Court of Appeals of Maryland

SEPTEMBER TERM, 1964

No. 368

LIDGE SCHOWGUROW,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

Appeal From the Circuit Court for Cecil County
J. DeWeese Carter, C.J.
Edward D. E. Rollins, J., and
Thomas J. Keating, Jr., J.

BRIEF FOR APPELLANT AND JOINT RECORD EXTRACT

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from a jury verdict of murder in the first degree without capital punishment.

QUESTIONS PRESENTED

1. Was Appellant, a member of the Buddhist faith, denied due process of law and the equal protection of the law because of the religious requirements for jury service under Article 36 of the Maryland Declaration of Rights?

2. Was it prejudicial and denial of due process to admit Appellant's signed confession when *Appellant was not* permitted to obtain a lawyer until after the confession?

STATEMENT OF FACTS

Appellant is a Kalmuck of Mongolian descent and was born in Belgrade, Yugoslavia, approximately 35 years ago. He was raised in the Buddhist faith and has continuously been and was at the time of his indictment and trial an adherent of that faith. (E. 1) His education ceased at the age of 13 when he was seized by the Nazis and transported to a German labor camp. (E. 44-45) Subsequently, in 1952, he immigrated to the United States and later married an American girl.

On January 5, 1964, Appellant was apprehended by the State Police at the apartment where his wife had received fatal gunshot wounds. He was removed to a hospital for treatment of a self-inflicted wound, informed he was charged with murder, and kept under constant guard. (E. 37-38, 42, 46-47) On the following day he was removed to the State Police barracks and booked on a charge of murder. (E. 38) He was fingerprinted, photographed, and given lunch. He was then interrogated and a statement was obtained from him. (E. 12) Appellant testified that, prior to the interrogation, he requested permission to telephone his sister or brother to inquire about getting a lawyer but his request was ignored. (E. 48, 51-52) State witness Kosirowsky testified he heard no request for a lawyer . . . (E. 35) and State witness

Fields testified that Appellant stated that his family was getting an attorney but Witness could not recall when that statement was made . . . (E. 40-43) nor could Trooper Fields "recall" Appellant asking permission to use the telephone. (E. 40)

ARGUMENT

I.

The Provisions of Article 36 of the Maryland Declaration of Rights Deprived Appellant of Due Process and of the Constitutional Guarantee of Equal Protection of the Laws

By timely motions Appellant challenged the compositions of the grand jury that indicted him and the petit jury which tried him. (E. 1, 20) Article 36 of the Maryland Declaration of Rights reads in part:

> "[N]or shall any person, other competent, be deemed incompetent as a . . . juror on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

The impact of Article 36 has been made clear by the opinion of this Court in the case of *State v. Mercer* (1905) 101 Md. 535, wherein the Court referred to the above-quoted part of Article 36 and said:

> "The provision . . . must be construed to assert that no one shall be deemed competent as a juror who does not have that belief.
>
> "If any of the grand jurors who found the present indictment against the appellee were incompetent it is clearly null and void."

A. The Jurors Are Presumed To Have Been Selected in Accordance With the Requirements of Article 36.

It is to be presumed that the proceedings of the Circuit Court were regular in all respects and that both the members of the grand jury and the petit jury called for service were selected in accordance with the requirements of Article 36. As stated in 22A, C.J.S. at Pages 352, 353,

> "In the absence of proof to the contrary the proceedings of courts properly exercising criminal jurisdiction are presumed to be regular . . . this presumption applies to the selection of the petit jury . . . ."

Citing *Lewis v. U. S.*, Okl., 49 S.Ct. 257, 279 U.S. 63, 73 L.Ed. 615. *Poliafico v. U. S.*, C.A. Ohio, 237 F.2d 97; *Cornelius v. State*, 17 S.E.2d 156, 193 Ga. 25; *State v. Fletcher*, 106 So.2d 709, 236 La. 40; *State v. Woodard*, 273 S.W. 1047, 309 Mo. 19; *Commonwealth v. Spallone*, 35 A.2d 727, 154 Pa. Super. 282.

The text in 22A C.J.S. at Page 356 reads as follows:

> "In the absence of proof to the contrary, it will be presumed that the proceedings before the grand jury were regular in all respects, . . . that the jurors were properly selected and drawn according to law . . . ."

Citing *Cole v. State*, 22 S.E. 2d 529, 68 Ga. App. 179.

B. Buddhism Is a Well-Established Religion Which Does Not Teach a Belief in the Existence of God.

In Footnote #11 to the Opinion in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed. (2nd) 982, the Court says:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God, are Buddhism, Taoism, Ethical Culture, Secular Hamanism and others." [Emphasis supplied]

In the recent case of *U. S. v. Seeger*, 326 F.2d 846, decided by the United States of Appeals for the 2nd Circuit on January 20, 1964, the Court says:

> "[W]e feel compelled to recognize that a requirement of belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called 'religious'.
>
> * * *
>
> "Especially when considered in the light of *Torcaso* and the still more recent teachings of the Supreme Court, a line such as is drawn by the "Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment."

C. The Courts Take Judicial Notice of the Existence in This Country of a Substantial Minority of Persons Who Do Not Profess a Belief in God.

The *Torcaso* and *Seeger* opinions, as well as many other, clearly indicate that the courts take judicial notice of the diversity of religions to which the people of the United States adhere.

> "[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all."

School District of Abington Township v. Schempp, 374 U.S. 203, 240 (1963) (Concurring opinion).

Judicial notice of such substantial minorities professing no belief in God is based upon common knowledge. Accordingly, the burden is upon the State to rebut the presumption that such substantial minorities, otherwise competent to serve as jurors, exist among the citizens of Maryland and residents of Cecil County. This the State has not done.

D. The Exclusion From the Juries of Minorities Professing No Belief in God Denied Defendant Equal Protection of the Law and Due Process of Law Contrary to the Fourteenth Amendment of the United States Constitution.

The cases holding that the Fourteenth Amendment to the Constitution prohibits the exclusion from jury service of persons of the colored race are too numerous to list. The Opinion in *Eubanks v. Louisiana* (1958) 356 U.S. 584, commences as follows:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a Grand Jury or tried by a petit jury from which members of his race have been excluded because of their race."

Race is not the only criterion. As has been stated by Chief Justice Warren in *Hernandez v. Texas* (1954) 347 U.S. 475:

> "Although the Court has had little occasion to rule on the question directly, it has been recognized since *Strauder v. West Virginia*, 100 U.S. 303, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws."

See also *Fay v. New York* (1947) 332 U.S. 261 in which the Supreme Court held that Blue Ribbon juries in New York were not in violation of the Constitution and at page 270 said:

> "We fail to perceive on its face any constitutional offense in the statutory standards prescribed for special panel. The Act does not exclude, or authorize the Clerk to exclude, any person or class because of race, **creed**, color or occupation." [Emphasis supplied]

See 16A C.J.S. Section 540, page 467:

> "The exclusion of persons from jury service by any method or system, ingenious or ingenious, solely because of race, color, class or condition, constitutes a denial of equal protection of the laws . . . ."

The decision of the Supreme Court in *School District of Abington Township v. Schempp* (1963) 373 U.S. 203 is pertinent. In that case Mr. Justice Clark's opinion states:

> "[T]his Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the states by the Fourteenth Amendment."

In Mr. Justice Brennan's concurring opinion the following language appears:

> "But the teaching of both *Torcaso* and the *Sunday Law Cases* is that Government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that non-religious means will not suffice."

A recent decision of the highest court of the State of Georgia, in which the applicable Supreme Court decisions were carefully reviewed, is apposite. In the case of *Allen v. State,* 137 S.E.2d 711, the Court held that the constitutional rights of a white man were denied if negroes were excluded from jury service. The Court quoted from the opinion of the Supreme Court in *Glasser v. U. S.,* 315 U.S. 60, 85, 62 S.Ct. 457, 472, 86 L.Ed. 680, as follows:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violate our Constitution and the laws enacted under

it but is at war with our basic concepts of a democratic society and a representative government."

The Georgia Court then went on to say:

"We are of the opinion that any system that results in the consistent selection of jurors from a group or portion only of those available for service in that office, rather than from those available without discrimination, does not accord to any defendant the type of jury to which the law entitles him. 'The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community.' *Fay v. New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (Dissenting opinion), accord *Beck v. Washington,* 369 U.S. 541, 570, 82 S.Ct. 955, 970, 8 L.Ed.2d 98, (Black, J., dissenting)."

E. No Proof of Discrimination Is Needed Where the Law Requires the Exercise of Discrimination.

Article 36, by its very terms, sets apart and discriminates against a segment of citizens who do not believe in the existence of God. It clearly prohibits an accused, whether a believer or a non-believer, from being tried by a jury composed of persons who do not believe in God as well as persons professing a belief in God. Its application can easily result in prejudice to accused when his lack of belief is manifested to the jury by his failure to take the oath before testifying. (E. 43)

F. Article 36 of the Bill of Rights Calls for the Use of Religious Means To Serve Governmental Ends.

The trial, conviction and the punishment of an offender against the law is solely a governmental function for the protection of society. It bears no closer relation to religion than other governmental functions such as public

education, health and welfare, and tazation. Its secular character is obvious but is perhaps best illustrated by the imposition of a death sentence, which would be hard to justify under any religion known to Appellant or his counsel. Accordingly, Article 36 is violative of the First Amendment as interpreted by Mr. Justice Brennan in his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203, wherein he wrote that the First Amendment proscribed the use of "essentially religious means to serve governmental ends, where secular means would suffice."

II.

Appellant Was Denied Due Process Because of the Denial by the Police of His Request To Telephone To Ask the Assistance of an Attorney Befor His Interrogation at the Police Barracks

Appellant testified that he requested leave to telephone on three occasions prior to the interrogation . . . (E. 48, 51-52) . . . and that on the first two occasions his requests were ignored. Referring to the third request he testified,

"At that time [Trooper Fields] answered me, he told me, said, do I have money? I said, 'I don't have much money, but I would like to contact with my people.' And he told me, said, 'If you don't have money, can't get a lawyer, the Court is going to appoint you a lawyer.' And I asked him when is going to be court, when they going to appoint me a lawyer? He said he don't know, he can't give me the answer on that." (E. 52)

The above testimony was not denied by Trooper Fields, nor did Fields deny that Appellant requested leave to telephone. Although Trooper Fields was pressed by counsel to admit or deny Appellant's requests to telephone, Fields would only testify that he did not "recall" such a request. (E. 40) Fields did testify, however, that Appellant informed him that his family was getting an attorney.

(E. 40-41) All of the foregoing testimony related to a period of time **after** Appellant was informed of the charge placed against him and after he was, in fact, charged. (E. 38,42)

The statement of Trooper Fields quoted above was nicely calculated to lead a man of little education, and inexperienced in the law, to believe he was not entitled to the protection of legal advice until he was taken to Court. The Courts hold otherwise. In the light of Appellant's background (E. 43-46) and of all the attendant circumstances of the interrogation, the following quotation from the opinion in the case of *Haynes v. Washington*, 373 U.S. 503, 10 L.Ed.2d 513; is applicable:

> "The uncontroverted portions of the *record thus disclose* that the petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and action of state authorities."

The foregoing language is quoted in this Court's Opinion *reversing a judgment* and remanding in the recent case of *Thiess v. State of Maryland*, 235 Md. 541.

Bearing in mind Appellant's history, including the paucity of his education, a contention that Appellant was effectively warned of his constitutional rights or that he intelligently waived his right to counsel places too great a strain upon credulity. Accordingly, as in *Escobedo v. Illinois*, 378 U.S. 478:

> "[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular subject, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of

> Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment,' "

and in the dissenting opinion of Mr. Justice White,

> "At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. 378 U.S. at 495."

See also *Miller v. Warden,* (4th Cir.) 338 F.2d 201.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment and verdict of the Circuit Court for Cecil County, Maryland should be reversed and the proceedings remanded for a new trial.

Respectfully submitted,

J. GRAHAME WALKER
J. GIFFORD SCARBOROUGH

Attorneys for Appellant

RECORD EXTRACT

[Filed April 20, 1964]

IN THE CIRCUIT COURT FOR CECIL COUNTY, MARYLAND

STATE OF MARYLAND	)	
	)	
Vs.	)	No. 1040 Criminals
	)	
LIDSCHA SCHOWGUROW	)	

MOTION TO DISMISS

Now comes the Defendant, Lidscha Schowgurow, by his attorney, J. Grahame Walker, and moves the Court to dismiss the proceedings herein and as reason therefor states that the Grand Jury which indicted him was not legally constituted in that its members were selected,

(1) In violation of the provisions of Article 36 of the Maryland Declaration of Rights, or

(2) In violation of the provisions of the First Amendment and the Fourteenth Amendment to the Constitution of the United States.

J. Grahame Walker

Attorney for Defendant

[Certificate of Service dated April 17, 1964]

AFFIDAVIT

STATE OF MARYLAND, COUNTY OF HOWARD, SS:

I, LIDSCHA SCHOWGUROW, (being first duly sworn, on oath) depose and say that I am the Defendant in the above entitled proceeding; that I am a Kalmuck, of Mon-

golian descent, and was born in Belgrade, Yugoslavia, approximately 35 years ago; that I was raised in the Buddhist faith and have continuously been and am now an adherent of that faith; that the spiritual leader of the Buddhist faith is the Dalai Lama; that the Buddhist religion does not teach a belief in the existence of God or a Supreme Being.

Lidscha Schowgurow

Suscribed and sworn April 16, 1964.

[Filed July 30, 1964]

MEMORANDUM AND ORDER

The defendant, Lidscha Schowgurow, has been indicted by the Cecil County Grand Jury for murder in the first degree. By timely motion he seeks dismissal of the indictment on the basis that the Grand Jury was not legally constituted because persons of the Buddhist faith, to which he claims devotion, were necessarily excluded therefrom.

The motion is supported by the defendant's affidavit which states:

> "that I am a Kalmuck, of Mongolian descent, and was born in Belgrade, Yugoslavia, approximately 35 years ago; that I was raised in the Buddhist faith and have continuously been and am now an adherent of that faith; that the spiritual leader of the Buddhist faith is the Dalai Lama; that the Buddhist religion does not teach a belief in the existence of God or a Supreme Being."

The argument in favor of dismissal runs thus: Article 36 of the Maryland Declaration of Rights provides that

no person "otherwise competent [shall] be deemed incompetent as a . . . juror on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come. It is presumed that those impanelled on the Grand Jury which indicted the defendant did in fact affirm their belief in the existence of God; Buddhism does not teach the existence of God; Buddhists were excluded from the Grand Jury which returned the indictment against the defendant, who is a Buddhist; therefore, the indictment is constitutionally defective.

The court has reviewed the brief of the Attorney General filed through the State's Attorney of Cecil County and also the defendant's attorney's trial memorandum and reply to the State's memorandum and has read all of the authorities cited therein. The court is persuaded that the position of the State with reference to the motion is correct and adopts the same with some modification as set forth hereinafter.

"There is no merit to the defendant's argument, even if it be conceded (1) that the court may presume the members of the Grand Jury to have been in fact required, as a condition of service, to affirm a belief in the existence of God, and (2) that the court may take judicial notice that devout Buddhists do not believe in the existence of God (on the basis of the statement in Torcaso v. Watkins, 367 U.S. 488, 495, 81 S. Ct. 1680, 6 L.Ed. 2d 982 [1961] footnote number 11).

The defendant has failed to show that there has ever been a single adherent of Buddhism resident in Cecil County who, aside from the religious question, was qualified to serve on the Grand Jury, let alone that any Buddhist was excluded from the call or, being called, was excluded from the panel for failure to affirm his belief in the existence of God. This failure of proof

indicates no lack of diligence in presenting the issue. It truly reflects the County's history.

"The most recent Supreme Court decision on the subject of group discrimination in grand jury selection is Eubanks v. Louisiana, 356 U.S. 582, 78 S.Ct. 970, 2 L.Ed. 2d 991 (1958), cited by the defendant in his memorandum. This decision provoked a full annotation of the subject in 2 L.Ed. 2d 2040. But far more pertinent to the instant situation is the decision in Hernandez v. Texas, 347 U.S. 475, 74 S. Ct. 667, 98 L.Ed. 866 (1954), also cited by the defendant, in which the Supreme Court reversed a murder conviction on account of demonstrably systematic exclusion of Mexicans --- a significant minority in the county --- from jury service. In the course of his opinion for the Court, Mr. Chief Justice Warren made the following observations (347 U.S. at 477, 478, 479-81):

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question *directly, it has been recognized since Strauder* v. West Virginia, 100 U.S. 303, 25 L.Ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.'
>
> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid

of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.'

"The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites'. One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican.' the participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served'. On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and "Hombres Aqui' ('Men Here'). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.'

'Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074, 55 S. Ct. 579. In that case, proof that Negroes

> constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion', has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.'
>
> 'The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that 'for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.' The parties also stipulated that 'there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.'

"The standards of proof required in that case have not been met here. There is no instant showing that Buddhists or other not believing in the existence of God form a separate class in Cecil County. Nor is there any showing that Buddhists or others not believing in the existence of God form any significant part of the County's legal residents, of its landowners or of its general population.

And these failings accord with the understanding and belief of those familiar with the ethnic and religious history of Cecil County.

"The Torcaso case, supra, is irrelevant to the present dispute. Its meaning, in the jury duty -- group discrimination context, is that any Buddhist called for jury service cannot, if he presses the point, be excluded therefrom on account of his refusal to express a belief in the existence of God. Also irrelevant is United States v. Seager, 326 F.2d 846 (2nd Cir., 1964), which simply held what a young man who was conceded to be a sincere conscientious objector but whose objections were not the product of religious belief in 'a relation to a Supreme Being' -- which was the statutory test for exemption from military service -- could not be denied the exemption on that account alone."

The defense relies principally on the Torcoso and the Seeger cases to support the proposition that the indictment in this case is constitutionally defective. If these cases seem to have cast doubt on the constitutionality of a requirement of Article 36 of our Declaration of Rights that a juror to be competent must have a belief in the existence of God, the following statements of the Supreme Court appear apt:

In the case of Zorach v. Clauson, 96 L.Ed. 954, pp. 961, the Supreme Court held that the "released time" program in the State of New York for religious instruction was not violative of the First Amendment of the Constitution of the United States, and had this to say about the meaning of the First Amendment:

> "*** There is much talk of the separation of the Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See Everson v. Board of Education, 330 US 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392; Illinois ex rel. McCollum v. Board of Education (US) supra. There cannot

be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one or the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other--hostile, suspicious and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session; 'God save the United States and this Honorable Court'.

And at page 962, the Court had this to say:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We

make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor under take religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.'

And in U. S. v. Seeger, 326 Fed. Rep., 2d, page 846 (conscientious objector case), the Supreme

Court in holding that Congress in using the "Supreme Being" definition as a guide for the draft board created an impermissible classification under the circumstances present in that case, said at page 854:

"We wish to make clear, moreover, that by holding the 'Supreme Being' requirement to create an impermissible classification under the circumstances present here, we are not passing upon the validity of legislative classifications in terms of religion in any other context. As an observer has recently noted, 'to characterize constitutional limitations as inflexible imperatives is an unproductive form of judicial activity.' Pollak, Forward: Public Prayers in Public Schools, The Supreme Court--1962 Term, 77 Harv. L. Rev. 62, 67 (1963). We feel it the soundest course to deal with such problems as they are presented to us, and not to lay down hard and fast rules which may be inappropriate to some of the many and varied interactions between government and religion." (Emphasis supplied).

The Court has compared the forms of the oaths administered to the grand jury, to the bailiff to the grand jury, to the jurors in criminal and civil cases, to witnesses, to petit jurors, to the bailiff to the petit jury, and to interpreters in the courts of this State and in the district courts of the United States for the District of Maryland. They are alike and begin with the declaration: "In the presence of Almighty God, You _____ do solemnly promise and declare that****". Rule 5c, Maryland Rules of Procedure defines an oath:

"means a solemn promise and declaration, sworn to under the penalties of perjury, that a certain statement of fact is true",

and an Affirmation:

> "means a solemn promise and declaration, made under the penalties of perjury, by a person who conscientiously declines to take an oath that a certain statement of fact is true."

Our Court of Appeals in State v. Mercer, 101 Md. 535, had this to say about the questioned requirement of Article 36 of the Declaration of Rights, at pages 537-538:

> "We think however, that the language used in sec. 36 is plain and that its intention clearly was to afford to the community, in so far as they were affected by the exercise of the important powers conferred upon grand juries, the protection as to each juror of the sense of restraint and obligation arising from the belief that he would be held accountable for all of his transactions at the bar of Divine Justice. ***"

In Zorach, supra, 343 U.S. 306, 313, the Supreme Court said:

> "We are a religious people whose institutions presuppose a Supreme Being."

I repeat here the hope expressed by Judge Henderson in Torcaso v. Watkins, 223 Md. 49, at page 58, which proved so futile on appeal to the Supreme Court:

> "In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid.***"

In conclusion, regardless of the possible implications of Torcaso and its so-called "teaching", I am not prepared in either my official or in my personal life to attempt to operate in a vacuum, devoid of all religious

considerations. I believe that this defendant's rights have received better protection from a grand jury composed of people who make decisions out of respect for their conscience and the belief that there is a Supreme Being who will reward or punish them for their good or bad conduct rather than from a jury composed of people who respect no high authority or an authority of similar supreme nature or being.

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For the reasons assigned hereinbefore, the Motion to Dismiss the indictment is hereby denied, this day of July, 1964.

Edward D. E. Rollins

State's Exhibit No. 1

STATEMENT OF LIDGE SCHOWGUROW

Taken at Barrack 'F", North East, Cecil County, Maryland, Maryland State Police on Monday, January 6, 1964. Statement begun at 1:00 P.M. and concluded at 3:00 P.M.

"Lidge", you are now at Barrack "F" of the Maryland State Police, located at North East, Cecil County, Maryland. People present are TFC W. E. Fields and Clerk is Mrs. Rogan, civilian employee. I am 1st Sergeant Ragan, Kosirowsky of Maryland State Police. We would like to ask you some questions in connection with the shooting of your wife which happened on January 5, 1964 at approximately 12:45 PM at 253 Laffey Circle, Manor Heights, Port Deposit, Cecil County, Maryland. It is my duty to inform you that you have a perfect right to answer any and all questions asked you, and you have a perfect right not to answer any and all questions asked you. Anything

you say may be used against you in Court. Now that you know these facts, do you wish to make a statement?

A. Yes.

Q. State your full name?
A. Lidge Schowgurow

Q. Address?
A. 168 W. Laurel Street, Philadelphia.

Q. Are you married?
A. Yeah.

Q. What is your wife's name?
A. Joyce

Q. And her address is the same as yours?
A. Yes.

Q. Can you read?
A. Not perfect.

Q. Can you write?
A. No

Q. Can you write your signature?
A. Yes.

Q. Would you tell us in your own words exactly what happened, why and where it happened, to the best of your knowledge?
A. Each Thursday night I took her to psychiatrist at 8th and Spruce. I took her to doctor, first she says she wants clothes. I buyed her clothes then I took her to mothers place. We had to stop anyway to pick up children. Then she said she wants coffee. Her mother didn't offer her coffee and she was angry. When she come home she goes to kitchen and grabs coffee pot. Pot was empty and she had cup and sugar in cup and fell asleep in chair. I wake her up to go in bed. So she arguments with me - person can sleep whenever person wants. After around 11:30 I went up and we had 2 young child with us and she started waking up and started arguments with me and

said I in purpose keep waking her and trying to drive her nuts. I said no man tries to make his wife nuts. I still need you, I love you and children still need mother. She started screaming and said children are together and try to drive her nuts. She tried to run to door. I ran first and slammed the door and told her to go to bed and rest. She kept screaming. I said up stairs I got sister and brother-in-law sleeping. Why you try to advertise the fighting. She said what they are "kings" ? I seen it was impossible to fight with her. So I went to sleep. I was going to work and she was coming downstairs and didn't say nothing to her, I went to work. After I come back from work I had 2 children with me. Ninety-four year old grandmother and countryman was watching children. I asked him what happened to her and he said she get dressed and left. This was Friday, December 20, 1963 when she left the house.

I went to her mothers place and asked if she is there. She said she didn't see her. Told her I am not mad, to come home when she sees her. I am going to Vineland I took sister and brother-in-law to Vineland. I left around 10:30 or 10:45, arrived in Philadelphia around 12. So I went home. She was not home, the 2 children was home. So I went to sleep. Next morning I went to her mother place and they said she was not there. So I took my girl to my mother place, the boy was home with countryman. My brother brought girl back and I was not home and then - [my brother] - brought to my in-laws and left the girl there. Monday I went to work, we had suspension, they give us ten dollars Christmas present and we don't work all week, if we do they give me call. I went to in-laws and brother-in-law said I never saw her. I am tooking the children. After I took them back the second to oldest one, Nina, my brother took her to mothers place. I went to Camden to a lady we know, Marge, I told her she left and I got children. She said little one stay with me. She had the little one 2-3 days then she bring me back and took her back again.

Week passed and her brother told me she was in Maryland. I come in Maryland. I knock on door and I went in and I see her. Her sister told me she want to talk with me in kitchen. I talk and she said wait till her husband come and then I talk to her. This was January 2nd. Her husband come, he poured me whiskey I drinked couple sips. She called her out and she come and sit beside me. I talked said when you coming home and I got children all over. She said I don't have nothing to talk till Court come. Give me answer are you finishing with me. She said she let me know at Court. I asked sister if all right to go in room and talk with her. I went with her in room and talk to her. She said I won't go home till after this Court. I don't give you no answer. I asked if I could visit and she said "no". I asked if I could call and she give me telephone number. I asked if she needs money and she said yeah. I don't have much, but I send you money. I went back to Philadelphia by bus and send her $10.00 next day.

I called her that evening she said to call me tomorrow morning, Saturday. Every time I talk to her I ask her to come home and reunite. She said not yet. Then letter come my name. Her sister was writing to her mother. In letter was that I was there I saw my wife and they were expecting arguments but it went nicely. She was calm. She made me believe that she was coming back to me. I found the gun in apartment house where I was working couple months ago. Place was empty, I found gun in closet.

Me and my wife both found gun couple years ago. We went to people I know and I took gun out and was playing with boy and it accidently fired. My wife she gave gun to - [nephew] - niece. My - [nephew] - niece was playing with the gun outside and police saw him. She told him we thought was play gun. So it was ended with that.

When I found the gun I wrapped it in newspaper and put in the cellar, this second gun I found. After that letter I

said I come to her. I come here (this was Saturday night). I took the gun out of cellar, I figures when I come here with gun I scare her and get her to come home. Then when we get together everything going to be all right. I got here by bus and got taxi to apartment. I went in empty place I straightened myself up, then I walked down and saw my girl and asked where mommie was. She was sitting alone. I said surprise Joyce, did you receive the money I send you money. She said not yet. I said when are you coming home. She said not till we go to court. Then she said what you got in your pocket, do you have a gun? I said no. She said well I can believe you. I said I want you to come home with me. If you don't want to go home, see about the children, you got two here and three in Philadelphia. If not for my sake, for your childrens sake come home. She jumped off sofa and grapped the coffee table and started hitting it and started screaming. She picked up a chair, then I took the gun and I started shooting. I didn't have time to show her the gun and say here is gun I want you to come home. When I pulled the gun she was running and I kept shooting and then when I realized what I am doing I shoot myself and I fell down and that I am still moving and shoot myself again and clips is empty. Then I walked through door and brother in doorway said stop, police are coming. I threw gun away and said I killed her and he said no she's not dead. I said you call ambulance and he said I call ambulance and state police and shore patrol going to come.

After police come they said where is gun and I told them. I told them it was same gun I had.
Q. This was the same gun that you used to fire bullets into your wife?
A. That is the one.

Then I took money out, two ten dollar bills to brother-in-law and said take my children to my brothers house. The Shore Patrol took my wife away and they wanted to take me and my brother-in-law said I was civilian and that state police are coming.

Q. Why did you do this?
A. I don't know.

Q. Were you jealous of your wife because of her good looks?
A. No, because I know I living with her so many years and we had children.

Q. Was she running around with anyone?
A. No she was not. If she was running around countryman lives with us and he would tell me. In evening she went out and took either children or dog with her.

Q. Are you a naturalized citizen?
A. No.

Q. Are you registered?
A. Yes.

Q. When did you come to this country and from where?
A. 1951 - Germany

Q. Where was your home country?
A. Yugoslavia

Q. What are you?
A. Mongolian

Q. What was your trade in Germany?
A. Electrician.

Q. How did you come to America?
A. Immigration quota.

Q. You met your wife here?
A. Yes-Philadelphia.

Q. (By TFC Fields) When you took cab to Manor Heights, you got out at Perryville, why did you get out of the cab this far from Manor Heights?
A. I had to go to the toilet.

Q. Were you there long? (By TFC Fields)
A. Maybe 5 or 10 minutes.

Q. (By 1st Sgt. Kosirowsky again) Were you so tense you maybe felt you had to urinate?
A. I was calm, I had no intention to kill-not like person have something on mind.

Q. (By TFC Fields) How did you know your wife was in bottom apartment and not upstairs?
A. My daughter told me. She was in the hallway.

Q. (By 1st Sgt. Kosirowsky) What did you say to your daughter?
A. I petted her face and asked her where mommie was.

Q. (By 1st Sgt. Kosirowsky) Did you ever hear of anyone or relatives using pointed gun and say I am going to scare you?
A. Yes in Russia. They said pointing gun and as long as they can settle between us it is over and forgotten.

Q. In Russia are they allowed to carry a gun concealed? (Questioning now continued by 1st Sgt. Kosirowsky)
A. Yes.

Q. You said that the first time you came which was last week, she (your wife) patted you down to see if you had a gun?
A. That's right.

Q. This time, Sunday evening, yesterday, she said "Do you have a gun"?
A. At first she said what you got in pocket - you got a gun. I said no. Then she picked up chair and I pulled out gun and shoot her.

Q. Is there anything else you wish to say about this matter?
A. I don't know what else to say, I don't understand now she is dead and never will I know why she left me.

Q. Do you have anything to say about why you shot her?
A. I can't say nothing. I don't know.

Q. Have you been treated all right by State Police or anyone else involved with your custody, while you have been in custody?

A. Yes.

Q. Has anyone threatened you?
A. No. Everybody is nice and kind.

Q. Have you been offered any reward, promise of leniency or favor in order to get you to make this statement?
A. No.

Q. Have you made this statement freely, voluntarily, and of your own free will?
A. Yes.

Q. After reading your statement consisting of five pages and seeing the statement true and correct and just as you have told it, are you will -[ing] - to sign your name?
A. Yes.

Q. Can you read English?
A. Yes.

Defendant's signature

WITNESSES:

1st Sgt. Peter C. Kosirowsky
Pfc. Wiley E. Fields
Gene Ragan

EXCERPTS OF PROCEEDINGS

September 16, 17 and 18, 1964

* * *

JUDGE CARTER: Now, Mr. Walker, you have a [9] motion with regard to the jury panel as a whole?

MR. WALKER: Yes, if the Court please. I move that I challenge the jury panel as a whole, and move they be dismissed, on the grounds that the constitution of the State of Maryland requires that jurors express a belief in a Supreme Being, and in the existence of God, and that under his dispensation such person would be held morally accountable for his acts and be rewarded or punished therefor, either in this world or in the world to come.

The first amendment to the constitution as applied by the Supreme Court through the 14th amendment prohibits religious discrimination of any sort. The record shows that this accused is a Buddhist and that his sect does not have a belief in a Supreme Being and in God. Therefore, it is our contention that he is not being tried by his peers and if the [10] jurors qualify under the Maryland constitution, and have to qualify under the Maryland constitution, under the United States constitution they are illegally constituted.

JUDGE CARTER: Are you saying, Mr. Walker, that the requirement of the constitution of the State for jury service is an unconstitutional requirement under the Federal constitution?

MR. WALKER: That is correct.

JUDGE CARTER: You are not attacking this panel because there are no Buddhists on the panel, but because the State law requiring a juror to believe in God is contrary to the Federal constitution, as it affects your client?

MR. WALKER: That is correct. Of course, we have no way of knowing at this time whether or not there are any Buddhists on the panel, or whether or not there are any atheists, or any of the several different sects which

have beliefs but do not believe in the existence of a Supreme Being, in God. This we don't know. But we do know the requirement of Article 36 of the constitution of Maryland, and it is our belief that that requirement, if put into effect, violates the constitutional rights of the defendant, violates the constitution of the United States.

JUDGE CARTER: Raising that challenge to the jury panel [11] you feel is a proper way to raise the constitutionality of that part of the Maryland constitution?

MR. WALKER: I think, if the Court please, if the case proceeds, that we should be permitted to ask each juror respecting his belief. However, there is law to the effect that it is presumed that the jurors are selected in accordance with the law of the jurisdiction, and that presumption I think prevails as of this moment.

* * *

JUDGE CARTER: For the purpose of this ruling on this motion, we will presume that the jury panel here, both the regular jurors and the tally jurors, have been selected in accordance with the requirements of the Maryland constitution, that is, that they believe in the existence of a God. With that before us, we will overrule this motion which is based on the proposition that Article 36, I believe it is, of the Maryland constitution requiring a belief in a God in order for jury service violates Article 1 of the Federal constitution. Judge Rollins went into this same question [12] very exhaustively and filed a written opinion in respect to the same issue that was raised in the motion to dismiss the indictment because of a requirement for members of the jury to have a belief in a God. We will adopt his opinion in regard to this one, and overrule the motion.

MR. WALKER: May I make this inquiry, if your Honor please: Is the Court presuming that the jurors were selected in accordance with Article 36?

JUDGE CARTER: Yes, sir, we are presuming that.

MR. WALKER: That they were selected accordingly.

JUDGE CARTER: And we are taking that presumption into account in our ruling on your motion.

MR. WALKER: Then I think it would be useless for me to ask the jurors that specific question.

JUDGE CARTER: Well, so far as this Court's ruling is concerned, as I say, we presume that they are selected in accordance with the legal requirements, and I believe you mentioned earlier that you understood that there was some ruling of the Court of Appeals that had been made to that effect. As far as this Court is concerned, we act on that presumption. You can govern yourself in any manner you want to with respect to your future acts.

All right, are there any other motions, gentlemen, that [13] should be heard out of the presence of the jury and prior to the selection of the jury in this case?

MR. WALKER: Well, if your Honor pleases, I do move that the question of the admissibility of the statement which the State's Attorney has indicated he is going to introduce into evidence, the testimony and argument on that question be had before the jury is sworn in, or it can be after they are sworn in but before the case proceeds otherwise.

JUDGE CARTER: What you are saying is that you are verbally making a motion to suppress evidence which the State proposes to introduce.

MR. WALKER: That is correct, your Honor.

JUDGE CARTER: What is the motion directed to?

MR. WALKER: The motion is directed to a written statement.

JUDGE CARTER: Of the accused?

[14] MR. WALKER: Of the accused.

JUDGE CARTER: In the nature of a confession?

MR. WALKER: That is correct.

JUDGE CARTER: Well, the question is whether or not it is of a voluntary nature.

MR. WALKER: That is the question, your Honor.

JUDGE CARTER: Is there any other issue involved?

MR. WALKER: Only that.

JUDGE CARTER: The burden is upon the State to establish by a preponderance of evidence that the statement was voluntarily given by the accused, identify the statement and establish the circumstances under which it was given.

MR. WALKER: If the Court please, as a subsidiary of that, we do contend that the question of the absence of counsel is involved.

JUDGE CARTER: We will hear you on the matter of whether or not the State's evidence shows it was voluntary before we rule on the question. We will let you offer any evidence that will rebut the State's evidence on that issue.

Could we have an explanatory statement of this evidence, Mr. Baker?

MR. BAKER: Yes, your Honor, I have here a five-page statement taken on January 6 at the North East Barrack.

[15] JUDGE CARTER: Just a minute. January what?

MR. BAKER: January 6, which was the day after the victim was killed.

JUDGE CARTER: This year?

MR. BAKER: Of this year, yes, your Honor. It was taken at the North East Police Barracks by First Sergeant Peter C. Kosirowsky, Trooper First Class Wiley E. Fields, and the stenographer was Jean Ragan. I do not have Mrs. Ragan here at the court, she is at the barracks, but I do have both the officers here in court.

JUDGE CARTER: It is up to the State to present what evidence they determine advisable to establish the voluntary nature. I don't know what rebuttal evidence there is. You had expected that you would present this in the course of trial, and you are caught unawares, and if you wish to get your third witness here we would give you an opportunity to do that.

MR. BAKER: I can have her here in five minutes, your Honor.

MR. WALKER: Excuse me. If the Court please, I do think it would be appropriate to exclude the witnesses at this point.

JUDGE ROLLINS: Motion to exclude all witnesses now.

[16] JUDGE CARTER: You make a motion that all witnesses be excluded during any part of the trial except as to their own testimony?

MR. WALKER: That is right.

JUDGE ROLLINS: You make a similar motion with regard to the defendant's witnesses?

MR. BAKER: Yes.

* * *

[17] JUDGE CARTER: Retire to the library.

(The State's witnesses left the courtroom.)

* * *

[18] MR. BAKER: Your Honor, if I might go back to this first motion. It got past us pretty fast. Mr. Walker rose and then started talking about the confession. There is a presumption with regard to the fact that the jury has been constituted according to our constitution, I believe, and I understand that there is no presumption that certain people were excluded by reason of them being non-believers, and there is no evidence of that.

[19] JUDGE CARTER: He is not basing his motion on exclusion of anybody or any religious sect, as we understand it. He is basing his motion on the assumption that in order to serve on this jury a member would have to believe in the existence of a God.

MR. BAKER: Yes.

JUDGE CARTER: Required by the Maryland constitution, and such a requirement is contrary to freedom of religion as guaranteed by the first amendment of the Federal constitution.

MR. BAKER: All right.

JUDGE CARTER: Am I correct in that?

MR. WALKER: Yes, your Honor.

* * *

[21] PETER C. KOSIROWSKY

called as a witness in behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOODRICK:

Q. Sergeant, would you state your name and occupation, please? A. First Sergeant Peter C. Kosirowsky,

Assistant Barrack Commander, Maryland State Police, Barrack F, North East, Maryland.

Q. How long have you been a member of the Maryland State Police, Sergeant? A. Approximately 18 years.

Q. In that 18 years have you had occasion to do any type of criminal investigation work? A. Yes, sir, general police work, approximately six years of it.

Q. Approximately six years of it? A. Six years general police work, and then specialization as a law instructor, State Police Academy later, approximately seven years.

Q. Sergeant, I would like to show you a statement which has been marked for identification as State's Exhibit No. 1, and ask you to identify this. [22] A. Yes, sir, this is the original of the statement taken the afternoon of January 6, 1964, at the North East Barrack.

Q. From whom did you take this statement? A. The defendant, Lidge Schowgurow.

Q. In taking this statement, where were you when it was taken? A. In the basement of the barrack, North East.

Q. Who was present at the time? A. A stenographer, we call her a barrack clerk, Mrs. Jean Ragan, and Trooper First Class Wiley E. Fields.

Q. What if anything did you say to the accused before you took the statement? A. May I have the original, please?

Q. Yes. A. I quoted the defendant -- may I read from the original notes -- "Lidge, you are now at Barrack F of the Maryland State Police located at North East, Cecil County, Maryland. The people present are Trooper First Class W. E. Fields and the clerk is Mrs. Ragan, civilian employee. I am First Sergeant Kosirowsky of the Maryland State Police. We would like to ask you some questions in connection with the shooting of your wife which happened on January 5, 1964, at approximately 12:45 P. M., at 253 Laffey Circle, Manor Heights, Port Deposit, Cecil County, [23] Maryland. It is my duty to inform you that you have a perfect right to answer any

and all questions asked you and you have a perfect right not to answer any and all questions asked you. Anything you say may be used against you in court. Now that you know these facts, do you wish to make a statement?" His answer was, "Yes".

Q. What if any threats were made or promises made in order to obtain this statement? A. There were no, to my knowledge, force, threats, promises or inducements made to the defendant. The defendant was given luncheon at the barrack, he was given hot coffee, cigarettes. The statement commenced at approximately 1 P. M. and finished approximately 3 P. M.

MR. GOODRICK: Witness with you.

CROSS-EXAMINATION

BY MR. WALKER:

Q. Sergeant, when did you first see the accused? A. Approximately a few minutes before taking the statement, sir.

Q. That was the first time you had seen him? A. Yes, sir.

Q. Where was he when you first saw him? A. In the basement of the barrack.

[24] Q. I believe you said he had been given lunch or something of the sort? A. Yes, sir.

Q. How do you know that? A. At my direction.

Q. You think he was? You directed he be given lunch, is that it? A. I directed Trooper First Class Fields to see that he had luncheon and that no one else would speak to the defendant or have any contact with him.

Q. Well, now, you are not testifying as to things that you don't know, are you? A. No, sir, I did not see him eat the luncheon. I did see him drink the coffee and have the cigarettes.

Q. All right. Now, where were you? In the station-house, you say? A. In the basement of the barrack, yes, sir.

Q. What did you have on? A. What did I have on?

Q. Yes. A. My uniform.

Q. What else? A. I had exactly what I have on now, with the deletion of [25] my holster, pistol, handcuffs. I had no weapon, no blackjack. I was merely in a uniform, with a badge.

Q. What time was it you first saw him? A. Just a little before 1 P. M.

Q. What did you say to him? A. I said exactly what I read to the Court here.

Q. Now, Sergeant, that is not all you said, is it? What did you say when you first saw him? A. I said exactly what is on here, sir. I had no prior contact with the defendant whatsoever. We sat down and I had the format in front of me, and I quoted to him as I quoted to the Court right now.

Q. What you have just read were your opening remarks and only remarks? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Did you greet him? A. I greeted him just as I have here, "Lidge, you are now at Barrack F."

Q. All right, then what occurred? A. Well, we began the questions and answers, and as we progressed down approximately a few minutes, the format here began in [26] a narrative form.

* * *

Q. Well, now. Sergeant, I am not going to ask you to read this, but was there anything said whatsoever other than what is in this? A. This is it, sir.

Q. What do you mean, it? I am asking you whether anything was said at the time that you are speaking of other than what is in here? A. This was taken down verbatim by the stenographer in shorthand, the exact utterances, the exact questions and the exact [27] answers.

Q. Now, you are telling me nothing further was said? A. Nothing further, sir.

Q. And you are telling me this includes all questions, all answers, is that correct? A. Yes, sir.

Q. When it was concluded what did you do? A. When the statement was concluded the stenographer transcribed it. We then had the defendant read the statement, the

five pages, word for word, and as we came up to any typographical errors, this was pointed out to him, I initialed the error, corrected it, and he initialed the error. And he was very precise in initialing it, scrutinizing the statement word for word.

Q. All right, now, what was said and done while this was being transcribed? A. While it was being transcribed? You mean by the stenographer?

Q. Yes. A. There was nothing being said. He was sitting, having coffee and cigarettes.

* * *

[28] Q. Well, now, you are stating under oath that you and the accused and Trooper Fields sat there for one half hour? A. No, sir.

Q. And no word was said? A. No, sir.

Q. Well, what are you saying? A. I am saying that when the clerk went out to type it up, Trooper Fields remained there. I may have walked in and out and continued other duties, and then came back, and read the thing back with the defendant.

Q. Trooper, I don't want to confuse you, but don't tell me what may have happened. What did happen? Do you have a recollection of what happened? A. Not precisely what I did during the time she was typing or transcribing the notes, no, sir.

[29] Q. Why did you say you all sat there and nothing was said? A. We sat there, watched him drinking coffee, and a couple cigarettes, and naturally there are other duties, people were calling me for different things. And as soon as she had --

Q. I assume you were busy, is that correct? A. Quite busy, yes, sir.

Q. But you didn't have occasion to speak to Trooper Fields at all? A. No, sir.

Q. Or the defendant? A. No, sir.

Q. Did he speak to you, the defendant? A. No, sir.

Q. Did Trooper Fields speak to you? A. No, sir.

Q. No one spoke? A. No, sir. As soon as it was finished the clerk took it up and began to transcribe it,

type it up. When she was finished, went down and read it verbatim, corrected the typographical errors with his initials and mine.

Q. After this half hour of meditation, what occurred? A. I don't know what occurred.

Q. Well, what did occur? What is the lady's name who [30] transcribed it? A. You mean after --

Q. After this half hour of meditation, when you and Trooper Fields and -- A. When he was thoroughly satisfied, he signed the statement and we witnessed the signature.

Q. Just tell me what happened. Did the lady bring it in? A. Yes, sir.

Q. And you were in there at the time she brought it in? A. Yes, sir.

Q. What happened? A. I began to read the statement with the defendant.

Q. Well, now -- A. And he read it.

Q. What do you mean, you began to read it with the defendant? Did you read it to him or what did you? A. Yes, sir, we read it.

Q. Just tell me in plain English what happened, please. A. We read the statement, he questioned a few things, we looked it over, and initialed it.

Q. What did he question? A. Well, for example, the first thing we corrected here, it said, "will be used in court," and I put down "may" and explained to him it is possible [31] it may or may not, so he initialed it and I read it.

Q. You had a conversation about that. What else was said at the time? A. Well, he corrected several things here. There was --

Q. I am asking you what was said. A. In the first person, "I," and he said, "Well, that wasn't I, it was my brother," so we put the words in ink there, "my brother," he initialed it and I initialed it.

Q. When he said, "that wasn't I, that was my brother," what did you say? What was said and done? A. When he said no, "that was not I, it was my brother," I just

put in the words "my brother," I initialed it ahd he initialed it. We went on to the next as we read it. I read it and he followed with his eyes, and we came up to the other typographical error. She had a little, which was misspelled. I initialed it, and he initialed it.

And the next discrepancy was, "my wife, she gave gun to niece." He said no, it was his nephew, so I put the word nephew there. And then "my niece" again. He said no, it was my nephew. Again we initialed, both of us, the discrepancies.

Q. All right. Now, he -- A. At the conclusion he signed it, we witnessed his [32] signature.

Q. And that is everything that was done, is that right? A. That is right.

Q. Everything? A. Yes, sir.

Q. All right. You are positive of that? A. Sir?

Q. You are positive of that, is that correct? A. Yes, sir, I am positive.

Q. How long had the accused been in the station before the statement was taken, if you know? A. I don't know the exact time, sir. I know it was approximately noon.

Q. At the time you took this statement you had had no previous conversation with him? A. Absolutely no previous conversation.

* * *

[33] Q. The questions just occurred to you and you asked him? A. As is stated, "We would like to ask you some questions in connection with the shooting of your wife which happened January 5th." And he began to answer these questions. He began for awhile in a narrative form, which began to go on, taken by the stenographer, and then we referred it back to a question and answer format.

Q. So there was a record taken by the stenographer prior to this, is that correct? A. No, as I say, we began here, "Would you tell us in your own words exactly what happened, why and where it happened, to the best of your knowledge," and he started from back in Phila-

delphia and worked on up towards the conclusion. And the format ended with another question and answer session.

* * *

[35] Q. You started off cold taking this statement, is that correct? A. Yes, sir, I started off cold, that is right.

Q. And did Trooper Fields help you, assist you in taking this statement? A. He asked a few questions in the statement.

Q. The questions in the statement that are indicated that he asked are the only ones he asked? A. Yes, sir.

Q. Did he coach you in any way? A. No, sir.

Q. You just did this cold? A. Yes, sir, I did this cold. The investigator, the civilian investigator, was off, and the barrack commander directed me to take the statement. I complied with his directions.

* * *

[36] Q. Have you told us everything that occurred -- A. Yes, sir, I have, to the best of my knowledge.

[37] Q. Just a minute until I complete the answer, please. From the time you first saw the accused until this statement was signed by him, as you said? A. Yes, sir. To paraphrase your own expression, I went into this cold. Just, "First Sergeant, take the statement," the Barrack Commander said, "First Sergeant, take the statement." "Yes, sir." I picked up the format, went down there and concluded.

* * *

[38] Q. As a matter of fact, Trooper, you had a conversation with the accused in Polish, didn't you? A. Yes, sir.

Q. You haven't told us about that. A. You haven't asked me, sir.

Q. I didn't ask what language you were speaking in. I asked what was said. A. It is merely -- as he reverted to Polish, we would transcribe it into English.

Q. Well, I really have been asking you everything that occurred. Didn't it occur to you -- had you forgot-

ten you spoke to him in Polish? A. No, sir, I haven't.

Q. You withheld that? [39] A. I can speak the language, but I cant write Polish, sir. This is the reason it is not documented.

* * *

BY JUDGE KEATING:

* * *

Q. What was your purpose in going to the basement room? A. My purpose was, sir, carrying out the order of my Barrack Commander. He had requested that I take the statement.

Q. Did you know whether the man was going to give a statement or not before you went down there?
A. No, sir, I did not know.

Q. You didn't know that he was going to give one?
A. No, sir.

Q. Well, when did you first learn he was going to give one? A. I did not learn, sir. I was directed by the Barrack [40] Commander to take the statement, and said, "Yes, sir."

Q. Was the stenographer present at this time or not?
A. Yes, sir, she was. She overheard from the Barrack Commander.

Q. Is that the usual place you take statements?
A. Generally, yes, sir. This is the interrogating room for the plain-clothes investigators. It is out of the way, and as I say, traffic is less in that area, and this is where generally people are --

Q. Is that where the stenographer stays? A. No, sir, she doesn't.

Q. How did she happen to come there? A. I requested her to accompany me to take the statement in shorthand.

Q. How did you know you were going to need her, if you hadn't had the accused interrogated as to whether he was going to give a statement? A. Well, it was entirely up to him. It was a voluntary statement. As I say, the format, we asked him if he was willing to answer questions, and he said yes. Do you wish to make a statement? He said yes. It was strictly voluntary. It was up to him.

Q. At what point did she begin to take down the notes? [41] A. She began to take the notes down as the first word here, "Lidge, you are now at Barrack F."

Q. And you mean to state that you and the stenographer and the accused and the other officer were all present before you asked any single question as to whether or not he was going to give a statement? A. That is right, sir. All I did, I came into this thing cold, picked up the format, and I began to read from it. I asked Trooper Fields his name, and he said, "Lidge," and I said, "Lidge, you are now at Barrack F." and we went right through the format, and then the preliminary questions, "What is your name?" "Where do you live?," and then the next question, "Would you tell us in your own words exactly what happened, why and where it happened to the best of your knowledge." And he began to relate in a narrative form the background of this as contained in the statement.

* * *

[42] You testified that you didn't see him until shortly before this statement which you took at 1 P.M. Were you aware of the fact that he was in the barracks, even though you hadn't seen him, earlier than that? A. Yes, sir, I was aware that he had been brought into the barracks.

Q. Where had he been brought into, if you know? A. He had been taken down in the basement of the barrack where we have a detention cell.

Q. Do you know what time he was brought in? A. No, sir, I do not. However, the logs would show what time he was brought in.

Q. The log would show? A. Yes, sir.

Q. Do you know what the log shows? Have you looked at the log? A. No, sir, I have no idea. I would have to produce the log.

Q. When did you first become aware of the fact that he was in the barrack? A. When the Lieutenant, "Would you take the statement?" that the man is in the basement.

Q. And that was just a short time before 1 P.M.?
[43] A. Just a few minutes before, and I just quickly said to Mrs. Ragan, "Jean, will you take your note pad and accompany me."

* * *

MR. WALKER: May I ask one or two more?
BY MR. WALKER:

Q. Isn't it a fact that the accused said to you, "Does everyone have to make a statement?" A. No, sir, I don't recall this.

Q. And isn't it a fact that in answer to that, you said, "Yes"? A. No, sir, I don't recall this.

Q. You have no recollection of it? A. No recollection.

Q. Do you deny it? A. Yes, sir, I deny it.

MR. WALKER: All right.
BY JUDGE CARTER:

* * *

[44] Q. Do you know whether he understood the questions that were propounded to him in English? A. Yes, sir, I do. The stoic calmness which he displayed, and the intense interest, to me. He looked like he was self-educated. I felt that he had.

Q. Did he comprehend or appear to comprehend the meaning of the questions? A. Yes, sir, he comprehended and scrutinized every single word on this statement. And he noted to me little typographical errors that would have inadvertantly been --

Q. Did he experience any difficulty in reading the statement? A. No, sir, none whatsoever. He was asked if he could read. He said yes. And --

Q. Did it appear that he understood the questions? A. Yes, sir.

Q. Did he converse freely and fluently in English? A. Yes, sir.

Q. Did he read the statement after the statement was taken down by the stenographer, you say verbatim, question and answer, [45] and then transcribed in written form, were copies of the original made? A. This state-

ment here is the statement that he read, scrutinized thoroughly, and he initialed any and all errors, and made all the corrections.

* * *

Q. When you referred the written statement to him, was there more than the original used at that time? A. No, sir. I dealt with the original.

Q. How did he examine it? A. We sat close together and as we read it he would read --

Q. Who read it? A. The defendant.

Q. Did you read it aloud? A. Yes, sir, I read it aloud verbatim.

Q. Did he follow the reading of it? A. He followed the reading. When we came to a discrepancy, I initialed the discrepancy and he initialed the discrepancy.

* * *

[47] Q. I note that there is nothing in your preliminary explanation concerning his right to counsel. I assume that because there is nothing in that that there was nothing said to him [48] in that form? A. No, sir.

* * *

[52] BY JUDGE CARTER:

Q. On this matter of his right to counsel, Judge Keating asked you whether he requested that he be allowed to see any member of his family or any one else. Did he make any request for the opportunity to consult with an attorney? A. No, sir.

Q. Or was anything of that nature mentioned in any way? A. No, sir.

* * *

[55] WILEY E. FIELDS

called as a witness in behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q. Trooper Fields, will you state your name and occupation, please? A. Trooper First Class Wiley E.

Fields. I am a Trooper for the Maryland State Police.

Q. How long have you been on the State Police force? A. Eleven and a half years.

Q. Trooper Fields, I show you State's Exhibit No. 1 which is marked for identification. It is a statement taken of Lidge Schowgurow, at Barrack F, North East, on January 6. Were you [56] present when this statement was taken? A. Yes, sir, I was.

Q. Where was the statement taken? A. Down in the basement, in the Criminal Investigator's office, at the barrack.

Q. Who was present when the statement was taken? A. Lidge Schowgurow, First Sergeant Kosirowsky, Clerk Jean Ragan, and myself.

Q. How were you dressed at that time? A. In uniform.

Q. Did you have a complete uniform on? A. Yes, sir, minus hat, of course.

Q. Minus your hat? A. Yes, sir, that is the one thing we take off when we go in the barrack.

Q. Would you describe what you mean by your complete uniform? A. We had the blouse, the brown blouse we have, it is a jacket, we call them a blouse, the Sam Brown equipment, the 38, black tie.

Q. You did have your weapon on? A. Yes, sir.

Q. All right. How did the defendant get to the [57] interrogation room? A. I took him in there in person, myself.

Q. Do you know the sequence, or who arrived at this interrogation room first, second, third, fourth? A. No, sir, I don't recall the sequence in which we entered. No, sir, I do not.

Q. Where did you get the accused from? A. From the detention cell in the barrack.

Q. Do you know what time he arrived at the barrack that day? A. I have to check my notes for the exact time of arrival. But it was approximately 11 A. M.

Q. Approximately 11, before noon? A. Yes, sir.

Q. Do you know whether or not he had anything to

eat that day? A. He had lunch, and he also had supper. I personally fed him both meals.

Q. You personally fed him lunch? A. Yes, sir.

Q. At what time? A. 12:10 P.M.

Q. Before he gave the statement? [58] A. Yes, sir.

Q. I see. Now, in order to get the statement, what if any promises or threats were made? A. None whatsoever.

MR. BAKER: Witness with you.

CROSS-EXAMINATION

BY MR. WALKER:

Q. Trooper Fields, you said you fed the accused. What do you mean by that? What did you actually do? A. I took the food to him.

Q. Took the food to him? A. From the dining room to the detention cell, sir.

Q. I see. Let's get back where you first saw him. Where was it you first saw him? A. Where did I first see the accused?

Q. Yes. A. On January 5th, in Helga Prokiter's apartment in Manor Heights.

Q. Then how long a period of time did you remain with him on that day? A. Until 3:15, sir.

Q. And that was from about when? A. From 1:17 till 3:15, sir.

[59] Q. And I take it you were in uniform with your side-arms on then? A. That is correct, sir.

Q. Where did you leave the accused on that day? A. In room 316 of the Harford Memorial Hospital in Havre de Grace.

* * *

[61] Q. All right, now, you left him at the hospital, that was the 5th of January. When did you next see him? A. At 10:45 on the 6th, sir, the following morning.

Q. Where was that? A. In room 316 of the Harford Memorial Hospital in Havre de Grace.

* * *

[62] Q. You told him he was being taken to the barrack, is that correct? A. Yes, sir.

Q. All right. Then following that you took him to the barrack, did you? A. Yes, sir.

Q. And who went? A. Trooper Nagingast, Mr. Schowgurow, and myself, went in my car, in the police car, from the hospital directly to the barrack.

Q. When you say police car, you mean a State Police car, that type of car? A. No, sir, it was not. It was not a marked car, it was a plain car, which I am assigned, sir.

Q. I see. When you got to the barrack, what occurred? A. I took him in, we signed in on the in and out log, he was then taken downstairs to the detention cell. He was placed inside the detention cell. It was approximately lunch time. I had lunch. I fed Mr. Schowgurow lunch. After we finished, then the statement was taken.

* * *

[63] Q. What is the procedure of signing? What went on? A. Merely walking up to a table, there is a clock above it, and a light, you put the time that you have come into the barrack, you put who came into the barrack, and if it is an accused, what he is being charged with. That is merely signing in, sir.

Q. What did you put down he was being charged with? A. Murder, sir.

* * *

[71] Q. All right, now, what else if anything was said or done, said, rather, between the time that you went in the room and this statement was signed? A. I don't recall anything, sir.

Q. You examined the statement, did you not? A. Yes, sir.

Q. Is this a true and complete and accurate transcription of everything that was said and done other than the request for coffee? A. Yes, sir.

Q. Word by word? A. Yes, sir. We took it from Mr. Schowgurow and we read it over after it was typed up and what have you, and Mr. Schowgurow and all of us

agreed this was exactly what had been taken, and said, and this is the way we all signed.

[72] Q. Nothing whatsoever further was said other than this? A. Not to my knowledge, sir.

Q. Except for the time you went out for coffee, you were there the entire time, were you not? A. That is correct, sir.

* * *

BY MR. WALKER:

Q. Trooper, I don't want there to be any misunderstanding between you and me. I have asked you on more than one occasion whether everything that was said appears on this word for word? A. And I have answered you, sir, to the best of my knowledge [73] there is, sir.

Q. All right. As a matter of fact, wasn't there a conversation in Polish that took place? A. As I said, sir, to my knowledge it was all there. I do not know what was said in Polish, sir. I do not speak or understand it, sir.

Q. But you heard some language being used which you might well have guessed was Polish, because of Trooper Kosirowsky, isn't that correct? A. This occurred between First Sergeant Kosirowsky and Mr. Schowgurow. I do not know what was said, sir.

Q. I know, but you heard it said? A. I heard some foreign language, sir. I don't know what it was.

Q. So that when you tell me that everything that was said appears word for word on this, you are wrong, aren't you? A. No, sir. To the best of my knowledge everything that was taken in this statement is here, sir. What was said in Polish, or this language, I do not know what it is, sir.

Q. You don't know whether everything that was said appears on this or not, do you? You know very well, though, there is no Polish in there, is there? A. No, sir, there is no Polish in this.

[74] Q. All right. You don't know what was said in Polish, do you? A. No, sir, I do not speak or understand Polish.

Q. Now, isn't it a fact that the time or just prior to

the time this statement was taken, that either you or Trooper Kosirowsky said to the accused, "Everyone must give a statement," or words to that effect? A. No, sir. Definitely not.

* * *

[75] Q. Isn't it true, Trooper Fields, that the accused did state that his family would get an attorney, and asked if he could talk to an attorney? A. He stated that his family was getting an attorney, yes, sir. I don't recall exactly when he stated this, but I do know that he said that an attorney was being obtained, yes, sir.

Q. And he said it before the statement was taken, didn't he? A. I don't recall the exact time, sir.

Q. You don't recall? A. But I do know that Mr. Schowgurow told me that his family was obtaining an attorney.

Q. And didn't you tell him at that time that at the preliminary hearing an attorney would be provided for him if there wasn't one? A. Yes, sir.

Q. Did he ask to telephone anyone? A. No, sir.

Q. Are you positive of that? A. I recall him asking for no telephone call.

Q. Now, isn't it a fact that while he was in the cell he asked on more than one occasion to make a telephone call and there [76] was no response to that request from you? And you were seated right outside the cell. Isn't that a fact? A. No, sir, I don't recall him ever asking for any 'phone call, sir.

Q. Are you positive that he did not? A. I do not recall him asking to make a 'phone call, sir.

Q. You wouldn't swear he didn't, though, would you? A. I said I do not recall any, sir.

* * *

[77] Q. As I remember the sequence of events, when you arrived at the stationhouse you first put down the charge, murder, and the time, and the necessary record, then you took him immediately down to the cell, is that correct, put him in a cell? A. The detention cell, yes, sir.

Q. Then you got your lunch? [78] A. Yes.

Q. Then having finished your lunch you brought lunch to him, correct? A. Yes.

Q. Then you sat there while he ate his lunch?
A. Right, sir.

Q. Then you immediately went down to the interrogation room? A. Which is next door, yes, sir.

Q. And immediately the interrogation started, within about three minutes? A. Within a short time.

Q. Isn't it a fact that you took his fingerprints during this period of time? A. This was before lunch.

Q. You haven't told me about that. A. You didn't ask me.

* * *

[81] Q. During that time, didn't the accused ask about getting a lawyer? Don't you recollect that? A. I don't recall him asking for an attorney, no, sir. He stated that his family was getting him an attorney.

BY JUDGE CARTER:

Q. Where was he when he made that statement?
A. At the barrack, sir, but the exact time I do not know.

Q. You say the exact location you do not know?
A. No, the time. I don't know, sir. It was at the barrack, but when he was eating lunch or in the criminal investigating room or where I don't know, sir.

BY MR. WALKER:

Q. Well, now, Trooper, you said he said his family was getting a lawyer. Had he received any message from his family insofar as you know? A. I do not know of any message that he did or did not receive from his family.

Q. Had he had an opportunity to talk on the telephone, so far as you know? [82] A. Not while he had been with me, no, sir.

Q. Isn't it a fact that while the fingerprinting was being done that you did tell the accused, "Everybody must make a statement"? A. No, sir, I have never made that statement to Mr. Schowgurow, sir.

Q. You now have a clear recollection of the finger-

printing and the picture taking, and so on, which had escaped you before, is that correct? A. You didn't ask me anything about the fingerprinting and photograph, sir.

MR. WALKER: I have nothing further.

JUDGE CARTER: Any redirect?

MR. BAKER: No redirect.

BY JUDGE KEATING:

Q. At what point, Trooper Fields, if at all, did you, or anybody in your presence, inform the accused of what he is being charged with, or would be charged with, or being held for? A. He was informed of that when he was put into room 316 in the hospital on the 5th. When Trooper Kennedy came from the scene and the hospital at Bainbridge to the hospital at Havre de Grace. At that time we found out, we were sure that his wife was dead. At that time he was informed that he would be charged with [83] murder.

Q. That he what? A. That he would be charged with murder at the time.

Q. Well, now, what was his actual condition? What necessitated him to be taken to the Havre de Grace Hospital? A. He had a wound on his chest and he had been examined by the doctors at the hospital for this wound that he had on his chest, sir.

* * *

BY JUDGE KEATING:

[84] Q. You have indicated that you don't recall precisely where this statement of the accused to the effect that his family was getting him a lawyer was made. Are you able to tell us whether [85] it was at the barracks? A. It was at the barracks, sir, but I don't recall in what sequence or the exact --

Q. Are you able to tell us whether or not it was made in the course of the questioning which was taken down and reduced to the written statement; in other words, in the interrogation room, was it made there? A. Your Honor, I don't recall exactly where it was stated. I know that Mr. Schowgurow did state to me at the barracks in some of the sequence there that his family was obtaining an attorney, but its location I don't recall, sir.

Q. Well, did he say that they were obtaining one, or had obtained one? A. The best I recall, sir, he stated that they were obtaining an attorney. He stated from Maryland. From Maryland.

Q. And that statement was made to you? A. Yes, sir.

Q. And was anyone else present when it was made? A. I don't know, sir.

Q. You don't recall? A. I do not recall.

Q. Do you recall what prompted him to make that statement? A. No, sir. As I stated, Mr. Schowgurow was a quiet type [86] fellow, and during talking to him he would just up and say something, and this might have been just one of those times. I don't recall, sir. I don't recall what prompted him to say it.

* * *

[88] AFTERNOON SESSION

LIDGE SCHOWGUROW

the defendant, called as a witness in his own behalf, having been duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

Q. You are Lidge Schowgurow, the defendant in this case? A. Yes.

[89] Q. How old are you, Lidge? A. Thirty-five.

Q. Where were you born? A. Belgrade, Yugoslavia.

Q. Could you speak up a little bit so that all of us can hear, and try to speak fairly slowly so that we can understand. You were born where? A. Belgrade, Yugoslavia.

Q. How long did you live in Belgrade? A. I lived 13 years.

Q. Now, Lidge, I want you to tell me what is your earliest boyhood recollection? Where were you and what do you recollect? Do you understand me? A. No.

Q. What part of your boyhood do you first remember? A. Well, I remember that time when I was outside Bel-

grade. There was a town there, Debelacha. That is outside of Belgrade.

Q. Did you live on a farm or in the town? A. In the town.

Q. Who lived there? A. My family. My mother and my father, my brothers, sisters.

Q. Did there come a time when you left that town? A. Yes.

[90] Q. How old were you at that time? A. Thirteen.

Q. Was that the end of your schooling? A. Yes.

Q. You didn't have any more schooling? A. No.

Q. How did you come to leave the town? What happened? A. German soliders took me.

Q. The German soliders took you? A. Yes.

Q. And who else did they take? A. My brother.

Q. You and your brother? A. Yes.

Q. Was your brother older or younger? A. Younger.

Q. What did the German soldiers --how were they dressed? A. Uniform.

Q. And did they carry rifles or revolvers? A. Yes.

Q. How did it come about they took you? A. I do not understand you.

Q. Do you know why they took you? A. Yes. Well, there were children they was putting there, advertising in the papers for partisans.

[91] Q. For partisans? A. Yes.

Q. Were you a partisan? A. Well, in a way, yes.

Q. Did they say anything to you when they took you? A. Oh, yes, they was trying to question us, what was the headquarters, and who keeps the papers, what person was it? At that time I didn't know what was it. I know with the boys we had a bunch of papers, was going around and putting on them houses.

Q. How many Germans came and took you? A. Oh, there was a truck load. I don't know how many. Must be more than 10, 15.

Q. Were you afraid of them? A. Yes.

Q. Did you own a dog at that time? A. Yes.

Q. What happened to the dog? A. My dog, I had a

big dog, and the German soldiers shot and killed it.

Q. What kind of a dog was it? A. Big white and black. It was a big dog. [92]

Q. Were you present when the dog was killed? A. Yes.

* * *

BY MR. WALKER:

Q. Now, Lidge, when you were taken by these soldiers where were you taken? A. They took us to Belgrade. From Belgrade they took us to Germany. [93] Q. Where did they take you in Germany? A. Agar, Deutschland, that is the name.

Q. I am not speaking now of the town. I am speaking of in what sort of place did they put you? A. In camp.

Q. What sort of a camp? A. Labor camp.

Q. Who was in authority at that camp? A. German soldiers.

Q. What was their attitude toward you, you boys? A. I can't --

Q. Well, let me ask you this: What did they require you to do, if anything? A. What?

Q. What if anything did they make you do? A. Oh, work. Digging foxholes, bunkers, holes for the city people. You know, when the bombing come, hiding shelters. All things like that. Camp cleaning, potato cleaning, all sorts of work.

Q. How did the soldiers treat you? A. They treated us bad.

Q. How did they treat you bad? A. Well, they would say something, and you refuse it, or [94] you don't do it the way he wants, he beats you; he used to beat us, he used to kick us. If we walked slow he used to kick us to walk fast, and give the end of the shotgun, or rifle end.

Q. Rifle? A. Yes.

Q. They would hit you with the rifle? A. Yes. I had this several times.

Q. How old were you at the time? A. I was going on 14 at that time.

Q. How long were you in this camp? A. Close to two years.

JUDGE ROLLINS: How old did you say he was?

MR. WALKER: He was about 13 when he was taken.

JUDGE ROLLINS: No, I meant now.

MR. WALKER: He is about 35.

Q. Now, if you don't understand this question tell me so. What effect did this treatment have on you with respect to people in uniform? A. I got a fear of a person in uniform, from my back childhood.

Q. And there came a time when you were released from the camp, is that correct? A. Yes.

[95] Q. Have you continued to have that fear of people in uniform? A. Yes, sir.

Q. What did the German soldiers in the work camp wear? A. Uniforms.

Q. Did they carry rifles? A. Rifles, uniforms, belts.

Q. Coming up to date, getting back to the 6th of January, this is when you were in the hospital in Havre de Grace. Was anyone there with you in the hospital? A. Yes.

Q. Who were they? A. Policemen.

Q. And was he with you constantly, that is, all the time? A. Yes.

Q. And did he talk to you? A. Yes.

Q. What was the conversation? A. Well, I don't quite remember everything what he was talking about. He was talking --

JUDGE CARTER: I couldn't hear it.

Q. Speak up. A. I was talking with the doctor. He was a Yugoslavian [96] doctor, and I was talking with him. I was asking him, that he was Yugoslavian, and I also tell him that I was born in Yugoslavia, and I was a Yugoslavian. And then the Trooper asked me, said, how come I was speaking them languages, and I was explaining them how I was born there, and how I had been raised there, and that is the reason I speak the Yugoslavish languages.

Q. All right, now getting back to when you were first taken in the hospital, who took you there? A. Navy

people. In ambulance, Navy men.

Q. What was done, what did they do to you, or what was done by you when you first went to the hospital? A. Well, as far as I remember, I know I was on the table, and they rolled me down, and they brought me in a room, I don't know on the same floor or upstairs, and I remember they was giving me on both arms, one side, either was taking blood, or both sides nurses was working on my hands. I guess needles in one and the other blood, I don't know. And they was making x-ray. And after that they brought me in the room, and put me in bed, and the Trooper was all the time with me. And I don't know what time it was that they gave me some pill, and I had that pill, and I think I fell asleep after that.

Q. If I understand you correctly, the first thing they did was prick your arms and either take something out or put something [97] in, is that correct? A. Yes.

Q. Is that what you told me? A. Yes.

Q. And did that have any effect on you, the effect of making you sleep or otherwise? A. I don't know.

Q. You don't know? A. Might, I don't know.

Q. All right. And you said they gave you some pills later? A. Yes.

Q. All right. Then you stayed in the hospital that night? A. Yes.

Q. Where were you injured? A. Injured?

Q. Yes, why did they take you to the hospital? A. Oh. On the left shoulder, bullet wound.

Q. The next morning the Troopers took you to the stationhouse? A. Yes.

Q. Tell us what happened at the stationhouse that day. A. Well --

Q. Start at the beginning if you can, and tell us as [98] accurately as you can right through. A. The doctor come and told me, said they are going to take me to police barracks, and I asked him when they were going to take me. He said, "I don't know, whenever they come." And when they come, I get dressed, help get dressed, and they took me to police barracks. First took me to

police barracks they brought me in one room. And I was there, and I asked Trooper Fields what I had with me, and I had change, and I asked him to get me a pack of cigarettes. He bought me cigarettes, and I smoked cigarettes, and after awhile they brought me downstairs and locked me in the cell. After that they brought me coffee, and after the coffee he took me in the side room and they make the picture, fingerprints, and while I was doing that, at that time I was asking Trooper Fields if I can make a telephone call, but he told me I couldn't, he never told me I can. And I also asked him --

BY JUDGE CARTER:

Q. You said what there? A. If I can make a telephone call.

Q. He told you what? A. He didn't refuse, he didn't tell me I can't, he didn't tell me I could make a telephone call.

BY MR. WALKER:

Q. Did he show you where a telephone was? [99] A. No.

Q. Did you know where a telephone was? A. No.

Q. In the barracks? A. No.

Q. What was the reason you wanted to make a telephone call? A. Well, I was trying to contact my people, my sister or brother.

Q. Why did you want to contact them? A. I was trying to contact them to tell them to try -- what happened with me, and probably they come to see me, or get a lawyer or something.

BY JUDGE CARTER:

Q. What was that? A. I tried to contact to my people, brother and sister, to explain them what tragedy happened to me, and also probably they would give me, try to have a lawyer or not to have a lawyer.

BY MR. WALKER:

Q. All right, sir, now, was anything further said at that time? A. I can't understand.

Q. Well, at the time you were having the picture taken, and the fingerprints taken, that was the conversa-

tion between you and [100] Trooper Fields, is that correct? A. Yes. And I also was talking about my children. I was telling how many children I had, how long I was married to her.

Q. All right. After the fingerprinting and the picture taking, what was done then? A. Then he brought me coffee, I drink the coffee, and they locked me back in cell. After the cell, they brought me out, and he told me, said they are going take statement, and brought Mister, Trooper, Sergeant.

Q. Could you speak up, please? A. He come up with, he was with me with Sergeant Kosirowsky, he come and introduced to me, and as soon as he told the name, I knew he must be Polish, and I started talking Polish with him. And Trooper Fields went out at the time, and when he comes back, he brought the coffee, I was talking with him in Polish, that he was born here, how we still understand the Polish language, and said a lot of people here that are born here in the United States, they usually don't speak the modern languages, and how nice of him and his family to learn him their own national language to him. And after that I asked him, said, if I have to take the statement, to give them. He told me, said that everybody gives statements. And after, the time was taking statements.

JUDGE CARTER: I can't understand him.

[101] JUDGE ROLLINS: I can't understand him.

Q. Try to speak a little more slowly, please. A. At the time they was talking on statements, he told me, said I had the right to refuse not to give or to give the statement, I wouldn't just go along with him, I just couldn't refuse, I had no idea to --

Q. Keep your voice up, please. A. I just had to, I just, I guess my fears, I couldn't refuse to them, I just went along with them, and I give the statement. When I give the statement, I tried to come out with how it happened a couple times, but they refused, he refused, he stopped, he refused.

JUDGE CARTER: Tried to come out what?

Q. Tried to come out what? A. With the story how it happened, how I come to see my wife, and how the tragedy started. And he refused me, he says, "No," he said, "we know you are lying. So you better come out with another story." Two or three times he interrupted my story. And then I told the story which is in the statement.

* * *

[103] Q. Did you read the statement just before you signed it? A. No, I didn't.

Q. Did you have it read to you? Did anyone read it to you just before you signed it? A. No.

Q. Were you afraid of the police at that time? A. Yes.

Q. What made you sign the statement? A. I just got that information of policeman. Just everything they said I went along with them. At that time I didn't feel --

BY JUDGE CARTER:

Q. What? A. I didn't feel nothing, to continue to go on with them. I just wanted to be to myself. And I went along with anything they would ask me.

[104] BY MR. WALKER:

Q. Did I understand you to say that you said several things that were not taken down and included in the statement? A. Yes.

Q. You are positive of that? A. Yes. That is the reason a couple times they stopped and he said, "No, you are lying." He said, "We know those stories, you are lying, that is not your story."

Q. I couldn't hear. A. He told me, he stopped me and told me, said, "You are lying, we know you are lying, and that is not a true story."

Q. Who told you that? A. The Sergeant.

Q. The Polish Sergeant? A. Yes.

Q. Were you afraid of him? A. Yes, in a way, yes. I didn't go against him at all. I just tried to be friendly.

Q. Now, Lidge, do you remember that while you were at the State Police Barracks, that you did get a telephone call at one time? A. No, I didn't get a telephone call.

Q. As a matter of fact -- [105] A. I got telephone

call once after statement. Trooper Fields answered. I was having coffee with him, and you was on telephone.

Q. That is right. A. And he handed me telephone and you told me, said that, "I am your lawyer, I am hired by your family." And you told me to give it back to the Trooper, and I gave back to the Trooper.

Q. I told you not to say anything, didn't I? A. You told me not to say anything.

BY JUDGE ROLLINS:

Q. Was this the same day? A. Same day, that is right after statement I signed, they brought me in the kitchen and gave me coffee. I didn't even finish the coffee yet when the telephone ring, and Trooper Kennedy answered on telephone, and then he gave me telephone and I answered it. Then Mr. Walker told me, said, "I am your lawyer, hired by your people, and now you give back to the Trooper, I want to talk to them," and told me, "don't say anything to them." And I didn't have no chance to say yes or not, and I give to Trooper Fields the telephone.

BY JUDGE CARTER:

Q. How long was that after you had signed the statement? A. In between five and 10 minutes. Not even, not quite 10 minutes.

[106] BY MR. WALKER:

Q. Now, before that time, had you been able to get to the telephone? A. No.

CROSS-EXAMINATION

BY MR. BAKER:

Q. Mr. Schowgurow, you asked Trooper Fields to use the phone? A. I asked Trooper Fields could I make a telephone call, yes.

Q. How many times did you ask him this? A. Three times, I think.

Q. Three times? A. Yes.

Q. When was this you asked him? One time was while they were taking fingerprints? A. Once when I was taking fingerprints, twice when I was upstairs, when

they first brought me in. No, once upstairs, once in kitchen. And first when I asked him, when they brought me from the hospital, I asked him to get me a pack of cigarettes.

Q. Yes. A. He bought me a pack of cigarettes, and I asked him if [107] I make change, I would like to make a telephone call. He didn't take no money to make change, didn't tell me I can make a telephone call, and they didn't told me I couldn't make a telephone call.

Q. He didn't answer you? A. He didn't answer nothing.

Q. Do you know whether he heard you or not? A. Oh, yes. Yes, we was right beside each other.

Q. The next time you were in the kitchen? A. Yes.

Q. Was anyone else present? A. Yes, a couple prisoners, the trustees that was there.

Q. I see. And did he answer you that time? A. No.

Q. Did he hear you? A. Yes, he was right beside me with a cup of coffee in the hand.

Q. And then the third time -- oh, yes, just a minute, please. A. At that time he answered me, he told me, said, do I have money? I said, "I don't have much money, but I would like to contact with my people." And he told me, said, "If you don't have money, can't get a lawyer, the Court is going to appoint [103] you a lawyer." And I asked him when is going to be court, when they going to appoint me a lawyer? He said he don't know, he can't give me the answer on that.

Q. Did you ask anybody to make a 'phone call while you were at the hospital? A. No.

Q. Did you have an 'phone in your room? A. No -- I don't know. I don't know if I have or not.

Q. Did any of the Troopers that were either in uniform or out, State Troopers, ever make any threats to you? A. No.

Q. They did nothing to intimidate you, did they? A. No.

Q. In fact, Sergeant Kosirowsky you said was very kind to you? A. Yes.

Q. Did you ever read this statement? A. No, I didn't.

Q. You did not? A. No. First, when they brought the statement, the girl brought the statement, I asked Mr. Kosirowsky what I am signing. He opened the pages and said, "Here you will sign." Then I signed.

[109] Q. Is this your initial here? A. Yes.

Q. Did you put your initial there? A. He told me, said, put the first letter initials on each place where he put it. He said the girl --

JUDGE CARTER: Louder, please. A. He told me, said, any place when he put the initials I am to follow him and put the initials, the girl made mistakes, he is correcting it.

Q. Well, I show you this correction here. That is not a mistake there, is it? A. What is that?

Q. Right here. You have your initials here, do you not? Are those your initials? A. Yes.

Q. Who told him to change that from what it was to what it is now? A. Oh, I don't know.

Q. What does it say now? A. Here?

Q. Yes, up here in pencil. A. (Unintelligible)

Q. You say you don't know what that is? A. No. [110]

* * *

[111] JUDGE CARTER: Louder, please.

A. My lawyer, he read me, and he asked me if that is all true, and I correct him, I told him I said part of this is true and part of this is not true. And he asked me what I did that for, and I told him I tried to tell them, but they didn't take my word, they told me, said I am lying, and it is a different story. So I just lied to them.

Q. Did your attorney read that statement to you? A. Yes.

Q. Did he explain it to you? A. Well, he -- he read me the first time when he come to jail.

Q. Did you understand it when he read it to you? A. Yes. I understand, he read me slowly and --

* * *

[112] BY MR. BAKER:

Q. How many languages do you speak, sir? A. I

speak Yugoslavian, Russian, and Polish. A little bit German I can understand.

MR. WALKER: A little bit of what?

THE WITNESS: A little bit German, I can understand.

Q. Yugoslavian, Polish, Russian, and a little bit of German. Do you speak them and read them fluently? A. I speak and read Yugoslavian.

Q. Very well? A. Yes, pretty good.

Q. You are an electrician by trade, is that right? A. Yes.

Q. Don't you have to read diagrams and such things as that [113] in your trade? A. Well, yes, but I am just house wiring.

Q. House wiring? A. Yes.

Q. But you have to read diagrams in your trade, do you not? A. Yes.

Q. As to how to do things? A. Yes.

Q. And you understand how to read that, don't you? A. Yes, but I learn this in Yugoslavian language, and German.

Q. Well, when you get diagrams -- you work as an electrician in Philadelphia? A. Yes, but I don't have to use the diagram. Always a copy of the sample house. I wire projects. Copy of sample houses. How many outlets, and how many -- what do you call that -- lighting receptacles in the house. I never use a diagram. I don't know diagram.

Q. Did Sergeant Kosirowsky read the statement to you? A. No.

Q. He did not read it out loud to you? A. No. First the girl brought it in, and I looked at it, [114] and I said, "What I got to sign?" He flipped a couple pages, said, "Here you are going to sign." I signed it. After I signed it, he read them, and then he started putting name, and then he told me, he said, "Every place I put my initial you put yours, L. S., and you are going on like that." I asked him why. He said the girl had a misprint in words.

* * *

BY JUDGE CARTER:

[119] Q. Where did you acquire any knowledge of the English language sufficient to enable you to speak it, broken English; have you just been able to do that since you have been in the United States, or were you exposed to the English language before [120] that? A. I learned it, my wife; the majority I pick up with my wife and working.

Q. What nationality was your wife? A. American.

Q. American? A. Yes.

Q. How long were you married to her? A. Ten years, going on 10 years.

* * *

[121] Q. Who did you intend to call on the telephone if you had been able to get to a telephone after you were taken to the police barracks? Who were you going to call? A. I was going to contact with my brother.

Q. Which brother? A. Thomas. Thomas or Bos.

[122] Q. Thomas or who? A. Bos.

Q. Do they have a telephone? A. Yes.

Q. Did you know the number? A. No.

Q. How were you going to call it? A. I was going to get it from the telephone company, and the address.

Q. Are you sure they have a telephone? A. Yes.

Q. But you don't know the number? A. No. I had telephone and they had telephone.

Q. Where do they live? A. Philadelphia, 4718 North Fourth Street.

Q. Well, did you expect them to be home at that time? Were they working people? A. Yes, they are working.

Q. How were you expecting to contact them at their home between noon and three o'clock in the afternoon? A. I was going to leave a message. My mother, she stays with the children.

Q. To have them call you back when they came home from work, [123] was that your intention? A. Yes, at the police station.

Q. Well, your attorney actually called you before that time arrived, didn't he? He called you around three o'clock. A. I don't know what time it was that he called me.

Q. It was before five o'clock, wasn't it? A. I don't know.

Q. The evidence indicated the statement was signed around 3:15. You say he called you within 10 minutes after that? A. Yes.

Q. Well, that was an earlier time than you would have been able to talk to your brother, wasn't it, if you had gotten to the telephone? A. Yes, but my lawyer told me, said that he was hired by my people, and he going to come to see me tomorrow, and said, "Don't say nothing to nobody, nothing."

Q. You followed his advice, apparently, after that? A. Yes.

Q. You weren't going to take the matter up then with your mother, but you were going to take it up with one or the other of these two brothers? A. Yes.

Q. As to the correct advice in regard to an attorney? [124] A. Yes.

Q. Both brothers work? A. Yes, same place.

Q. What day of the week was this? A. Monday.

* * *

[126] BY JUDGE CARTER:

[127] Q. During the 12 years that you have been in the United States, the 10 years that you have been married to an American wife, you have become fairly familiar with the English language, haven't you? A. Yes.

Q. And you understand, do you, or do you understand all that is transpiring here now in the courtroom? Is there anything about this proceeding that you don't understand? A. Well --

Q. I mean the language, the words that are used. A. I don't understand everything, no.

Q. What is there that you don't understand? A. Well, I don't know, a lot like just common talk like that I understand. The words I didn't use in my living --

Q. Some words that are unusual words you don't understand? A. No.

Q. But the ordinary -- A. Ordinary ones.

Q. -- speech you do understand? A. Correct.

* * *

[129] BY JUDGE CARTER:

Q. Did you realize at that time you were being charged with the unlawful killing of your wife? A. No.

Q. You knew she was dead, didn't you? A. At the time I don't know. It was like dreams.

Q. Now, you say it was like a dream. The Court wants to ask you whether or not at the time you were in this interrogation room, in the police barracks, you knew that your wife was dead? A. Yes. Some moments I knew and some moments I didn't.

Q. You mean you don't remember what went on in there?

JUDGE KEATING: Just a minute.

BY JUDGE CARTER:

Q. I guess the correct question to you is whether or not you had been informed by the police or somebody that your wife had died at the time you were being questioned in the police [130] barracks. Had you been informed of that fact? A. Yes, in the hospital when I was there they told me.

Q. That was before you were taken to the barracks? A. Yes.

Q. Well, now, do you recall everything that went on in that interrogation room accurately? Do you recall everything that occurred in the barracks, in the police barracks, or were you so upset that there is part of it you don't recall? A. No, partly I don't recall.

* * *

AFTER RECESS

[131] WILEY E. FIELDS

recalled as a witness on behalf of the State, having been previously sworn, testified further as follows:

[132] BY MR. BAKER:

Q. Trooper Fields, you were present during the taking of the statement, is that correct? A. Yes.

Q. I refer to State's Exhibit No. 1 for identification. Were you present when the accused signed the statement? A. Yes, sir.

Q. Did the accused have the statement in his hand at any time? A. He had the original.

Who was there at the time besides you? A. Sergeant Kosirowsky and Mrs. Ragan.

Q. Did you read the statement to the accused? A. No, sir. The First Sergeant did.

Q. The First Sergeant read it to him? A. Yes.

Q. Did he read the whole statement to him, do you know? A. Yes, we each had a copy and we each followed.

Q. And you say that Schowgurow had the original? A. Yes, sir.

MR. BAKER: I have no further questions.

BY MR. WALKER:

Q. Trooper, you didn't testify to that fact on your first [133] examination, did you? A. No, sir.

Q. You were asked more than once what was done and what was said in the entire time, were you not? A. Yes, sir.

Q. But you omitted that part? A. I wasn't asked it, sir, about the signing of it or the reading of it.

* * *

[135] BY JUDGE KEATING:

Q. You say, Trooper, that the third question on page 4 of State's Exhibit 1 for identification is inaccurately transcribed as not what your language was in the question? A. I don't recall if this was exactly, but this is not what I meant. As far as I know, this is not the question I asked, as far as Perryville being the location.

Q. When you were listening to it being read back to the accused, did you then call attention to the fact that there was an inaccuracy in it, when you were listening to it? A. I don't recall, Judge. I don't believe I did, but I don't recall.

Q. You mean you don't think you heard it or you don't think you had it corrected if you did hear it? [136] A. I am saying that I do not recall saying whether it was incorrect or correct at the time, sir.

Q. Don't you think it was important to have it correct? A. Yes, sir, I do. Very important.

* * *

BY JUDGE CARTER:

[137] Q. In regard to the mechanics surrounding the reading of this statement to the accused by the Polish Sergeant, do I understand you correctly to say that the accused had the original and you had one copy and the Sergeant had another copy? A. That is correct, sir.

* * *

[138] BY JUDGE CARTER:

Q. How are you able to state that the accused followed along in the statement by reading it as the Sergeant was speaking? A. He was asked to follow the reading of it, and any part that he did not understand, to stop and ask, if there were any corrections to let us know.

Q. Did he stop you? Did he stop the Sergeant at any time, or were the corrections all initialed by the Sergeant? A. No, sir, he stopped us I know of once. I don't recall now the exact wording that he stopped us on, but I do know that he stopped us at least once.

Q. Now, then, he was not looking on the same piece of paper that the Sergeant was reading, he had a separate copy? A. He had this one, sir, the original.

Q. Was the Sergeant reading from the original or reading from a copy? A. No, sir, he was reading from a copy of the original, sir. Mr. Schowgurow had the original in his possession.

* * *

[143] JUDGE CARTER: Let's see if we are in agreement here as to what is the test before the Court at this time. As we understand the law the question which the Court has to determine on this preliminary inquiry in regard to the voluntary character is as to whether or not, considering the evidence of the State, and the evidence in opposition, a prima facie case as to the voluntary character of the confession is made out, and if so, then we let it go to the jury with the instruction that its admission into evidence is prima facie evidence of its voluntary character. But the State still has the burden of going forward and proving that fact beyond a reasonable doubt in order for the jury to consider it, and unless

they do prove it beyond a reasonable doubt, the jury would be instructed to disregard it. Is that the State's understanding of the law?

* * *

[144] JUDGE CARTER: Do you understand that to mean that the Court should consider the evidence of the State, should also consider the evidence of the accused, and after considering the evidence offered by both sides, determine whether or not there is legally sufficient evidence to support a finding of the voluntary nature of the statement?

MR. BAKER: Yes, I think I will accept that.

* * *

[145] JUDGE CARTER: Before you take your seat, Mr. Baker, there is some discrepancy in the testimony of the two State witnesses, the two officers. The Sergeant said there was only one statement in the room when it was read by him to the accused, and that was the original, he read from it and he looked over his shoulder.

The other officer said that was entirely inaccurate, there were three statements, the accused had the original, the Sergeant had the copy he read from, and he had the other copy.

The second point on which there is a discrepancy is that the Sergeant said that the two signatures, the two places on the statement which were signed by the accused, one at the end of the statement and the second one at the end of a concluding paragraph that says, "I have read it and it is correct," words to that effect -- that the first one was signed at one time, the second was signed at a subsequent time. The officer last on the stand said that is inaccurate, [146] they were both signed at the same time. And as Judge Keating points out, there was a discrepancy of rather a material nature in the transcription in certain places about the distance from one point to another. True, they are not controlling facts in the matter, but they are discrepancies as to what transpired in the room.

* * *

[167] JUDGE CARTER: We have considered this matter, gentlemen, of the admissibility of the alleged confession of the accused. The Court understands the rule in these matters to be that the Court rules as a preliminary matter on the admissibility of the confession, making our determination after considering the evidence presented on the point of the voluntary nature by the State and by the accused. And after considering the evidence presented by both sides on that issue, we then determine whether or not the State has made out a prima facie case of the voluntary nature of the confession.

By that method and that criteria, the Court has considered the evidence offered by the State and the evidence offered by the accused, and we have unanimously concluded that the State has made out a prima facie case of the voluntary nature of the alleged confession. For that reason we will admit the confession when it is offered in evidence by the State.

However, we point out to both sides that by its admission, that is prima facie proof of its voluntary character, but the State is nonetheless required to convince [168] the jury beyond a reasonable doubt of the voluntary character of the confession by all of the evidence that is presented at the trial, and unless the jury are so convinced and convinced to that extent of the voluntary character, they will be instructed not to consider it as a part of the evidence in the case. If they are convinced beyond a reasonable doubt on that point, then the weight to be accorded to it, even in that situation, is still a matter for the jury to determine in considering the merits of the case.

The evidence which has been introduced here before the Court on this preliminary matter will be assumed introduced again before the jury for them to consider this question, on the basis of whether they are convinced beyond a reasonable doubt of the voluntary character, together with all the evidence, including, of course, the defense evidence on this point. If the defense counsel wants to put him on for that reason alone he will be

permitted to do so without having him testify as to the merits of the matter. We make that explanation of the effect of the Court's ruling for possible edification of counsel.

The motion to suppress this evidence made prior to impanelling of the jury is therefore for these reasons overruled.

[169] Make an entry on the docket of that ruling on the motion to suppress.

* * *

CROSS-EXAMINATION

[498] MR. BAKER: I would like to reoffer the statement in evidence.

JUDGE CARTER: You object, Mr. Walker?

MR. WALKER: Yes, I do, if your Honor please. I think [499] it was undoubtedly coerced by the effect of the uniform on him, the effect of revolvers, and his history, his fear of uniforms grew out of experiences during his formative period, and to be taken into a basement room, to be surrounded by officers, according to his testimony, told that everyone gives a statement, to be refused the aid of counsel before he gives a statement, when they had already lodged the charges against him, I don't think that is Maryland justice. I don't think that this statement should be admitted.

JUDGE CARTER: We will overrule the objection and admit the statement in evidence, with the observation that the ultimate question of whether or not this statement was voluntary is for the jury to determine, and the burden is on the State, of course, to prove that fact beyond a reasonable doubt.

* * *

[514] AFTERNOON SESSION

CARTER, J. Mr. Foreman and ladies and gentlemen of the jury, the Court is about to give you what is known as an advisory instruction on the law of this case. Under

the constitution of this State, juries in criminal cases are the sole and final judges of the law as well as of the facts. That is a rather unique and unusual provision in our constitution. I think there is only one other State that has such a rule of criminal procedure. But it is the law of Maryland. The jury in a criminal case are the sole and final judges of what the law is in regard to that case. That is not so in a civil case. In a civil case the Court determines the law and gives you an instruction as to what the law is, and the jury determines the true facts from all the evidence and applies the rules of law given by the Court to those true facts and arrive at its verdict. But in a criminal case the jury, as I have said, are the sole and final judges of the law [515] as well as the facts. Therefore, anything that the Court may say to you with respect to the law of this case is advisory only, and is not binding upon you.

When we say to you the jury are the judges of the law, that does not mean that you are free to make up the law, or that you would construe the law one way because you liked it or another way because you didn't like it. It means only that you will apply your intelligence and your conscience in honestly attempting to determine what the law is, and by the application of that process, make up your mind what the existing law is and apply the law as you find it by that process.

The indictment in this case charges the defendant, Lidge Schowgurow, with the murder of his wife in the first degree, it having occurred in this county on January 5, 1964. In this connection, as has been previously referred to by counsel, the fact that this man has been indicted by the Grand Jury in and of itself is no evidence of his guilt, is no evidence against him, and should not be so interpreted by the trial jury. It is simply a procedure for bringing him to trial before you ladies and gentlemen, and no inference of guilt in any way should be drawn from the fact that he has been indicted by the Grand Jury. The guilt or innocence [516] is to be determined solely upon the evidence that is presented in this case and the law

applied to that evidence as the jury finds the law to be.

To this charge of murder in the first degree the defendant has interposed three pleas. First he has pleaded not guilty; secondly, he has entered a plea of not guilty by reason of insanity at the time of the commission of the alleged offense; and thirdly, he has entered a plea of insanity at the time of trial.

The Court would like to point out to you that you should consider these pleas in the inverse order to that which I have enumerated them; in other words, you should first consider and determine the issue created by his plea of insanity at the time of trial, because should you find in the affirmative on that plea, then he could not stand trial, and it would not be necessary to consider either of his other pleas.

What is the law in respect to that matter? The law of this State is that every person is presumed to be sane until the contrary is established. There has been no legally sufficient evidence introduced in this case to establish the contrary of that presumption, or to rebut that presumption. Therefore, if the jury shall find beyond a reasonable doubt that he is sane at the time of his trial, then you should [517] render a verdict accordingly on that issue. If you fail to find that the State has shown beyond a reasonable doubt that he was sane at the time of the trial, then you find him insane at this time and it would not be necessary to further consider the case.

In respect to this issue we have said proof beyond a reasonable doubt, and we will refer to that kind of proof in other references in this instruction. What do we mean by proof beyond a reasonable doubt? There has been mention made of that criterion in a criminal case, and it is proper for an advisory statement to be made to you by the Court in respect to it.

It is rather difficult to define it in a manner that will throw any more light on it than the words themselves, proof beyond a reasonable doubt. It has been defined and this definition has been approved by our Court of Appeals that proof of a fact beyond a reasonable doubt means proof

to a moral certainty of the existence of that fact.

What do we mean by a moral certainty? A moral certainty doesn't mean proof to an absolute or a mathematical certainty, because few things in life are susceptible of that kind of proof. But proof to a moral certainty or beyond a reasonable doubt means such proof as would convince you of the existence of a fact to the extent that you would be willing to act on that conviction without hesitation in an important matter in your own private business affairs. If you are convinced to the extent that you would be willing to act without hesitation in respect to an important matter in your own private business affairs, then you would be convinced beyond a reasonable doubt. If you are not convinced to that extent, then you would not be convinced beyond a reasonable doubt.

What do we mean by sane or insane? Well, this is the test of that question, and has also been approved by the Court of Appeals of this State: sanity or insanity at the time of the trial or at the commission of the alleged offense has been defined in this manner: that a person would be deemed to be legally insane if he was unable to differentiate, to distinguish, between right and wrong, and understand and appreciate the nature and consequence of his acts as applied to himself. I repeat that. If he is mentally incapable of distinguishing between right and wrong and understanding the nature and consequence of his acts as applied to himself, if he is mentally abnormal to that extent, mentally deficient to that extent, then he would be deemed legally insane under the criminal law. If he is not mentally disabled or to that extent, then he would not be deemed insane under the law.

[519] If you find him sane at the time of the trial, then the next matter that you should consider is whether or not he was sane or insane at the time of the commission of the alleged offense on January 5, 1964, because, again, if you would find him insane at that time, then your verdict should be not guilty by reason of insanity at the time of the commission of the alleged offense, and it would not

be necessary to consider the case any further.

What is the law in respect to that question? Again the law presumes him to be sane at that time, until the contrary is shown by substantial evidence. Probably if I read this it might be a little more clearly worded. In respect to this plea of insanity, the jury is instructed where insanity is raised as a defense to a criminal charge, the law presumes that all persons, including those accused of crimes, are sane. So long as this presumption prevails, the State is not required to prove the defendant sane, but as soon as some substantial evidence of insanity has been produced by the accused, then sanity like any other fact material to the question of guilt must be proved by the State beyond a reasonable doubt.

We have explained what we mean by proof beyond a reasonable doubt. In other words, we start out with the presumption [520] that the accused was sane on January 5th. If he introduces substantial evidence or substantial evidence is introduced, if he introduces it or it comes in any other way, that he was not sane, then the presumption disappears, and the fact of his sanity, like all other material facts, is required to be proven by the State beyond a reasonable doubt. And the question of whether he was sane or not sane is measured by the yardstick which I have just explained to you. Did he know the difference between right and wrong, and was he able to understand, appreciate, the nature and consequence of his acts as applied to himself at that time? If he was, you should find him to be sane. If he was not you should find him to be insane. And the burden of proving him sane is upon the State to establish beyond a reasonable doubt.

As we have said, if you find him insane at that time you will find him not guilty by reason of that fact. If you find him sane at that time, then it will be necessary for the jury to make a definite finding on that issue one way or the other. If you find him to be sane at that time then it will be necessary for you to take up and consider the case on its merits. By on its merits I mean you would

consider whether or not the accused was guilty of the matter whereof he stands charged under the facts and circumstances here presented.
[521] He is charged with murder in the first degree. Under our rules of procedure you may find him, if the evidence and the law warrant, under this charge, guilty of murder in the first degree; guilty of murder in the first degree without capital punishment, which we will explain to you in a moment; not guilty of murder in the first degree but guilty of murder in the second degree, and not guilty of murder but guilty of manslaughter; or not guilty.

Which of those five verdicts, if you arrive at that point, you should bring in, again depends on the law of Maryland in reference to what constitutes each of those crimes, and after you determine what the law is that makes up the crime, then you have the duty of analyzing the evidence and what are the true facts in this dispute, these inferences to be drawn. Then you take the law as you find it to be and apply it to the true facts and determine which of these verdicts is the proper one for you to arrive at.

First of all, what is the difference between murder and manslaughter? Well, the jury in this connection are instructed that murder has been defined as the unlawful killing of a human being with malice aforethought. Malice has been defined in this connection as the intentional doing of a wrongful act to another without legal excuse or justification. It [522] includes any wrongful act done wilfully or purposely and may be inferred when there is intent to inflict great bodily harm or when one wilfully does an act the natural tendency of which is to cause death or great bodily harm. The law presumes all unlawful and felonious homicides to be committed with malice aforethought and to constitute murder. And under this presumption, where it is established that a killing was done with the wilful intent to kill or to inflict great bodily harm without legal excuse or justification, then malice would be established and it would be, if it

was without legal excuse or justification, an unlawful killing and the law would presume that to be murder in the second degree.

The burden is on the State in the first instance to prove that it was done wilfully and with the intent to inflict bodily harm. If you find those basic facts, then the burden is on the State to raise it to first-degree murder by proving all of the elements that are necessary to constitute that degree of unlawful killing, and the burden is on the accused, if the unlawful and felonious nature is established, to reduce it to manslaughter.

What is necessary in order to elevate it to first-degree murder, in addition to the intent to kill or inflict great bodily harm? Well, I will again read from a prepared definition. [523] In order for the jury to find the accused guilty of murder in the first degree, it would be necessary that they find that the killing of his wife by the accused was wilful, was deliberate, and was premeditated. Those are the three required requirements of murder in the first degree: wilful, deliberate, and premeditated.

What do we mean by those words in layman's language, in understanding the terminology? Well, again the Court of Appeals has expressed the definition of those terms in this language: to be wilful there must be a specific purpose and design to kill or inflict great bodily harm. To be deliberate there must have been a full and conscious knowledge of the purpose to kill or inflict great bodily harm. And to be premeditated the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to deliberate. To justify a conviction of murder in the first degree under these requirements, the jury must find the actual intent to kill or inflict great bodily harm, the fully formed purpose to kill or inflict great bodily harm, with enough time for deliberation and premeditation to convince them that this purpose is not the immediate offspring of rashness and impetuous temper but that the mind has become fully conscious of its own design. It is not necessary that [524] deliberation or premeditation shall have been con-

ceived or shall have existed for any particular length of time before the killing. The existence of these elements must be judged from the facts of the case. If, therefore, the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as a result of thought, however short the struggle between the intention and the act, is sufficient to characterize the crime as deliberate and premeditated murder.

Under that explanation, if the jury first find beyond a reasonable doubt that the accused killed his wife with malice aforethought, with intent to kill her or inflict great bodily harm, and shall further find that it was done wilfully, it was deliberately, after deliberation, and with premeditation, and shall find all three of those elements beyond a reasonable doubt, then their verdict should be guilty of murder in the first degree.

On the other hand, if there is a reasonable doubt as to whether or not the State has established any one or more of these required three elements, then they should not find the defendant guilty of murder in the first degree. It is necessary to find all three and that they find them by a belief and a conviction that they have been established beyond any reasonable [525] doubt.

I have attempted to explain to you what is necessary to establish in order to raise murder in the second degree to murder in the first degree. Now, what is it necessary for the accused to establish in order to reduce it to manslaughter? Well, that has been described in this manner: in order for the accused to reduce the degree of homicide -- homicide meaning the killing of one human being by another -- to manslaughter, it would be necessary that he establish from the evidence in this case to the satisfaction of the jury either that the killing or shooting was done in the heat of passion which had temporarily dethroned his reason, and which was provoked by adequate provocation -- what we mean by adequate provocation is that under such circumstances his passion was provoked to the extent that his reason was dethroned because he was provoked to that point. And what is adequate provocation

so as to reduce this to manslaughter? Well, that has been described as such provocation as would cause a reasonable person in the shoes of the accused, standing in his position, to become so impassioned as to lose control of his reason.

If you find any circumstances here surrounding this shooting which would have caused a reasonable person in the shoes of the accused to have become so enraged as to lose control of his reason, then the shooting would be deemed to have been provoked by adequate provocation, [526] and under those circumstances there could be no malice and the crime would be, if there was no legal excuse or justification, reduced to manslaughter, because there would be an absence of malice or intent to kill or inflict great bodily harm.

Or, even if you find that the shooting was done in reckless disregard of human life, if you find there was no intent on his part to kill, or no intent to inflict great bodily harm, that intention was lacking, in either respect, either to kill or inflict great bodily harm, then you would find a verdict of manslaughter.

The burden of establishing either of these propositions, that he lost control of his reason because of adequate provocation, or that there was no intention on his part to kill or inflict great bodily harm, the burden of establishing either of them so as to reduce it to manslaughter is upon the accused.

In this connection the Court would call attention that a person who uses a deadly weapon such as a pistol directed at the vital parts of the body of another person is presumed in law to intend the natural and probable consequences of that act, until the contrary intent is established by evidence [527] which the jury considers as true.

I have pointed out that there could be a verdict of not guilty on the merits. That could be only under these circumstances. The burden of proving an accused guilty is upon the State at all times to establish the material facts required for his guilt. If the jury in considering

the evidence in this case would fail to find that sufficient facts had been established beyond a reasonable doubt to constitute any one of these three degrees of unlawful homicide, that is, murder in the first degree, in the second degree, or manslaughter, then the State would have failed to prove their case that this man has committed unlawful homicide, and under those circumstances the verdict of the jury should be not guilty by reason of failure of the necessary proof to establish the crime that the accused committed.

There are certain legal rules that are the law of this case, the law of all criminal cases. There is a provision of our constitution, basic law, that no person can be compelled to give evidence against himself in a criminal proceeding. It has been the law of this land ever since it was founded. Experience has shown it to be a good law. So that under that legal provision, the accused in this case is not required to take the witness stand and give his version [528] of what occurred. He did take the stand in respect to the voluntary character of the confession. He did not go into the facts and circumstances of the incident. He is not required to go into the facts and circumstances of the incident, and the fact that he did not testify in respect to what occurred, or why, is no evidence of his guilt in any form or manner, and there should be no inferences drawn by the jury from the fact that he did not go into what occurred or testify further than he did. There should be no inferences drawn that that is indicative of his guilt, because the law is to the contrary, and you should not consider that fact as in any wise constituting any evidence of any inference or any indication of his guilt.

In respect to the so-called confession which you heard Mr. Baker read, it is a writing signed by the accused, and again under our form of criminal law and criminal procedure a confession by a person accused of a crime, before it can be considered by the triers of the case as evidence against the accused, the State must establish that that statement, written or oral, was the

free and voluntary statement of the accused person. Otherwise it can't be considered.

The Court in respect to this statement ruled as a preliminary matter that the evidence here showed prima facie, [529] that is, on its face or subject to rebuttal, that it was freely and voluntarily given, and we let it in evidence. However, that is in no wise controlling in respect to the jury's determination of whether it was freely and voluntarily given. The law very clearly sets forth that before the jury can take into consideration as evidence in this case the content of that written confession, as a condition precedent to considering the content, they must find that that statement was given voluntarily by the accused and they must find that fact beyond a reasonable doubt.

Now, what do we mean when we say it was freely and voluntarily given? Well, we mean simply that it was not caused to be given by any threats made against the accused, he gave it because he was put in fear of his life or of bodily harm by the police, or that it was given because they held out to him some promise of benefit or promise of reward if he gave it and he was induced to give it under those circumstances.

If they find that there were no threats, there was no improper inducement which caused him to give the statement, and find that to be a fact beyond any reasonable doubt, then they should consider the statement as evidence in the case. If they fail to find that preliminary requirement, then they [530] should not consider in any manner that written statement.

If you consider it, if you find beyond a reasonable doubt it was freely and voluntarily given, because there were no threats, there was no improper inducement held out, then you consider it and you weigh it as to what it shows, what it establishes, and consider it in the light of all of the other evidence in the case. And in taking that into consideration and evaluating it, it would be proper for you to consider the ability of the accused to understand it, his intelligence, his background, his

state of mind at the time, all of those matters, and any other relevant facts which surrounded it, which make him up as a personality or which existed with him at that time. You weigh and evaluate the facts and the force to be given to the contents of that statement.

Going back to whether it was freely and voluntarily given, of course you determine whether there were any threats or there was any force or whether he was coerced into it. By that is meant whether any undue pressure or any physical force was used in order to get him to give a statement. Was it freely given and was it his voluntary statement?

It is proper, we think, to take in consideration his intelligence and his ability to understand in determining [531] whether the statement was freely and voluntarily given as well as those factors that should be taken in consideration in evaluating the weight to be given the statement in the event you decide it was a voluntary statement.

What I have said about his voluntary statement relates to this paper writing only. There was evidence from some of the witnesses of certain verbal statements which were made by him shortly after the incident occurred. There is no objection to those, there is no claim on the part of the accused, as I understand it, that there was any force or coercion or threats used in order to cause him to make those statements. You don't have to inquire into the voluntary character of those statements, but what weight you are going to give to the statements again is a matter for you to determine according to how you evaluate the circumstances under which they were given, in the light of all the rest of the evidence in the case.

You have heard some expert testimony from men who, because of their experience, their education, in the field of psychiatry, the medical field, were determined qualified to express an expert opinion with regard to the subject of psychiatry as you would relate it to this case. The fact that they are qualified because of their educa-

tion and [532] experience doesn't mean at all that the jury has to accept their opinion at full value. The weight to be accorded to the expert opinion of an expert should be determined in the light of the reasons assigned by the expert as the basis for his opinion, the grounds on which he bases such opinion, and in determining whether to attach little weight, great weight, or no weight to the opinion of an expert you should inquire into the reasons he gave in support of his opinion, and his opportunities of examination, together with his educational advantages and experience, and take in consideration all those matters and then arrive at what weight, credence you believe should be given to his opinion.

There have been some inconsistencies in the statements of some of the witnesses. What effect does that have? A witness says one thing about a particular fact and then later on he says another thing. He is contradicted by some other witness, or contradicted by himself, let's put it that way. What effect should that have on the balance of his testimony? Well, if the jury believes that the fact that he contradicted himself on was an innocent contradiction in the sense that there was no intent on his part to deliberately tell a falsehood on the witness stand under oath, in that situation they should not discredit the remainder of his testimony [533] solely because there was that inconsistency. However, if the jury believes on the other hand that he deliberately lied or told an untruth in part of his testimony, then they may consider that factor in evaluating the balance of what he had to say. They could take the view that if he deliberately told a falsehood in regard to part of his testimony, that the balance of his testimony is not worthy of belief, or they could take the view that even though he did deliberately falsify part of his testimony, that he did not falsify the balance of it. Take either view. And whichever one of those views you take, you should interpret all of what he said in the light of all of the evidence in the case and then apply your good judgment and sound reasoning to determine

what part of his testimony you believe is the truth and what is not true. Because that is the peculiar and special province of the jury, to weigh and consider all of the testimony and the evidence, sift the wheat from the chaff and determine what is true and what is credible and what is worthy of belief.

There was some rather extensive discussion about whether a juror should change his mind or not. On that point the Court charges you in this manner as we believe to be a correct statement of the law. Each juror has taken an oath [534] before God that he would well and truly try this case according to the law and the evidence and a true verdict give according to the law and the evidence. Now, that imposes, of course, a serious obligation. But that does not mean that the position you take at first blush you are required to stick to through thick and thin. It means that you will conscientiously and honestly apply your intelligence and your conscience to the evidence in this case, that you will consider the deliberations of the jury, and that means the discussion, their opinion, what their opinion is based on.

It is conceivable that a juror might take one position at the beginning of the deliberations or discussion and after hearing the opinion of other jurors, having them point out maybe parts of the evidence which he had not considered or given sufficient consideration to, he might change his mind, and do so honestly and conscientiously. And that is what is contemplated by the deliberation of the jury, that you will consider the views of others and the reasons which they advance. But if after full consideration and deliberation and discussion -- full is a pretty general term, which means after you have exhausted the discussion and deliberations, to your satisfaction you have heard all that can be said that is material -- if after you do all of that and you have a firm [535] belief and conviction of mind that these are the true facts of what occurred, and this is what you conscientiously believe to be the law, by applying what you believe to be the law to those true facts, you should

vote this way or that way or the other way, then, if you are to arrive at that point, you should not change that position solely for the reason of joining the majority because you don't like to be in the minority or solely for the reason of making the verdict of the jury unanimous. I am sure most of you know, if not all of you, that in order to arrive at any verdict, the vote of the jury must be unanimous. Otherwise there isn't any verdict. So that is what is meant by correct conduct and proper consideration by members of the jury of the law and the evidence of the case as the Court understands it.

Now we will get to the matter of penalty. First let me say that we will do this for the benefit of the jury. Sometimes jurors listen to the Judge and the words of the Court escape them. We will have written up this definition we have given you as to what constitutes legal insanity under the law, and we will also hand to you, Mr. Foreman, a list of the possible verdicts that may be arrived at in this case. They will constitute seven, I believe, in number.

You will first be required to find whether he was sane [536] or insane at the time of trial. As we have previously explained, if you find that he was insane at the time of trial, then you don't have to go any further, because nothing else that would be done would be legal.

Or you find whether he was sane or insane at the time of the commission of the alleged offense. By the same token, if you find that he was legally insane at the time of the commission of the act, then you will find him not guilty by reason of insanity at the time of the commission of the act, and it wouldn't be necessary for you to make any further finding.

If you find him sane both at the time of trial and at the time of the commission of the alleged offense, then it would be necessary for you find one of five possible verdicts on the law and the evidence. No. 1 would be a possible verdict, guilty of murder in the first degree. The penalty to be handed out is prescribed by the law

of Maryland, and in some instances is a responsibility of the Court and lies in their discretion. Under a verdict of murder in the first degree the law says that one of two penalties must be imposed, either the death penalty or imprisonment for life. Which of those two is imposed is in the discretion of the Court.

If you find him guilty of murder in the first degree and [537] you wish to impose in the discretion of the jury a condition, without capital punishment, which means that the death penalty shall not be imposed, then you can find him guilty of murder in the first degree and add the words, without capital punishment. The penalty under that one is automatically life imprisonment. The penalty cannot be imposed if that verdict is returned, and there is no discretion of the Court. That is an automatic penalty.

If you find him not guilty of murder in the first degree but guilty of murder in the second degree, the law says that the penalty shall be imprisonment for not less than five nor more than 18 years, in the discretion of the Court.

If you find him not guilty of murder but guilty of manslaughter, the law says that a fine up to $500 may be imposed or imprisonment up to 10 years or both.

If you find him not guilty because of the failure of proof, then of course he goes free.

Both Judge Rollins and Judge Keating called my attention to this, and properly so. In enumerating these possible verdicts in the form or in the order in which we have mentioned them, the Court does not mean to give the jury the impression that you should give any more serious consideration to one verdict than you should give to the other. The order in which [538] we have enumerated them should not be accorded any significance by the jury in any way. We do that because we start at the top and go down to the bottom. We don't mean to convey the impression, and the jury should not so construe it, that there is any significance whatever in the order in which the Court has enumerated the possible verdicts in this case.

Now, we think we have covered this, but out of an abundance of caution we will say it again if we haven't said it: that the accused in this case, like every other person when he is accused of a criminal offense in this State, comes into court presumed to be innocent, until he is proven guilty beyond a reasonable doubt. That means that the presumption of innocence is to be respected by the triers of the fact. It means that the burden at all times is upon the State to establish beyond a reasonable doubt every fact and circumstance material to the guilt of the accused.

Your judgment and your decision in this matter, as we have previously said, should be judged by the law as you find it to be, by the application of your conscience and your intelligence and the true facts as you find them to be, considering the evidence presented in this case. The arguments of counsel are made to the jury for the purpose of drawing your attention to various parts of the evidence, but what they [539] say in and of itself is not evidence and should not be considered as evidence. They have a perfect right, and it is their duty, to point out various aspects of the evidence, but their statements are not in and of themselves evidence.

In that respect the Court would say further that any exhibits that have been offered in the case, such as the written statement of the accused, the jury can take into their jury room if you request them, when you retire, or you can send for them at any time.

If there is any doubt as to what the evidence was, if you get into a discussion and one juror says, "No, this witness testified to that," and another juror says, "No, he didn't, he testified directly to the contrary," and there is a dispute as to what the evidence is, it is perfectly proper for you to bring out the whole jury and we will have the stenographer read back what the witness said, and by that method you can resolve that question.

* * *

[542] JUDGE CARTER: The Court would like to very briefly mention two additional matters in regard to its instructions. No. 1, when we referred to any verbal statements about which there was some testimony that the accused had made to the police officers or in their presence immediately after the incident, we did not mean to give the jury the impression that they would necessarily have to conclude that the statements were made. Whether the statements were made or whether they were not made in any way or whether they were not made in the wording in which the witnesses testified to is a matter for the jury to determine. It is up to the jury to consider that evidence in regard to those matters as it is all other matters and to determine whether any statements were made by the accused at that time, and if so what they were. And the Court did not mean to convey the impression that we were assuming that the statements were made, we are simply calling attention to the fact that there was testimony [543] to that fact. The weight you see fit to give the testimony is a matter for the jury to determine.

Is that sufficient on that point, Mr. Walker?

MR. WALKER: Yes, thank you.

JUDGE CARTER: The Court in describing the formula for legal insanity failed to mention this fact: if the jury were to find here that the evidence warrants a conclusion by them that the accused was sane or insane at the time of the commission of the alleged offense, that would not preclude them from further considering the question; even though they find that he was not insane in the legal sense, they should consider whether or not his state of mind at the time of the act or immediately preceding it was such as to prevent him from deliberating or premeditating on the act that was done. In other words, as I recall Dr. Howard's testimony, he said that in his opinion the accused was not mentally capable of deliberating because of some impulsive impulse that he was under at that time. Now, it is up to the jury to weigh that, consider that, on the question of

whether he deliberated, whether he premeditated. The fact that they may find him sane does not prevent them from considering that evidence, together with all the other evidence, in determining whether or not he could deliberate, did deliberate, or premeditate.

* * *

[544] JUDGE CARTER: Now, Mr. Foreman and ladies and gentlemen, the Court mentioned Dr. Howard's testimony. We did so simply to demonstrate the law we were trying to give to you, that [545] even though you found him to be sane you could still consider this evidence in respect to his ability to deliberate and premeditate. And in determining whether he could deliberate or premeditate, you should consider not only Dr. Howard's opinion, but you should consider all of the evidence in the case that in any wise bears on that question and determine the answer after consideration of all the testimony in the case that relates to that point.

* * *

[553] (The jury retired at 6:52 P. M. The jury deliberated until 10:37 P.M., at which time the following transpired:)

JUDGE CARTER: Mr. Clerk, call over the jury and ask them if they have agreed on a verdict.

THE CLERK: Ladies and gentlemen of the jury, you will all stand and answer to your names, please. (Jury roll called.) Are you agreed of your verdict?

JURORS: We are.

THE CLERK: Who shall say for you?

JURORS: Our Foreman.

THE CLERK: Lidge Schowgurow, you will stand and hold up your right hand, please. Remain standing.

What is your finding in respect to the question of sanity or insanity of the accused at the time of trial?

THE FOREMAN: We find that he was sane at that time.

JUDGE CARTER: Record the finding with respect to that [554] issue.

THE CLERK: Harken to your verdict as the Court

hath recorded it. Your Foreman has said that Lidge Schowgurow was sane at the time of the trial and so say you all.

Are you agreed on your verdict as to whether the accused was sane or insane at the time of the commission of the alleged crime?

JURORS: We are.

THE CLERK: What is your finding?

THE FOREMAN: We find that the defendant was sane at the time of the crime.

JUDGE CARTER: Record the finding with respect to that issue.

THE CLERK: Harken to your verdict as the Court hath recorded it. Your Foreman has said that Lidge Schowgurow was sane at the time of the commission of the alleged offense and so say you all.

THE JURORS: We do.

THE CLERK: Are you agreed on your verdict in respect to whether the accused is guilty or not guilty of the matter wherefore he stands indicted?

JURORS: We are.

THE CLERK: What say you, is he guilty of the matter [555] whereof he stands indicted or not guilty?

THE FOREMAN: We find the defendant guilty of murder in the first degree, without capital punishment.

JUDGE CARTER: Record the verdict.

THE CLERK: Your Foreman has said that Lidge Schowgurow is guilty of first-degree murder, without capital punishment, of the matter whereof he stands indicted, and so say you all.

JURORS: So say we all.

JUDGE CARTER: You may be seated.

* * *

[558] MR. WALKER: As I understand it, if your Honor please, in view of the verdict there is no discretion on the part of the Court.

JUDGE CARTER: That is correct.

[559] MR. WALKER: With respect to the sentence.

Therefore, we would agree to have the sentence passed now.

JUDGE CARTER: Very well, sir.

Is that agreeable to the State?

MR. BAKER: Yes, your Honor.

JUDGE CARTER: Lidge Schowgurow, will you stand. Does counsel for the accused wish to make any statement before Court imposes sentence in this matter?

MR. WALKER: Well, there is a great deal I could say, your Honor, but I think since there is no discretion on the part of the Court, there is nothing I could say that would be helpful to anyone.

JUDGE CARTER: Does the State wish to make any statement before sentence is imposed?

MR. BAKER: No, your Honor.

JUDGE CARTER: Mr. Schowgurow, do you have any statement to make before the Court imposes sentence in your case, other than what your counsel has already said?

THE DEFENDANT: No.

JUDGE CARTER: The jury has considered your case I am sure thoroughly and conscientiously. They have found you guilty of murder in the first degree, but in their discretion and wisdom have added to that finding a condition or a proviso, [560] without capital punishment, and under the law of this State such a verdict carries with it automatically life imprisonment.

Therefore, the Court now sentences you to the Maryland Penitentiary for the balance of your natural life. You may be seated.

* * *

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1964

No. 368

LIDGE SCHOWGUROW,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CIRCUIT COURT FOR CECIL COUNTY (J. DEWEESE CARTER, Chief Judge, EDWARD D. E. ROLLINS, Judge and THOMAS J. KEATING, JR., Judge)

APPELLEE'S BRIEF

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For Appellee.

The Daily Record Co., Baltimore, Md. 21203

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

On September 18, 1964, a jury impanelled before the Circuit Court for Cecil County (Carter, C.J., *Rollins and* Keating, JJ.) returned its verdict finding Appellant guilty of murder in the first degree, without capital punishment. Upon this verdict the Court sentenced the Appellant to the Maryland Penitentiary for the balance of his natural life. From this judgment the instant appeal is taken.

QUESTIONS PRESENTED

1. Does the portion of Article 36 of the Maryland Declaration of Rights which instructs that no person shall be deemed incompetent as a juror on account of religious belief, "provided he believes in the existence of God", *ipso jure* void the murder conviction of the Buddhist Appellant?

2. Was the Appellant's signed confession shown by the defense to have been the product of a will overborne by police pressure?

STATEMENT OF FACTS

The State accepts the Statement of Facts made by the Appellant.

ARGUMENT

I.

APPELLANT HAS FAILED TO DEMONSTRATE THAT EITHER THE GRAND JURY WHICH INDICTED HIM OR THE PETIT JURY WHICH CONVICTED HIM WAS NOT DRAWN INDISCRIMINATELY FROM THE CECIL COUNTY COMMUNITY, INCLUDING THOSE IN THAT COMMUNITY, IF ANY THERE BE, WHO PROFESS NOT TO BELIEVE IN THE EXISTENCE OF GOD.

Appellant complains that the constituency of the grand jury which indicted him and the petit jury which convicted him was such that he was denied both due process of law and equal protection of the law.

Due process of law is an oracular concept which eludes expository definition. Even the prodigious intellect of Justice Frankfurter found the task staggering. *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952). But, however complex the problem of definition, one finds solace, and at least visceral comprehension, in resort to due process's equivalent and basic measure: fairness and a sense of justice.

It is also helpful that fairness is as well the basic ingredient of equal protection of the laws, since it is through that Fourteenth Amendment guarantee — rather than due process — that the Supreme Court has scrutinized the effects of state jury selection procedures upon state criminal convictions. *Eubanks v. Louisiana*, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. 2d 991 (1958); see also fn. 2 in *United States v. Greenberg*, 200 F. Supp. 382, 387 (S.D.N.Y., 1961). It is, therefore, of no moment that the Appellant casts his appeal in both the due process and the equal protection molds. The question before this Court is one of fairness alone, and in that portion of the criminal process which is devoted to the selection of jurymen, fairness "requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary and systematic exclusions". (*Hoyt v. Florida*, 368 U.S. 57, 59, 82 S. Ct. 159, 7 L. Ed. 2d 118 [1961]).

The Appellant, a Buddhist, asserts that his co-religionists have been *a priori* excluded from Cecil County jury service because (1) they do not believe in the existence of God and (2) nonbelievers are excluded from Cecil County jury service on account of that passage in Article 36 of the Maryland Declaration of Rights, which says:

> ". . . nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

The State does not understand him to argue either (1) that his constitutional rights guarantee him a Buddhist on either the grand or petit jury, or (2) that the mere fact no Buddhists appeared on either panel establishes proof

of exclusion because of their religious beliefs. Both issues have been determined against him. *Giles v. State*, 229 Md. 370, 378 (1962).

Appellant's argument proceeds, it seems, along these lines: he is a Buddhist; the presumed competency of Maryland juries requires each member to believe in the existence of God; if one member does not, the act of the jury is null and void (relying on *State v. Mercer*, 101 Md. 535 [1905]); the Supreme Court has taken judicial notice of the fact that Buddhism is one of several religions adhered to in this country, none of which teaches a belief in the existence of God (relying on fn. 11 in *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 [1961]); this notice requires the State to prove the absence of Buddhists in Cecil County, which it has not done; *q.e.d.* Buddhists have been excluded from Cecil County jury service, which exclusion is a constitutional defect on the criminal proceedings which culminated in his conviction and sentencing.

There are two principal errors in this syllogism.

First, to the extent that the *Mercer* decision may be construed to opine that the discovery of a single nonbeliever on a panel voids that panel's action, it was overruled by *Torcaso*, which held that expression of a belief in the existence of God could not be imposed as a condition precedent to holding public office.

Second, Mr. Justice Black's identification of Buddhism as an atheist religion in *Torcaso* does nothing but confirm what the encyclopedists tell us. It does not create any presumptions as to the extent of Buddhist practice in Maryland. It does not plant nor evangelize Buddhism on the Eastern Shore. It does not oblige the State's Attorney for Cecil County to canvass the countryside for naysaying witnesses to prove what is a good deal closer to common knowledge

than the tenets of Buddhism — that resident adherents to Buddhism are unknown to Cecil County.

Here is the center of dispute. The Appellant has proved nothing beyond his own allegiance to the Buddhist faith. He has not even tried to prove anything else. There is nothing in the record to show that there has ever been a single adherent of Buddhism resident in Cecil County who, aside from the belief-in-God issue, was otherwise qualified to serve as a juror, let alone that any Buddhist was excluded from the call or, being called, was excluded from the panel for failure to affirm his belief in the existence in God.

The *only pertinent evidence of any kind* is the uniform declaration of the oaths administered by the Clerk of the Circuit Court for Cecil County: "In the presence of Almighty God, you ..... do solemnly promise and declare that . . ." (E. 10). This declaration is no filter through which nonbelievers cannot pass. Appellant negotiated it himself without difficulty when he testified during his trial (E. 43), a fact which exposes the desperate emptiness of his present claim, something conjured up from a series of unfounded assumptions.

Appellant's argument that the State bears a burden to rebut a presumption that there are substantial numbers of Buddhists in Cecil County simply will not wash. The burden of establishing a *prima facie* case of deliberate and systematic exclusion of an identifiable and significant minority from jury service is irrefutably that of the defendant who has tendered the challenge. See *Arnold v. North Carolina*, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77 (1964). True this is even of federal jury challenges. In *United States v. Greenberg, supra*, 387, the Court stated:

> ". . . a party making the challenge has the burden of showing that the required and accepted standards

for jury selection have been violated. He must introduce or offer 'distinct evidence' in support of his challenge. *His failure to do so is fatal. . . .*" (Emphasis supplied.)

The most important single adjudication on this issue is *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954), cited in *Arnold*. There the Supreme Court reversed a murder conviction on account of demonstrably systematic exclusion of Mexicans — a significant minority in the county — from jury service. In the course of his opinion for the Court, Mr. Chief Justice Warren made the following observations (347 U.S. at 477, 478, 479-481):

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question directly, it has been recognized since Strauder v. West Virginia, 100 U.S. 303, 25 L. ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws. . . ."
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> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. . . ."
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> * * * * * *

"The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites'. One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican'. The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here'). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

"Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by Norris v. Alabama, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion', has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.

"The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor

> testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that 'for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.' The parties also stipulated that 'there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.' "

The Appellant has not met these minimal standards of proof. There is no instant showing that Buddhists or others not believing in the existence of God form a separate class in Cecil County. Nor is there any showing that Buddhists or others not believing in the existence of God form any significant part of the County's legal residents, of its landowners or of its general population. And these failings accord with the understanding and belief of those familiar with the ethnic and religious history of Cecil County.

Except as to its previously noted effect on the *Mercer* opinion, the *Torcaso* case, *supra*, is irrelevant to the present dispute. Its meaning, in the jury duty-group discrimination context, is that any Buddhist called for jury service cannot be excluded therefrom on account of his refusal to express a belief in the existence of God. Indeed, this decision is a complete answer to Appellant's argument that Article 36 sets apart believers and nonbelievers and keeps the latter off of juries. To the unknowable extent that this may have been true before *Torcaso*, it cannot be true today.

Also irrelevant is *United States v. Seeger*, 326 F. 2d 846 (2nd Cir., 1964), *cert. granted*, 377 U.S. 922, 84 S. Ct. 1222, 12 L. Ed. 2d 214 (1964), which simply held that a young

man who was conceded to be a sincere, conscientious objector but whose objections were not the product of religious belief in "a relation to a Supreme Being" — which was the statutory test for exemption from military service — could not be denied the exemption on that account alone.

II.

APPELLANT'S SIGNED CONFESSION WAS PREPARED IN AN ATMOSPHERE WHOLLY FREE FROM ANY FORM OF OFFICIAL COERCION OR INDUCEMENT AND IT WAS PROPERLY ADMITTED INTO EVIDENCE AS HIS FREE AND VOLUNTARY ACT.

There is nothing in the record which would even suggest that the Appellant's confession was anything other than a voluntary statement given freely and without constraint. Appellant was treated with courtesy and kindness by the officers of the Maryland State Police with whom he had contact at the North East Barrack. Not only was he fed (E. 37), but Trooper Fields bought him a pack of cigarettes when he first arrived at the Barrack (E. 48, 52).

Appellant did testify that he asked if he could make a telephone call to his family, but he affirmed on both direct and cross-examination that Trooper Fields did not tell him whether he could or could not place a call (E. 48, 52). Trooper Fields testified that Appellant "told me his family was obtaining an attorney" (E. 40). He did not recall any request by Appellant to make a phone call.

To the extent that an isolated refusal to permit an accused to telephone his family may be considered a significant indication of a will overborne to secure a confession, the State submits that Trooper Fields' testimony constitutes "believable, persuasive contradiction" thereof. *Mefford and Blackburn v. State*, 235 Md. 497, 514 (1964).

However, if it were not, the Appellant's own version of his efforts to get family and legal assistance does not es-

tablish "facts on which the Supreme Court acted and to which it limited its holding in *Escobedo*" (*Ibid.*, 516), and it stands in bold contrast to the persistence of the accused, and the runaround he got from the police, in *Thiess v. State*, 235 Md. 541 (1964), upon which the Appellant mistakenly relies.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court for Cecil County should be affirmed.

Respectfully submitted,

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