

MR. PALMIERI: But a man can lie by withholding evidence as well as by stating evidence.

THE COURT: Well, there is no evidence here that anybody

lies in this case. I am not going to have the jury decide this case on your remarks, but on the evidence alone, under the instructions of the Court as to the law. Now, go on. If you have any further remarks to make of that kind I will answer them. Now, point out in the record the place where you claim there is contradiction.

MR. PALMIERI: Yes, sir; on page 31.

THE COURT: You are referring now to page 31?

MR. PALMIERI: Yes, sir. But I want to put in the whole evidence. I want to show that he didn't any anything of the kind. Now, your Honor knows that I am not getting a cent in this case, but only doing my duty.

THE COURT: Now, the jury will disregard that remark. You know that it is the duty of an attorney to do all that he can legally, in behalf of any one who is his client, whether he is paid for his services or not. Now, if you will point out the specific place in the record as Mr. Edwards did, I will allow you to read it, but not otherwise.

MR. PALMIERI: On page 31: "Q---

THE COURT: But what does that contradict?

MR. PALMIERI: It contradicts that the didn't give the same testimony on the last trial.

THE COURT: I will exclude that. Where is the question that you put to him on this trial, where he denies giving the same testimony on the other trial? If you can point that out

to the Court, you may read it.

MR. PALMIERI: Well, he said, "I didn't say, on the last trial, that Maesry said, "Kill him, kill him." And haven't I the right to show that he didn't say it. I can show it by the record.

THE COURT: Well, then, do it, if you can.

MR. PALMIERI: Then I will read it.

THE COURT: Well, whose testimony are you speaking of?

MR. PALMIER: Rothman's testimony.

THE COURT: Well, we must have no confusion about this. It must be made perfectly clear to the jury. You first spoke of pages 4 to 20 and now you speak of page 31. You must take it clear to the jury what you desire to read.

MR. PALMIERI: I will read this---

THE COURT: Now, this is Rothman's testimony?

MR. PALMIERI: Yes, sir.

"Q Had you heard that expression used before they used it now?"

THE COURT: What expression are you referring to?

MR. PALMIER: Well I will have to read the expression there.

THE COURT: No, but you said that he said on this trial, "Kill him, kill him", and that he did not say that on the last trial.

MR. EDWARDS: And I submit that the counsel did not call

the witness's attention to any particular testimony.

MR. PALMIERI: Yes, I did, and I read from the record, too.

THE COURT: Now, what did you call to his attention?

MR. PALMIERI: I called to his attention this question---now, let me find it, Judge---and I will read it to you. I call-to you Honor's attention these two questions.

THE COURT: Well, read them.

BY MR. PALMIERI:

"Q (By the Court:) 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".

"Q Did they all about together?

A No, sir; this one (Indicating Maestry) He hollered out, 'You rat, you District Attorney's man', and he was trying to get in the cell to beat him up."

MR. EDWARDS: But he didn't deny saying that. He said he did say it, on the last trial.

MR. PALMIERI: Well, but he says he did say, on the last trial, "Kill him, kill him." And I want to show that he didn't say it.

THE COURT: Well, he gave the same testimony that you just read; he gave it to-day. He also testified to that.

MR. PALMIERI: And I say he didn't say that at the last trial, "Kill him, kill him."

MR. EDWARDS: I protest. The counsel should take the stand and testify under oath as to that, and subject himself to cross examination.

THE COURT: Now, I have the greatest respect for your ability to defend your clients, Mr. Palmieri, but you do not seem to understand the situation. I am merely saying that you make it necessary for me to warn the jury against considering anything except the evidence, and that the statements of counsel are not evidence, in any sense. The evidence is the testimony, gentlemen of the jury, given by witnesses produced on the stand and sworn before you; that is all. I have to repeat that constantly on account your habit of repeating things which you believe to be in the record, and which we did not finding the record.

MR. PALMIER: Well, I believe that I have established to the satisfaction of your Honor that this man has not said on the last trial that Maestry said "Kill him, kill him." Even if it isn't in the record.

THE COURT: Then if it isn't in the record, you cannot prove it by the record.

MR. PALMIERI: Yes, of course, if it isn't in the record. That's the way I can prove it, and it is my misfortune. I am against a prosecutor a long experience, but I have your Honor and the jury to protect us.

THE COURT: Now, there is no one who wants to deprive

your clients of any rights at all. They are simply entitled to a fair trial, which means a legal trial, and not to trial by any special system. The laws are fair and liberal. Now, if you claim that either of these witnesses swore, to-day, that they said things which they did not say at the last trial, the District Attorney will stipulate that they do not appear in the record, I suppose.

MR. PALMIERI: And that's all I want. Will you stipulate---

THE COURT: Now, one thing at a time, Mr. Palmieri. That point is established. But what Mr. Edwards did was the proper method. He repeated the question and answer to the witness, and the witness said point blank, that he never said those things. And then it would be proper to call any one who heard him make those statements, or read the record, as was done here, to obviate calling the stenographer. No favor was shown to the District Attorney that was denied to you. The same course is open to you, but you claim, to-day that he said something here, to-day, that he did not say at the last trial.

MR. PALMIERI: And I have proved it.

THE COURT: No. The jury will disregard that remark. You have not proved anything to the kind. But it does not mean that it is not in some part of the record, and you may call the stenographer to the stand tomorrow, and ask him to produce his notes, and require him to read the whole record, if you desire it.

MR. PALMIERI: Perhaps Mr. Edwards will concede it.

MR. EDWARDS: Well, I would like to read the record carefully myself before I enter into such a stipulation.

MR. PALMIERI: I know he didn't say it. I will stake my whole case on that.

THE COURT: No, the case will not be determined on any isolated statement or part of the testimony. It must be decided on all the evidence, gentlemen of the jury.

MR. PALMIERI: Then the case is closed with the exception of that Mr. Edwards will read the entire record, tonight, and determine what he will concede?

MR. EDWARDS: Well, I will read the minutes, overnight, and determine what I can properly concede, if anything. (The court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case to Thursday morning, August 12th, 1915, at 10:30 o'clock.)

THE PEOPLE VS. MAESTRY AND ANO.

TRIAL RESUMED.

New York, August 12th, 1915.

THE COURT: Mr. Palmieri, I believe it is your word now?

MR. PALMIERI: Your Honor, last evening, the learned prosecutor said that he was going to read the evidence of Mr. Rothman, for the purpose of learning whether he, on the first trial---

THE COURT: Well, I know all about that.

MR. PALMIERI: I wish to learn whether he has read it.

MR. EDWARDS: I have. And, if counsel will state what he wants, I will perhaps concede what he wants.

THE COURT: Well, he claims that Rothman did not say that the defendant Maestry said "Kill him, kill him," on the last trial.

MR. EDWARDS: As I understand the counsel's request, it is this. At page 32 of this trial, Rothman said, in answer to a question, that Maestry said, "Go on, kill him." "He's a District Attorney's man" and counsel wants to know whether I will concede that the words "Kill him" were not used in the first trial by Rothman, and I dconcede it.

THE COURT: Then that is settled.

MR. PALMIERI: I also ask the District Attorney whether he read the evidence of Bennie Schneider on the first trial, yesterday, and I want him to concede that Bennie Schneider never said a word on the last trial about his having heard a conversation,

or a remark, from "Rocks" Cornell.

THE COURT: Well, will you make that concession?

MR. EDWARDS: Yes, sir. He said on his cross examination that he didn't say it. He said so himself, and that is better than a concession.

MR. PALMIERI: Very well. And now, your Honor, I want to offer in evidence the record of acquittal of a witness for the defense, who testified here yesterday. His name is Michael Presser.

THE COURT: Not yesterday; at the last trial, you mean?

MR. PALMIERI: Yes, sir. But we used him, yesterday, as a witness for the defense, with the permission of your Honor and the District Attorney by reading his testimony which was given under oath before the jury at the other trial.

MR. EDWARDS: Yes, we read it yesterday to the jury.

THE COURT: Well, a charge amounts to nothing, Mr. Palmieri---it is only a conviction that may be used to affect credibility. I will exclude it as immaterial, irrelevant and incompetent. It will be conceded that he has been acquitted since he testified, is that so?

MR. EDWARDS: Yes, sir; I conceded yesterday he had been discharged.

THE COURT: But you have no right to ask any question of any man if he has been arrested, because any man may be arrested and charged with a crime. There is a moral obliquity on

that account, and there should be no stain on a man's character on that account. It is only a conviction that may be considered.

MR. PALMIERI: I now wish to renew the motions that I made at the close of the People's case, and urge the same grounds which I urged then.

THE COURT: Denied.

MR. PALMIERI: Exception.

THE COURT: There is a question of facts here for the jury, to be decided by the jury.

MR. PALMIERI: Exception. And I suppose your Honor will not limit me as to time, because I wish to do justice in this case.

THE COURT: Yes. We all want to do justice, but I think you can discuss the evidence in half an hour.

MR. PALMIERI: Yes, sir; about that. But your Honor will have a little patience with me if I should take a little longer.

THE COURT: Why, of course. I have to be patient with you, Mr. Palmieri.

(Mr. Palmieri summed up for the defense)

(During the summing up of Mr. Palmieri:)

THE COURT: Now, gentlemen of the jury, the interruption of the District Attorney was entirely proper. It is your duty to take the law from the Court. You are the judge of the facts, and the facts are to be gained from the lips of the witnesses.

It is not a fact in this case that one juror stood out on the other case.

MR. PALMIERI: I never said that.

MR. EDWARDS: Yes, you did.

THE COURT: If you interrupt me again, I will punish you for contempt of Court, Mr. Palmieri. Now you may speak when I have finished.

MR. PALMIERI: All right.

THE COURT: I say to you, gentlemen of the jury, that an attempt is being made to have you disregard your oaths of office, and disregard the law and the evidence, and be swayed by sympathy or prejudice; and it is your sworn duty not to be swayed by sympathy or prejudice. It is your duty to discuss this matter coolly and calmly, in the light of the law as the Court will give it to you, and the evidence as you find it from the lips of witnesses, and the statements of counsel should receive no consideration whatever, unless they are borne out by the evidence in this case. Comments on the evidence may be properly made by the counsel, and should be given such consideration as you think they are entitled to receive. I do not care to say anything more at this time, but, if counsel again ***, I will be obliged to say more to you. Now, Mr. Palmieri, you may take an exception to my remarks, and go on with your summing up. I will give you fifteen minutes more. You have had twenty-five minutes now.

(MR. PALMIEIR remained seated.)

THE COURT: Well, do you wish to close now, or go on?

MR. PALMIERI: I desire to answer your Honor's remarks to this jury.

THE COURT: I do not want any answer, and I will not tolerate any answer.

MR. PALMIERI: Well, your Honor charged me---

THE COURT: Do you wish me to commit you for contempt, Mr. Palmieri? You may go on with the case, and you may take an exception to my remarks, and that protects you fully, and your clients.

MR. PALMIERI: Then your Honor refuses to permit me to say what I did to this jury, and have me borne out by this jury?

THE COURT: No, sir; I will not have any controversy with you.

MR. PALMIERI: Then I will not say another word.

THE COURT: Very well.

MR. PALMIERI: And I also wish to take an exception to the Judge's remarks, which were as follows: "I will teach you that you will not make a farce of this trial."

THE COURT: Yes, now, go on, Mr. Edwards, if Mr. Palmieri doesn't wish to continue.

(MR. EDWARDS then summed up for the People).

MR. PALMIERI: I object to the statement of the District Attorney that Ferone is not produced here as a witness upon this trial.

MR. EDWARDS: I didn't say that, sir.

THE COURT: One minute, Mr. Edwards, one at a time. I do not want any interruptions. Now, Mr. Palmieri, it is your turn. Please begin again, and you must not be interrupted.

MR. PALMIERI: I ask your Honor to instruct the jury that Ferrone being under indictment, and being represented by a different lawyer, that I couldn't get him here as a witness, and that any allusion to Ferone in this case is improper, unfair and unjust to these defendants.

THE COURT: The law declares that, when a witness is just as accessible to the District Attorney as he is to you, no unfavorable inference can be drawn by the jury against either side. The District Attorney could have called him or you could have called him, if you had desired, and no inference may be drawn on account of the failure to call him against either side.

MR. PALMIERI: But that's not the point. We claim that we couldn't compel him to testify for us, because he was under indictment.

THE COURT: Yes, and that applies to either side. If a witness is within the sole control of one side, then the failure of that side to produce him would be a circumstance that you may consider, gentlemen of the jury, but when he is equally accessible to either side, neither side can be blamed for not producing him.

MR. EDWARDS: Now, may I state on the record what I did say?

THE COURT: Yes.

MR. EDWARDS: I made no reference to anybody failing to call him as a witness, I merely said that he was not called as a witness, and that the jury had not seen him, therefore, and could not judge him.

THE COURT: Well, the association of this defendant Napolitano with Ferone as a cell mate was not a voluntary association. They were put in the same cell by the keeper, and he couldn't choose his cell mate, and there should be no reference made to Ferone, except as to what he may have said or done, as told in the testimony given by the witnesses. Now, please proceed, Mr. Edwards.

(Mr. Edwards proceeded with his summing up.)

MR. PALMIERI: Your Honor, I didn't wish to interrupt the Prosecutor while he was talking to the jury. Unfortunately, his address was not taken down. He stated to this jury, and misquoted the evidence, which I now ask your Honor to call the attention of the jury to, that is misquoting of the evidence, he stated that the Doctor of the Tombs examined Napolitano are found a bruise on his mouth. I ask your Honor to state to the jury that the evidence of the Doctor is that there was no bruise of any kind on Napolitano at all, and he was flatly contradicted by Mr. Strouse, who was there first, and first saw Naploitano, and that is the evidence in this case.

THE COURT: Very well. The jury will be guided by their own recollection of the testimony, and, as I said before, gentlemen,

you must not be influenced by any statement of counsel concerning the evidence, unless it agrees with your own recollection of the testimony, and is, in your opinion, a proper comment or deduction therefore. Now, you will please be seated, Mr. Palmieri.

MR. PALMIERI: I have a request to make.

THE COURT: Please be seated. You had an opportunity afforded you to sum up, and you refused to do it. I will not give you another opportunity.

MR. PALMIERI: I except.

THE COURT: At the proper time you may submit your requests to change. It is now my duty to address the jury.

THE COURT'S CHARGE.

MULQUEEN, J:

Gentlemen of the Jury,

It is alleged that the defendants committed an assault upon Benjamin Schneider with their hands and feet, and with a weapon or instrument to the grand jury unknown, but that it was a weapon or thing likely to produce grievous bodily harm, and that they did, in fact, inflict grievous bodily harm upon him.

It was further charged in the indictment that they intended to kill Schneider, and so the grand jury charged them with assault in the first degree.

It is the duty of the Court to instruct you in the law, and I say to you that, as there was not sufficient proof that the defendants intended to kill Schneider, if you find that they did assault him, I have taken that degree of the crime from your consideration, and I shall submit the case to you as one of assault in the second degree or assault in the third degree.

I deem it proper at this time to tell you that this is not an action between Benjamin Schnider and Frank Maestry and John Napolitano. The case is entitled "The People of the State of New York vs. Frank Maestry and John Napolitano." That term, "People of the State of New York," means organized society in this State. It embraces all the human beings within the borders of this State. They have united in a government or society or

union, to protect their lives, their liberties and their property from unlawful interference on the part of others. They have the right to make laws to accomplish those ends, and they have made such laws. The condition imposed by that society on all who live in this State is that they must not unlawfully interfere with others, and, if they do so, they will be treated as criminals.

Now, that is not a hard condition. It merely says that every man must be permitted to work out his own salvation, without any unlawful interference from others. The law that has been made on that point is so plain that it really is not necessary to call it to your attention, but I shall read it to you, because the law puts the burden on the Court of telling you the law.

There are two duties that the Court has to perform in a criminal trial; first, to see that the defendants have a fair trial---that is, the paramount duty of the court---and, secondly, to instruct the jury in the law applicable to the case. You are made the sole and exclusive judges of the fact, and of the credibility of witnesses, and you are sworn to view the testimony of witnesses, and you are sworn to view the testimony in the light of the law, and with an honest determination to be animated solely by a desire to do your duty.

The defendants have had a fair trial. They have been represented by a counsel, and every latitude was extended to counsel in the selection of a jury. They were confronted with their accusers. They were given the right to appear before you, and

tell you their stories, to call witnesses in their own behalf, to have fair rulings made on the law, and all that has been done, and that is all that they are entitled to, a fair trial, not a trial made to order to suit them. The District Attorney of this County is not on trial. Our laws are not on trial. These defendants are on trial, according to, and pursuant to our laws, and it is for you to say whether the law, which is not disputed, and cannot be disputed, which is so simple, has been broken, and whether that fact is established by the evidence, in the manner required by law.

Now, that is all there is in this case.

Section 242 of the Penal Law reads as follows:

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."

The Court, of its own motion, said that there was no proof here that grievous bodily harm had been inflicted by these defendants. That would reduce the crime to assault in the third degree, if any assault was committed; but there is another section of the law which says, "A person 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."

The People claim, and there has been testimony given here, that things, similar to two pieces of crockery in evidence, People's

Exhibits 1 and 2, namely, the bowl and cup used in the Tombs, were used by these defendants wilfully and wrongfully against Schneider, and that those things are likely to produce grievous bodily harm, if hurled at another from a distance of four feet or four and a half feet, as Napolitano testified, and that the hurling of those things by Maestry and Napolitano, if they were engaged in the assault, was assault in the second degree. It is also alleged that they used their feet in assaulting Schneider, that they kicked him, and it is for you to say whether the shod foot of a man is a thing likely to produce grievous bodily harm.

Therefore, you understand the issues in this case. It is for you to decide from the evidence whether there was an assault committed by any one---that is the first thing---and, secondly, was the assault which is alleged to have been committed upon Schneider by hurling a bowl or cup at him a criminal act, or was it a justifiable act.

Every assault is not a criminal act. There are circumstances under which men have a right to commit an assault.

Section 246 of the Penal Law provides as follows:

"To use or attempt or offer to use, force or violence upon or towards the person of another, is not unlawful in the following cases:

#3. 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,"

The first part of that definition is what concerns you. If there was an assault committed by Maestry and Napolitano, it was not unlawful, if it was committed by them when they were about to be injured by the complaining witness, and if they committed this assault in their own aid or defense, in preventing or attempting to prevent such assault.

It is for you, first, to fix the grade of this crime. If the weapons or things used by these defendants were such as are described in the Statute, likely to produce grievous bodily harm, then they are guilty of assault in the second degree, unless their act was justifiable, under that provision of the law which I have read to you. A man would have no right to use an instrument or thing likely to produce grievous bodily harm against another for a mere verbal insult. If you should be insulted, or called names, or a man should make noises with his mouth against you, you might have a right to use your fist against him, but you would not have any right to use a knife or pistol, or a bowl or cup like that in evidence, if you think that it is a thing that, if hurled at another person, at a distance of four feet, might inflict grievous bodily harm.

If assault in the third degree was committed here, provocation, such as the calling of names, might be a justification. A man is not required to submit to verbal abuse in a place where he has a right to be. That is the law of the State. The man who does that to you runs the risk of being punched, at least. But the law does not justify a man in using, under those circumstances, a knife or pistol or any weapon or thing that might cause the infliction of serious or grievous bodily harm.

It is your duty to decide the facts. I have not formed or expressed any opinion in this case. You will hear me out in that. I have not disclosed by my attitude what I think of the case. It is not my duty to do so. I have sought to hold counsel on both sides down to a proper discharge of their duty. I cannot allow my counsel to make a farce of a solemn legal proceeding, to do things that he knows to be wrong and against the law.

But you must not be influenced against these defendants by anything that was said or done by counsel on either side in this case. The facts are to be found by you only from the statements of witnesses. As I told you, the statements or arguments of counsel, concerning things which are not in evidence, or things which should not be brought to your attention at all, or which do not accord with your recollection of the

testimony, should receive no consideration from you, unless the comment on matters in evidence agree with your recollection of the evidence, and are proper deductions therefore.

The law you must take from the Court. I say to you that these men had no right in law to assault Schneider because Schneider gave evidence to the District Attorney. That was probably the best thing that Schneider ever did in his life. It is not claimed here that Schneider was an angel. He is a murderer. He has pleaded guilty to manslaughter. But he is to be commended, and not punished, for aiding the law in other cases, and certainly no inmate of the Tombs has a right to take the law into his own hands, and punish him for being of assistance to the law, instead of a law breaker. The question for you is whether they did assault him or not, or whether he assaulted them, because, if a man be the aggressor in a fight, he cannot claim the right of self defense. If Schneider hurled a bowl at these men, as they say, or at either of them, or a cup, if the fight began in that way, by Schneider hurling a bowl or cup at them, acquit them, or, if you have a reasonable doubt as to how the fight began, acquit them, because the law regards them as innocent men, until you find them guilty, and the evidence is to be viewed from that standpoint; and, no matter what their character is, or how vile they may be, they are entitled to the protection of the law. The law makes no distinction. There is no man so powerful as to be beyond the power of the law to

reach him, and no man so humble or vile that the law will not protect him in his lawful rights.

So that, under our law, a defendant in a criminal action is presumed to be innocent, and he must be acquitted by the jury, unless the evidence---remember, the evidence in the case, not statements of counsel, not appeals to passion or prejudice--unless the evidence in the case satisfied you, beyond a reasonable doubt, that he has violated the law in the manner charged in the indictment.

The Court has endeavored to do its duty, to see that these defendants had a fair trial. Now, it rests with you to decide the facts. How are facts proved? Not by statements of counsel on either side, and what I say applies to the lawyers on both sides, but by the statements that fall from the lips of witnesses produced here before you, or whose testimony has been read in evidence by stipulation.

If there is a conflict among the witnesses, you must decide between them if you can. In the discharge of that duty, your judgment is supreme, you have no master. The Court has not sought to control your action. The Court would not do you the great injustice of deeming it possible that any one could control you in finding a verdict that did not satisfy your own judgment and conscience. I believe that you will take the law from the Court, and that you will honestly and faithfully carry out the oath that you assumed when you went into that jury

box. I think it proper for me to remind you, after all that has been said here, that the work that you are doing is the most important that a citizen is called upon to do in a republic, in time of peace. In time of war, you might have to leave home and friends and business, and risk your life for the State. In time of peace, there is war on crime always going on. You are enlisted, this month, not on one side or the other, but to uphold the law, which means to give honest verdicts, according to the law as the Court gives it to you, and according to the facts testified to by the witnesses. You are the sole and exclusive judges of the witnesses, and of their credibility.

The word credibility means worthiness of belief. What witnesses here, in your opinion, were worthy of belief, and what facts have been established by their testimony? That is a question you must decide for yourselves. Ask your own reason and your own conscience and your own judgment.

There is no claim on either side that you receive any special inspiration, or that your minds are any better, or your judgment any clearer, when you sit as jurors, than you possess, or that exists, when you are attending to your business or other important duties of ordinary American citizens. You should banish every thought of prejudice, on the one hand, or of sympathy on the other. The law cannot fix any arbitrary way in which you should do your duty. It may be helpful for you to

consider the manner of the witness in giving his testimony. Did he impress you as telling a truthful, frank story, or not? Or was his manner on cross examination different from his manner on direct examination? Did he impress you as truthful or not? Was the story that he told reasonable and probable, in your opinion? What was his interest in the controversy, if any, what relationship does he bear to the matter?

Has Schneider invented this story for revenge, or was he really assaulted in the way he says?

You may consider the character of the witnesses. The defendants have been convicted of crime. The witness for the People, Schneider, has been convicted of crime, of serious crimes.

The other witness for the People has not been convicted of crime. One of the witnesses for the defense, Presser, has been indicted on a charge, but he was subsequently discharged. I do not recall, at this moment, whether he had been convicted of any crime or not. But the law permit criminals to testify, it does not deprive them of the right to testify, and their testimony is competent and admissible, and it is submitted to the jury for their consideration, and you must determine whether it is credible in this particular case or not, or whether it is unworthy of your belief. That is something that you must do in a quiet, patient manner, not arbitrarily, and not act from malice, or under the influence of prejudice, but calmly,

quietly and judicially.

It may aid you in deciding the question to consider whether the people who have not been convicted of crime, who are inmates of the Tombs, not because they have broken the law, or are charged with breaking the law, but are engaged there in earning an honest livelihood, the keeper, whether their testimony corroborates one side or the other, or whether the physician's testimony corroborates one side or the other.

It is always proper on cross examination to call the attention of a witness to any alleged contradiction in his testimony; that is, it may be shown that he made different statements elsewhere. There has been a great deal of reference made to another trial here, but you must not give any consideration to any other trial than this. This trial stands by itself.

Whether there was more or less evidence given here is not for you to speculate upon. The jurors in the other trial, we will assume, did their duty as they believed, and you must do your duty as you see it, and there should be no reference to the other trial, except on one point; and that is, if any witness here made different statements at the last trial, it would be proper to call the alleged contradictory statements to his attention, so that he might explain them, or admit or deny that he ever made the statement, and it would be for you to say, if it was shown that he had made contradictory statements, how much weight you should give to that contradiction, whether it would be of such a nature, in

your opinion, as to cast a doubt on all of his testimony, so as to show you that the story was manufactured; or whether it was an omission to make a statement, because a question was not asked, for a failure to remember some details which might have been testified to, if his attention had been called to it. In other words, you must determine whether or not there is any contradiction, and, if there is, what weight, if any, you will give to the alleged contradiction. In other words, you are the sole judges of the credibility of the witnesses, and you may consider the things that I have mentioned, their manner, their interest, their motive, the fact of their character, and give their testimony the weight that you think it is entitled to in view of all the surrounding circumstances in the case.

I do not think there is anything else that I need say to you; the law is plain. If they wilfully and wrongfully assaulted Schneider with a thing likely to produce grievous bodily harm, they are guilty of assault in the second degree. If they began the controversy by throwing this bowl at him, or in any other way, they are guilty of assault in the second degree. If you find that they did throw the bowl at him, but that Schneider began the controversy, they are not guilty of any crime, that is, if you find that Schneider hurled a bowl at them, as they say, before they threw anything at him. Now, if you think that bowl or that cup could not produce grievous bodily harm, if thrown by a man such as these defendants are, at a

distance of four feet, still it would be assault, if they threw it wilfully, and wrongfully at Schneider, whether it hit him or not, but the degree of the crime would be assault in the third degree. So you have got to decide on the character of those things. It is admitted that they were thrown by the defendants---not these particular things in evidence, because the things they threw were smashed---but things identical in every respect with these. If you think that grievous bodily harm could not be inflicted with one of those articles, and that a blow from one of those articles was not likely to produce grievous bodily harm, then you may acquit them of assault in the second degree, and go to assault in the third degree.

So your verdict should be guilty of assault in the second degree, or guilty of assault in the third degree, or not guilty. There was a charge in the indictment that they were indictment as second offenders.

MR. EDWARDS: I withdraw that, your Honor.

THE COURT: So that part of the charge is withdrawn from you. And you understand that you can find one of these men guilty, and the other not guilty. Napolitano says he threw the bowl. If that act was criminal, he is responsible for it, but Maestry would not be responsible for it, if he was merely acting as a peacemaker, but, if he urged on the fight, if he instigated the attached, if he did as Schneider and Rothman say he did, called them these names, and went into the cell to

help in the assault, he is equally guilty. If you have a reasonable doubt on that proposition, you must acquit him. The evidence must satisfy you beyond a reasonable doubt that Maestry took part in the assault, if any assault was committed, and, if he did, he is equally guilty with Napolitano. If he did not, if he was a peace maker, or if you have a reasonable doubt about that, you must acquit him. If you have a reasonable doubt as to whether Napolitano was justified, then you should acquit him.

In other words, the law regards them as innocent, until they are proved guilty beyond a reasonable doubt.

What does that term "reasonable doubt" mean? It does not mean an unreasonable doubt; it does not mean that the People must produce a moving picture or a phonographic record of all the acts and statements in evidence, but the evidence must convince you beyond a reasonable doubt that the defendants are guilty, before you can convict them. A reasonable doubt is not based on sympathy for a defendant, or prejudice against the complainant, or a desire to avoid doing your duty.

Counsel told you how much depended upon your verdict. You have no right to consider that. It would be a great wrong to condemn any innocent man; it is just as great a wrong to let a guilty man go; and by a guilty man I mean a man concerning whose guilt the evidence satisfies you beyond a reasonable doubt.

So that you are not concerned with the result of your verdict. The question for you should be, "What is the law as the Court gave it to us? Has it been shown by the testimony of the witnesses here that he broke that law? Am I firmly convinced, as an honest man, that they did what they are charged with doing?" If so, it is not your fault that some consequences may be meted out to them. It is in the power of the Court to let them go free, or to punish them, as he thinks they ought to be punished. But you must not consider that. Just take the law and the evidence, and, if you believe from the evidence, beyond a reasonable doubt, that they are guilty, say no, and fix the degree of the crime. If you have a reasonable doubt of their guilt, acquit them.

Any requests now, Mr. Palmieri?

MR. PALMIERI: Your Honor has inadvertently said to this jury that it is admitted that the defendant threw the bowl.

THE COURT: Napolitano says he threw the bowl.

MR. PALMIERI: Pardon me, Judge. I ask your Honor to say to the jury that the evidence of Schneider, and the evidence of Rothman, is to the effect that Maestry never had any cup or bowl, and never threw any cup or bowl.

THE COURT: There is no testimony that he threw a bowl. I say that Napolitano admitted that he threw a bowl, but, if Maestry was concerned with him in the attack, he is responsible for his acts; but, if he was a mere peace maker, he is not guilty.

MR. PALMIERI: I ask your Honor to charge the jury that the mere fact that Napolitano admits throwing the bowl, after a cup of a similar kind and character of crockery had been thrown at him, that doesn't make him guilty of assault in any degree.

THE COURT: I have told the jury plainly that, if the cup was thrown first by Schneider, they must acquit him.

MR. PALMIERI: Yes, sir; I ask your Honor to tell them that, in considering the evidence of Napolitano on that subject, they may take into consideration the mute evidence of a broken cup in the corridor, just where he was standing at the time of this alleged fight.

THE COURT: I decline to so charge. There is no statement in the evidence that there was broken china just where he was standing. You are to be guided only by the evidence as to that, gentlemen, but I refuse to so charge, because there was no evidence that there was any china where Napolitano was standing, or that he ever stood where the broken china was found.

MR. PALMIERI: I ask your Honor to charge the jury as follows: That the information, or alleged information which Schneider gave the District Attorney has absolutely nothing to do with the crime for which these defendants had been convicted.

THE COURT: Why, that is their testimony. They testified to that. The jury know what the testimony is. I shall not charge them on the evidence; they know the evidence. I will charge any

legal proposition that you wish to have charged. If the jurors have any doubt about the evidence, they may have it read.

MR. PALMIERI: I ask your Honor to charge the jury that, if there is a reasonable doubt on the question as to who struck the first blow, they must acquit the defendants.

THE COURT: Why, I have said that repeatedly to the jury.

MR. PALMIERI: All right, Judge. That's all.

THE COURT: Now, gentlemen of the jury, if the defendants are willing, you may take those exhibits with you, and, if they are not willing, you cannot, but the defendants must state that for themselves, under the law, and not through counsel. The jury may not need them, but I wish to get their consent now, because otherwise we might have to send for them, if the jury, after they retire, should want them.

MR. PALMIERI: The defendants consent for themselves, your Honor.

THE COURT: The defendants having consented in open Court that the jury may take the exhibits to the jury room, they may have them if they desire?

MR. PALMIERI: Yes, sir.

(The jury retired at 12:30 P.M.)

(The jury returned to the Court Room at 1⁰⁵ P.M., finding the defendants guilty of assault in the third degree.)

MR. JOSEPH RAMO, Associate Counsel for the defense, in the absence of Mr. Palmieri, represented the defendants at the rendition of the verdict.

(The Clerk took the pedigree of the defendants.)

THE COURT: Now, if Mr. Palmieri were here, I think I could dispose of this case now.

MR. RAMO: Mr. Palmieri requested me to ask your Honor to remand the defendants, and postpone sentence to another day.

THE COURT: Well, I am disposed to suspend sentence in this case, and if the defendants wish to waive the right to a remand for forty-eight hours, I will dispose of the case now.

MR. RAMO: Then, as far as Napolitano is concerned, if your Honor Please, we will waive the remand, and we are ready for sentence now.

THE COURT: Napolitano has been sentenced to Elmira Reformatory under a plea of guilty of Manslaughter in the first degree, and, in view of that fact, I will suspend sentence on him in this case. I think that is the proper course to take in regard to him, in view of the sentence in the other case. If Maestry is ready for sentence now, I am prepared to dispose of his case also, and will suspend sentence.

MR. RAMO: He says he is ready for sentence now, your Honor.

We would like to have him disposed of at once.

THE COURT: You have a right to be remanded for sentence for forty-eight hours, if you wish it.

MR. RAMO: No, sir; we are ready for sentence now.

THE COURT: Does Maestry also waive the remand for forty-eight hours, as Napolitano has done?

MR. RAMO: He does, sir, and we are ready for sentence now.

THE COURT: Then I suspend sentence in Maestry's case also, in view of the fact that he is awaiting sentence, under a plea of guilty of manslaughter in the first degree, which was accepted in another court.

Under all the circumstances, I think that this conviction will meet the ends of justice, without the imposition of further punishment than Napolitano has received, and Maestry is about to receive, for the crimes of which they pleaded guilty in another Court, and, therefore, I suspend sentence on both of them.