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COURT OF GENERAL SESSIONS

PART IV.

-----X
THE PEOPLE OF THE STATE OF NEW YORK:

against

ALEXANDER DEVOE.
-----X

Before

HON. THOMAS C. O'SULLIVAN,
and a Jury.

Indictment filed January 16, 1907.

Indicted for murder in the first degree.

New York, February 26, 1907.

A P P E A R A N C E S.

For the People Asst. Dist. Atty James R. Ely.

For the Defendant MR. CHARLES SULLIVAN.

Peter P. McLaughlin,
Official Stenographer.

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MR. ELY: I move the case of the People against Alexander Devoe.

MR. SULLIVAN: In this case there is a very important witness who is, as far as I know, the only eye witness to the killing. That witness was committed to the House of Detention, taken into the custody of the State. Now, in announcing myself ready -- the name of the witness is William Harris -- in announcing myself ready I would like to know whether that witness is within the jurisdiction, having been taken possession of by the People, and practically excluded from the access of the defendant.

MR. ELY: In reply to that, sir, I am unable to state whether the witness or whether the person named William Harris is within the jurisdiction or not. I think, however, it is my belief that he is, for the reason that my belief is based upon the fact that until within a very short time he was incarcerated. A short time ago he was admitted to bail. My idea is that he is within the jurisdiction though I don't know. I, myself, never saw the person called William Harris but once and that was two or three months ago. So, personally, I am

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unable to make any definite statement. I have given the grounds of my belief to the Court.

THE COURT: Of course the prosecution cannot be expected to give any more information than it has with regard to that matter. In the event that any information comes to the prosecution concerning that witness I suppose it will be conveyed to the defense.

MR. ELY: I am perfectly willing to convey it.

MR. SULLIVAN: I ask your Honor now to direct the District Attorney to furnish the defendant with a list of witnesses, to endorse them on the back of the indictment and furnish the defendant with a list of them -- that is, with a list of the witnesses he expects to call in this case.

MR. ELY: I know of no rule, custom or practice that requires the District Attorney to give the names of his witnesses. I am perfectly willing to give the names of all those witnesses who appeared before the Grand Jury, but as to other witnesses that I may have --

MR. SULLIVAN: I ask for those that he has under subpoena, those that he expects to call. The rule under the old Code was that the defendant

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should be apprised of the witnesses in the case and that their names should be known so that the defendant would know just what he would have to confront. I ask that that list be furnished me so that I may know.

THE COURT: I do not know that there is any rule compelling the prosecution to disclose, even if it knew, the names of all the witnesses. You are entitled, of course, by statute to the names of those who appeared before the Grand Jury, and the District Attorney will furnish you with those names.

MR. ELY: Certainly.

THE COURT: I see no reason why, if he cares to do so, he should not comply with your request to furnish the others.

MR. ELY: I cannot see any reason why I could be compelled to but as a matter of professional courtesy I am perfectly willing to do so, not as a matter of right.

THE COURT: I do not think there will be any difficulty about matters of this kind. As far as the names of persons appearing as witnesses before the Grand Jury are concerned, you have a

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statutory right to know them, but as to the others, as a professional courtesy the District Attorney is willing that you should know who the others are.

MR. ELY: When I say that, sir, it must be strictly understood that these names are tentative; that I do not assert that I shall call all of those and that no inferences shall be drawn if I do not.

THE COURT: Certainly not.

THE CLERK: Alexander Devoe, if you intend to challenge an individual juror you must do so when the juror appears and before he is sworn. This will apply to all jurors called in this case with the consent of the District Attorney and counsel for the defendant,

MR. ELY: That is satisfactory.

MR. SULLIVAN: It is satisfactory to me.

(Six jurors were selected.)

The Court admonished the jury as follows:

Gentlemen, you are admonished that it is your duty to refrain from conversing upon any subject connected with this trial. Do not form or express any opinion upon it until it has been finally submitted to you. You are requested, on account of the important character of the trial to bear that

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admonition in mind. You will discuss the case with nobody and be careful that you exclude from your reading and your conversation any matter which may formulate, even in spite of you, an opinion upon this matter. You are requested to observe, with all the care possible, under the oath that you have taken, to refrain from conversing upon any subject connected with the trial or forming any opinion upon it until it is finally submitted to you.

(The Court then adjourned the further trial of the case until to-morrow, Wednesday morning February 27, 1907 at 10:30 o'clock.)

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New York, February 27, 1907.

TRIAL RESUMED.

(Six additional jurors were examined and sworn.)

(The jury being complete the Court then admonished the jurors and adjourned the further trial of the case until to-morrow, Thursday morning, February 28, 1907 at 10:30 o'clock.)

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New York, February 28, 1907.

TRIAL RESUMED.

THE COURT: Mr. Cleary (addressing the second juror) I understand, sir, that you are under a great sorrow this morning, namely that you are in the receipt of the news of the death of your mother.

THE SECOND JUROR: Yes, sir.

THE COURT: The Court sympathizes sincerely with you and in view of that fact I believe that it would be an uncalled for hardship to ask you to continue your service to the State until the last honors have been paid to your mother. You will be excused until Monday morning. Before you go, you, gentlemen, are admonished that it is your duty to refrain from conversing amongst yourselves or with others concerning any subject connected with this trial. You are further admonished that you should not express or entertain any opinions concerning it until it has been finally submitted to you. I shall have to ask the rest of the jurymen to

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remain just a moment because I think that perhaps they ought not to be continued over until there has been something said about the adjournment of this term into the next term.

MR. ELY: Now, if your Honor please, owing to the fact of the unfortunate death of the mother of one of the jurors we cannot proceed to-day in this case, that is, with the trial of the People against Alexander Devoe. I move you, sir, that the February Term of this Court, Part IV, be continued until the case now on trial, namely the case of the People against Alexander Devoe be finished. And I ask now that the jurors in that case now on trial be allowed to depart until Monday morning next at half past ten.

THE COURT: You have already been admonished, gentlemen, concerning the propriety of refraining from conversation concerning this case and from the expression or formation of any opinion concerning it until it has been finally submitted to you. You will be in your seats again, gentlemen, at half past ten Monday morning and this February term is continued until the disposition of this case.

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(The Court then adjourned the further trial of
the case until Monday morning March 4th at 10:30
o'clock.)

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New York, March 4th, 1907.

TRIAL RESUMED.

MR. ELY: Now, if your Honor please, before I commence even to open the case, I shall ask to have the witnesses on both sides of this case excluded from the room and that that injunction remain in force throughout the trial, with respect to all witnesses except those who have been called and thoroughly exhausted, and are not going to be again called in rebuttal.

(The Clerk gave the notice for the exclusion of the witnesses.)

MR. ELY: Of course, I don't consider that this rule applies to the Coroner's Physician nor the doctors, unless it is desired to have it so apply, they having nothing to do with the facts of the case, except the medical part of it. Do you desire that they should withdraw?

MR. SULLIVAN: I think they might withdraw too, if your Honor please.

THE COURT: It must be understood that if there are any witnesses present they are to be excluded from the court room.

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MR. JAMES R. ELY

opened the case on behalf of the People as follows:

If your Honor please and gentlemen of the jury:

This is one of the most serious cases known to the law.

The Grand Jury of the County of New York have indicted the defendant, Alexander Devoe, for the crime of murder in the first degree, in that, as is alleged, on the 28th of June, 1906, in the City and County of New York, at or in front of premises 160 or 158 West 28th Street, this defendant, with premeditation, deliberation and without justification, shot and killed one James Boyle, the death resulting on the 18th of August following. The defendant shot James Boyle in the back on the day in question, and from the direct results of which shooting the said James Boyle died, in the City and County of New York, at the New York Hospital, on the 18th day of August, 1906.

Now, gentlemen of the jury, in cases of this kind, that is, cases where the charge is murder in the first degree, before the People can ask, or may ask for a verdict at your hands, they must prove three facts to your satisfaction and beyond a reasonable doubt.

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The first fact is that James Boyle is dead.

The second fact is that James Boyle came to his death at the hands of this defendant.

The third fact is that the injuries inflicted upon the said James Boyle by this defendant, were inflicted with premeditation, deliberation and without justification.

When the People have proved those facts, beyond a reasonable doubt, then you are bound, under your oaths, to bring in a verdict in accordance with the evidence, of murder in the first degree.

Now, gentlemen, in cases of this class, where the charge is murder in the first degree, it is not incumbent upon the People, by law, to prove the motive or intent--the motive or intent may be collected from the act itself. The law presumes a man to be responsible for the natural results of his own acts, and if I, without justification and in the ordinary command of my faculties, that is, sane, draw and shoot a pistol at one of you, gentlemen, aim a revolving pistol and discharge it at one of you, gentlemen, why the law presumes that I, at least, meant to inflict grievous bodily harm on the person at whom I shot. If I shoot, while I am in the possession of my faculties, without justification, at a vital part of the person at whom I aim the revolver, the law will presume that I

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meant to kill, and if the person at whom I shot eventually dies, it being a condition precedent to this illustration that I shoot without justification and in the full possession of my faculties-- if the person die, then I am guilty of one of the degrees of homicide, either murder in the first degree, murder in the second degree, manslaughter in the first degree or manslaughter in the second degree, depending upon the circumstances attending the shooting as to what category this crime falls within. If I shoot with deliberation and premeditation, no period of time is necessary to elapse between the formation of the design and its execution in order to make the act premeditated, simply that the design is formed before the act is carried out, even if the time is inappreciable, for the human mind acts with such celerity that it is impossible to measure it. If the design is formed before the act is carried out, all the elements of murder in the first degree are present, premeditation, deliberation and lack of justification.

I have said, gentlemen of the jury, that it was not necessary or incumbent upon the People, in cases of this kind, to prove motive or intent, but, in this case, gentlemen of the jury, we will prove motive and intent.

We will prove that this defendant had a quarrel some four or five days before the killing with the deceased;

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that after the quarrel he went making threats and armed himself with a revolving pistol, and for the intervening time between the time of his arming himself and the execution of his design, a period of some days, he lurked about, making threats against the life of the deceased which he took ruthlessly on the early morning of the 28th of June, 1906, slinking up behind him and shooting him down like a dog, in the back.

Now, gentlemen, the narrative of the case is simple.

On Saturday night, June 23rd, 1906, there was a crap game going on at the premises 152 West 28th Street, New York City and County.

At this crap game there was present the defendant, Alexander Devoe, a person by the name of William Harris, a person by the name of Louis Defendo, a person by the name of Charles Fetter, another by the name of Fred Simmons.

This crap game continued for some period of time until the late hours of Saturday night, or the early hours of Sunday morning, when there was a fight or altercation between this defendant and the deceased. During this altercation the deceased hit this defendant with his fist, in the eye and in the stomach, and then he said to him, "Go and get your gun." The defendant ran out and the deceased went after him. In 27th Street the deceased and

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the defendant came up to an officer and the deceased said to the officer--

MR. SULLIVAN: I object to what was said by the deceased. I object to the District Attorney in his opening stating-- or making, in his opening statement, any statement in reference to the details of a conversation or an alleged statement made by the deceased even though it was made in the presence of the defendant.

MR. ELY: To which the defendant answered. They were all engaged in it.

MR. SULLIVAN: That question may be a serious matter, whether that would ever be permitted or not.

MR. ELY: I will drop that, if you please, I don't care enough about it. I will drop it for the time being but we will introduce it in evidence. If there is any objection to that at this time we will let it go for the time being.

The deceased and the defendant went down and saw an officer.

As the result of this seeing of the officer the deceased and the defendant went to look for somebody in 27th Street. This person that they looked for was not found, and, thereupon, both the deceased and the defendant went away, the defendant going one way and the deceased another.

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This expedition with the officers accompanied by the defendant and the deceased occurred on early Sunday morning, but on Sunday afternoon this defendant saw one Simmons, one of the participants in this game, and he said to him that he thought one Victor Forbach had a gun or a pistol, he described it as a gun, and that he wanted Simmons to accompany him to Brooklyn, I think it was 545 Franklin Avenue, Brooklyn, where Victor Forbach lived, in order to borrow this gun.

Simmons did accompany Victor Forbach, and together they went over to 545 Franklin Avenue, and the defendant asked Victor Forbach to loan him his gun. Victor said he would and he brought the gun with three cartridges in it. Thereupon, the defendant told Victor Forbach of the fight that he had with Boyle on the night before and that he was going to do him. During this time he snapped the pistol, the trigger of the pistol, to see in what condition it was.

Subsequently, they all left the premises 545 Franklin Avenue and walked down Franklin Avenue to Fulton Street, where the defendant said to the witness Simmons, "Why you beat it home, there is no use looking for Boyle until after one o'clock at night."

The defendant was left with Forbach and he said to Forbach, "Well, now, we will go down, I want you to go down to Oyster Bay with me and do a job."

MR. SULLIVAN: I object to these remarks or statements to the jury as prejudicial, and not germane to this issue. Also as incompetent and irrelevant.

MR. ELY: I will take out, "do a job." I want you to go down to Oyster Bay.

MR. SULLIVAN: Exception.

MR. ELY: The Court has not made any ruling at all. I have just taken out "do a job".

MR. SULLIVAN: I object to this. I object to the District Attorney's statement that he is going to cut out something, because it is in the minds of the jury, in the first place.

MR. ELY: The remarks I am making in my opening are perfectly competent, and if the counsel would wait for a second before he makes his objection he would see that the remarks that I am making, about going down to Oyster Bay, have a direct bearing on the act that this defendant was guilty of on the 28th of June, 1906.

THE COURT: Unless it has such a direct bearing it is irrelevant and incompetent.

MR. ELY: Certainly, sir.

THE COURT: And if it have a direct bearing it is a matter, of course, which the Prosecution will be entitled to prove in this case.

MR. SULLIVAN: I take an exception.

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MR. ELY: To continue,-- he asked Forbach to go down to Oyster Bay for the purpose of raising some money so that he could go out of town, after he had killed "Lefty" Boyle.

Forbach refused to go and did not go, and after some further discussion he left this defendant, and the defendant, as he left him, said, "You look in the papers tomorrow and you will see that "Lefty" Boyle is dead," or words to that effect.

A day or so afterwards, about the 26th of June, 1906, Charles Fetter, accompanied by William Harris, met this defendant at about 24th Street and Sixth Avenue, or, let me see, on 24th Street near Sixth Avenue; and thereupon there was some conversation between William Harris and the defendant and Fetter; and the defendant said, "Maybe the son-of-a-bitch is around here now, watch for him," referring to Boyle. Harris said, "No, he is not here now, he is downtown in court;" and the defendant then said, "Well, the first chance I get I am going to shoot the son-of-a-bitch, and I will shoot him in the back, I will give him no chance, because the son-of-a-bitch did not give me a show when he tried to trim me at the crap game." You will recollect the crap game at which the deceased struck the defendant with his fist.

After some more conversation of that description, the defendant and the deceased, or rather the defendant and

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William Harris and Charles Fetter separated, having made an arrangement by which they should meet again at 18th Street and Sixth Avenue about 8 o'clock on that evening.

They met again about 8 o'clock on that evening and from there they went to see a person by the name of Dicky Cassidy, who lived on 30th Street, and there, from Dicky Cassidy, this defendant borrowed another gun, having stated, subsequently to a witness who will appear here that the gun borrowed from Forbach was not any good, he could not use it. He borrowed another gun from Dicky Cassidy, and on the way back Harris said, "Well, you want to give it to him good so he won't be able to identify you," or words to that effect, and the defendant then stated that he would give it to him good, or words to that effect. I shall not go into that conversation or describe it with any more accuracy. I will not describe the words, but, substantially, that was what was said.

On the night of the 28th of June,-- or on the evening of the 27th of June, 1906, the defendant was about 28th Street between Sixth and Seventh Avenues from a period in the early evening up until the time of the commission of this act. There were present there, among others, during the period from 7 o'clock-- and when I say there were present there among others during this period I don't mean that every one of the men that I shall name now were

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there every minute, but that these persons whom I am about to name were there off and on-- there were present there during this period one Michael O'Neill, there was Louis Defendo, there was Charles Fetter and there was William Harris and there was Fred Simmons.

The defendant was at or about No.158 to 160; he was standing there with Fetter and with Defendo and he was referring to Boyle, "Why, perhaps he is around here now," or words to that effect, "I wish you would go and look." So the witness Fetter went around the corner and there saw Boyle standing on Seventh Avenue in front of a cigar store next to the corner saloon. He immediately came back and told the defendant that Boyle was around on Seventh Avenue in front of a tobacco shop. Whereupon the defendant went into the side door of the saloon and came around in front of the saloon and opened the door, and with his hand extended in his pocket like that (illustrating) saw Boyle who thereupon looked up, and the defendant then ran back and came out and subsequently said that he would have had him then if he had not looked up, or words to that effect, but, "He would get him before the night was over."

Subsequently, he had a conversation with Michael O'Neill to whom he repeated, substantially, the same remarks, saying, among other things, "If the son-of-a-bitch knew what was coming, how long he had to live, he would not

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be waiting around here."

Later in the evening the defendant was found in the yard back of No.313 Seventh Avenue.

In order now, gentlemen of the jury, that you may understand the situation, it will be necessary for me to describe somewhat the premises 158 and 160 West 28th Street and 313 Seventh Avenue.

THE COURT: May I ask what the number of the place is that is being described?

MR. ELY: 158 and 160 West 28th street and 313 Seventh Avenue.

These premises, at the time that I refer to, were tenement houses. The hallway of 313 Seventh Avenue ran right through the house and connected with the yard in the rear of this house. This yard connected with a yard in the rear of premises 160 West 28th Street, and there was nothing but a low wooden fence and some toilets or water-closets, in the rear of 313 Seventh Avenue, that is between the yard of 313 Seventh Avenue and the yard of 160 West 28th Street. The yard of 160 West 28th Street connected with the yard of 158 West 28th Street in the same way, and there was nothing between the two except the low toilets, about eight feet high, these wooden toilets eight feet high, and a fence between the toilet and the rear of the house six feet high.

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Now, in the same way 160 West 28th Street, the yard, as I have stated, in the rear and then there was an open space all the way down from 160 West 28th Street to 163 West 27th Street. There was nothing in the rear of 160 West 28th Street and the yard of 163 West 27th Street except the fences which were contiguous to these low closets, or toilets that I have spoken of. So that it was possible for people, desiring to go from 27th Street to 28th Street, sometimes, to pass through the yard of one of the houses on Seventh Avenue into the yard and then through the yards out into 27th Street.

Subsequently, about between half past 11 and 1 o'clock a communication was made to Fetter. Fetter went in with Harris, into the yard of 313 Seventh Avenue and there they found the defendant, waiting there. He was armed. There was some conversation between them. Defendo was also there. When they came in there was some conversation between them, and this defendant again made a threat to kill the deceased before the night was over.

They then separated and subsequently the witness Fetter went back there. As he went back he was jumping over down from one of these toilets, pulling a gun on him-- the defendant pulled a gun on him and said, "Jesus, I thought you were Boyle."

Fetter then left, and at the time or about the time

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he was leaving a man by the name of James Bird came in and said, "Your friend is outside in front of"--

MR. SULLIVAN: I object to what he said.

MR. ELY: To the defendant.

MR. SULLIVAN: I object to that as incompetent and irrelevant.

MR. ELY: Very well, let it go.

THE COURT: Objection overruled. Exception.

MR. ELY: For the purpose of the record, and for the utmost conservatism in this opening, I will withdraw what I was going to say that Bird said, and as I have not stated it there will be no exception.

James Bird came in and made a communication. Whereupon Fetter ran out. The defendant ran through the hallway of 158, emerged on the street and immediately afterwards a pistol shot rang out and Boyle was shot in the back. The pistol shot was shot by this defendant and it hit Boyle in the back as Boyle stood there on the street in front of about 160 West 28th Street, talking to one William Harris.

Immediately afterwards the officers came and they found the deceased lying upon the ground. The defendant was not there. The officer said something--

MR. SULLIVAN: I object to that.

MR. ELY: The officer said something to the deceased

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and the deceased said something to the officer, and then the officer went into No.158 West 28th Street and searched the yard and searched the roofs and he did not find the person whom he sought.

After the shooting, Fetter ran out of the premises, out of the hallway of 313 Seventh Avenue, to Seventh Avenue, then he ran down Seventh Avenue towards 27th Street and there he met this defendant with his hat pulled down over his eyes. The defendant then had a conversation with Fetter in which he said, "I only could give him one, I hope it will take effect so he cannot identify me," or words to that effect. "I only could give him one. There was a man in a red shirt sitting there and there was a milkman who was driving a milk cart, and I want you to find out who those people are and tell me, and I want you to find out who it was that said, 'Look, he has run in the hallway', and I want you to keep me posted about it." After Fetter said he would do it, he said he wanted to know who would be pinched, who was pinched, if anybody, on account of this shooting, all of which Fetter promised to do.

Subsequently he met Fetter at 35th Street and Eighth Avenue in the early morning, according to agreement, and perhaps then, or it may have been before, that a further conversation was had between the defendant and

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Fetter regarding the shooting of Boyle by the defendant, and the defendant said he lost or dropped Cassidy's pistol, as he was skirting the roof of the water closet, in his endeavor to get through to 27th Street, and that Cassidy would give him Hell for losing his pistol; and he also said that if he had not dropped the pistol that he would have had a chance to have filled the cops with lead from the height at which he had stood as he was making his escape.

Shortly after the 28th of June, or at or about the 28th of June, 1906, one John J. Fogarty, a detective sergeant, was detailed to find and take into custody this defendant. Shortly after the 28th day of June, 1906, this defendant said to various of his friends that the "cops" were getting so close to him that he would have to go out of town, and, thereupon, he did go out of town, taking with him the person, Charles Fetter, whom, he subsequently said to many people, he feared because he was afraid that Charles Fetter would leak; that there was only one man who knew he did it and that man was William Harris, but, "The red headed fellow, William Harris, would stick;" but he was afraid of Fetter, less Fetter would give it up, but, he says, "You can't tell nothing on me because you did not see the shooting." Harris is the only man who saw the shooting and I can depend on him, he will stick."

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So he took Charles Fetter away with him. They left town and were gone some three or four weeks and eventually they returned. But meantime, on the 28th of June, 1906, this deceased, Boyle, in the presence of Coroner Dooley, after being duly asked whether or not he believed that he was going to die--

MR. SULLIVAN: I object to this statement as irrelevant and incompetent, what was said to the Coroner--

MR. ELY: I have not yet stated anything that was said to the Coroner by the deceased. I am progressing, slowly however.

THE COURT: Proceed. You were going to state something which the People are going to prove?

MR. ELY: I am going to prove it, sir.

On the 28th of June, immediately after the shooting, in the presence of Coroner Dooley, the deceased made a certain statement which I will prove when the time comes. He made that statement after he had been asked, "Do you now believe that you are about to die?"

MR. SULLIVAN: I object to that.

MR. ELY: I have not said a word about what he said.

MR. SULLIVAN: I object to the statement that he had been asked anything at this time. The District Attorney is making a statement to the jury.

THE COURT: Yes, there is absolutely no necessity

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for it, Mr. Ely.

MR. ELY: Yes, very well, but it is competent, if your Honor please. It is a dying declaration. I have a right to state the whole of it now, but I won't.

This matter which I have been referring to occurred before Coroner Dooley on the 28th day of June, 1906, and I will bring it out later when I produce the Coroner on the stand. You will hear his testimony in that behalf.

On the 13th of August, 1906, this defendant was arrested by Officer John J. Fogarty, a detective sergeant. Immediately upon his being arrested, after Fogarty had merely said, "Hey, you, I want you, stop," and he covered the defendant with his pistol, the defendant came up and said, substantially, "Why, I don't know what you want me for, I didn't shoot Boyle." Whereupon, the defendant was taken to Police Headquarters and then he was taken in the presence of the deceased, who was still ill at the New York Hospital, and then in the presence of the defendant the deceased was asked who shot him.

MR. SULLIVAN: I object to this. I object to any statement going to this jury, in the opening statement of the District Attorney, as to what the deceased is alleged to have said, even though it was said in the presence of the defendant, as irrelevant and incompetent.

MR. ELY: If your Honor please, this is such a

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fundamental principle of law that the objection is frivolous, it is silly, because this is a conversation in which this defendant participated; it was in the presence of the deceased, and it is absolutely competent. I have been allowing the objections, simply because I did not care to have any objections on the record, but this is foolish.

MR. SULLIVAN: I take an exception, if your Honor please.

THE COURT: Objection overruled.

Exception.

MR. ELY: The deceased was asked who shot him. The deceased was asked, first, "Do you know this man," pointing to the defendant, and, the deceased, Boyle, said, "Yes, I do, that is Devoe, he is the man that shot me."

MR. SULLIVAN: Will your Honor give me an objection and exception to this?

MR. ELY: This is all under the exception. I do not see why I should have this interruption again.

MR. SULLIVAN: This cannot go in evidence when we come to the trial and I object to it as irrelevant, immaterial and incompetent. The Court should not permit the District Attorney to state it. His purpose is to get it into the minds of the jury. It will not be proven in this case.

MR. ELY: Surely it will.

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MR. SULLIVAN: If your Honor rules that it will, I take an exception.

Exception.

MR. SULLIVAN: On this particular subject I want to have the exception noted.

THE COURT: The exception goes to the conversation now under consideration by the District Attorney.

MR. ELY: Fogarty said, "Are you sure about that," and Boyle said, "Yes, I am positively sure;" "There can be no mistake," says Fogarty; "No," says Boyle. Devoe says, "I don't know how you can identify me as the man that shot you. You know you are on your dying bed, I don't know how the hell you can say that I could shoot you;" and he said, "All right, you shot me all right;" and subsequently, in referring to this conversation, to another witness whom I shall produce before you, one Michael O'Neill, this defendant said that he had been taken by Fogarty into the presence of the deceased, and that the deceased did identify him as being the person that shot him and that he, the defendant, said, "Why, you cock sucker, what do you mean by identifying me, or saying that on your dying bed, why don't you die game."

Gentlemen of the jury, there are other threats and there are other matters which I might descant upon in this opening, but, gentlemen, you have got the practical facts

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in this case as the People will prove them, and when the People have proven the facts in this case, as I have stated them, they will then ask for a verdict of murder in the first degree, and, it will be your duty, if those facts have been proven, beyond a reasonable doubt, under your oaths, to bring in a verdict of murder in the first degree.

THE COURT: Before there is any evidence taken, the Court wishes to say to the jury that the statements of the District Attorney are not evidence; that he has simply, within his duty, outlined the proof as he will introduce it in this case. If he does not introduce proof of the things which he has spoken of in his opening, you will disregard entirely anything that has been said on those subjects.

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THE PEOPLE'S TESTIMONY.

O T T O H . S C H U L T Z E , a witness called on behalf of
the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELY:

Q Dr. Schultze, you are a physician? A yes, sir.

Q You have been a physician, duly admitted and licensed
to practice under the laws of the State of New York, for what
period of time? A Over seventeen years.

Q Do you occupy now any official position in New York
County? A Yes, sir.

Q What is it? A Coroner's Physician, Borough of Man-
hattan.

Q How long have you been a Coroner's Physician, Borough
of Manhattan? A Since 1902.

Q You were a Coroner's Physician, at the Borough of Man-
hattan, on the 18th day of August, 1906? A Yes, sir.

Q Did you perform an autopsy on the 19th day of August,
1906? A I did.

Q Did you perform an autopsy upon the 19th day of August,
1906 at the New York Hospital? A Yes, sir.

Q Where is the New York Hospital with reference to the
City and County of New York? A In 15th street between Fifth
and Sixth Avenues.

Q In the City and County of New York? A Yes, sir.

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Q Do you remember about what hour in the day you performed that autopsy? A At noon.

Q Was it on a male or female cadaver? A On a male cadaver.

Q When you performed that autopsy upon this male cadaver, did you know whose body it was? A Yes, sir.

Q Previous to performing the autopsy on this body, had you seen one Dr. H. F. Burrows? A Yes, sir.

Q Whose body was it on which you performed the autopsy on the 19th of August, 1906, about 12 o'clock, at the New York Hospital? A The body of James Boyle.

MR. SULLIVAN: I object to that and move that it be stricken out. There is no evidence here that he knew--

MR. ELY: He has just testified that he did know. That is a subject of cross examination.

THE COURT: One of the most recent questions was, "Did you know," and the doctor answered, "I did."

Q (Now, stand right there, Doctor) Do you see this gentleman standing right there? A Yes, sir.

Q Do you know who he is? A Yes, sir.

Q What is his name? A Dr. H. F. Burrows.

MR. ELY: That is all right, thank you, Doctor.

THE COURT: Spell the name.

MR. ELY: B-u-r-r-o-w-s.

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BY MR. ELY:

Q Did you see him on the 19th of August, 1906? A Yes, sir; I did.

Q Where did you see him? A At the New York Hospital.

Q Whereabouts in the New York Hospital? A In the autopsy room of the New York Hospital.

Q And at the time you saw Dr. Burrows, in the autopsy room of the New York Hospital, on the 19th of August, 1906, was there anything there on the autopsy slab? A Yes, sir.

Q What was on the autopsy slab? A The body of a male cadaver, or a male cadaver, rather, not the body of one.

Q Is that the body you referred to as of James Boyle? A Yes, sir.

Q Do you know what position Dr. Burrows had with reference to the hospital? A He was the House Surgeon.

BY THE COURT:

Q What was his position? A House Surgeon.

BY MR. ELY:

Q Now, please describe what you found when you performed that autopsy upon the body of James Boyle at the New York Hospital, in the autopsy room or morgue, you would call it, wouldn't you, of the New York Hospital? A I would call it the autopsy room.

Q Of the New York Hospital on the 19th day of August, 1906? A I found a bullet that had severed his spinal cord.

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Q Now, Doctor, where, or about where in his back was the point of entry of this bullet? A There was a scar two inches to the right of the sixth dorsal spine, and the bullet was found in the spinal canal at the level of the body of the seventh dorsal vertebrae; the spinal cord had been severed by the bullet.

Q Do you know where that bullet is now, Doctor? A It is in my pocket.

Q Now, Doctor, you produce an envelope with some writing on it? A yes, sir.

Q In whose hand is that writing? A My own.

Q I take the envelope and feeling it I feel some substance within it. Now, Doctor, do you know who put that substance in that envelope? A I did.

Q I see that the envelope is sealed, do you know who sealed that envelope? A I did.

Q Do you remember when you put the substance that is in this envelope in it? A Yes, sir.

Q When did you? A On the 19th of August, or probably on the 20th of August.

Q In whose possession has this envelope been ever since you put the substance in it that it now contains, and you sealed it? A In my own.

Q Now, what was it that you put in this envelope?

A The bullet that I extracted from the body of James Boyle.

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Q Just open the envelope and produce the bullet?

A (Witness does so.)

MR. ELY: I offer the bullet in evidence.

(The bullet referred to, or the envelope containing it is stamped and marked People's Exhibit No.1.)

THE COURT: You offer it in evidence? Nothing has been said about it since it was taken from the envelope.

MR. ELY: The Doctor has said that this is the bullet that he extracted from the body of James Boyle and that it has been in his possession ever since he extracted it, that it was in this envelope and that he identifies it absolutely as the bullet that he extracted from the body of James Boyle, the deceased, at the time that he performed the autopsy.

MR. SULLIVAN: I object to its admission.

Objection overruled. Exception.

BY MR. ELY:

Q Now, you just get up there and take your coat off (addressing an attendant); just point out on the back of this person the place where you found the bullet. Indicate the point of entry. A (Witness illustrating.) That would be about the level of his sixth dorsal spine, and the scar was located two inches to the right of the sixth dorsal spine, at the point of my finger (illustrating). The sixth dorsal spine overlaps the body of the seventh dorsal vertebrae, and

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the bullet itself was found pretty near at the level of the scar, namely, at the level of the body of the seventh; and it was found in the spinal canal which normally contains the spinal cord, and at the point where the bullet was found the spinal cord was entirely severed, destroyed at that part.

Q That was just about on the level of the scar of the bullet, was it? A About that.

Q That the spinal cord was destroyed? A Yes, sir.

Q Now, Doctor, after your examination and the autopsy that you performed on this body of James Boyle on the day in question, the 19th day of August, 1906, did you form an opinion as to the cause of death? A Yes, sir.

Q What was it, what was the cause of death? A A bullet wound of the spinal cord.

Q Was that the direct cause of death? A That was the primary, first cause of death.

Q Well, what do you mean by that? A Well, I mean that the other lesions that he had resulted directly from the wound of the spinal cord.

Q Then you would say that the shot that severed the spinal cord was the direct cause of death? A Yes, sir.

Q Would you not? A Yes, sir.

CROSS EXAMINATION BY MR. SULLIVAN:

Q Now, Doctor, you never saw this cadaver during the life

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of the person? A No, sir.

Q You did not know, as a matter of fact, who James Boyle was? A I did not.

Q The only reason you say it was the body of James Boyle that you performed the autopsy on was because his name appeared on the slab? A No, sir.

Q Or ~~because~~ you were told so? A Yes, sir; I was told so by--

Q As a matter of fact, you have no independent personal knowledge of the identity of this body with the living person James Boyle? A No, sir.

Q Now, if the spinal column or the spinal cord is severed do you expect death immediately? A Not necessarily.

Q Are there cases where persons have lived with the spinal cord severed? A Yes, sir.

Q And been in perfect health? A Oh, no.

Q Been in perfect intellectual health? A They may have been in perfect intellectual health.

Q For a long time? A Not necessarily a long time.

Q Well, how long? A Well, we would have to look up the literature to find out the exact length. In this case the date of admission to the hospital is a matter of record.

Q There was no standard by which--

MR. SULLIVAN: I object to the last answer. That is hearsay testimony and I am not calling for that.

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THE WITNESS: All my testimony, if you will pardon me, must be hearsay in that regard, because I have never seen a man's spinal cord severed and then done the autopsy. I have to take that on faith.

BY MR. SULLIVAN:

Q On faith? A Yes, sir.

Q As a matter of fact, you don't know of any case that occurred within your own knowledge, except in the line of your experience as a physician in the way of autopsies-- you never have seen a case where a man's spinal cord was actually severed and he lived? A Oh, yes, I have seen a clinical case where the cord had been severed,-- not severed in my presence, but where the person was lying in bed, for instance, suffering from a severed spinal cord; I have seen such cases--

Q Now, when a wound of this kind is inflicted does it affect the senses of a person? A What do you mean by the senses?

Q Well, sight or hearing? A It does not affect their sight; it may not affect their hearing. What other senses do you want to know about?

Q Would you say that the--

MR. ELY: He is asking you what other senses you want to know about.

MR. SULLIVAN: He has answered my question.

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BY MR. SULLIVAN:

Q Well, do you say that the shock to his system from the severing of the spinal cord does not affect the sense of sight? A Well, I have answered that.

Q What? A It need not affect the sense of sight.

Q Would you expect it to? A No, sir; not necessarily.

O T T O L . G O E H L E , a witness called on behalf of the People, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELY:

Q What is your business? A I am First Assistant Senior at the New York Hospital.

Q How long have you been connected with the New York Hospital? A Fourteen months.

Q Were you connected with the New York Hospital on the 28th of June, 1906? A Yes, sir.

Q What was your relation to the hospital at that time, what did you do? A I was ambulance surgeon at that time.

Q Shortly after 1 o'clock, or after 1 o'clock, on the morning of the 28th of June, 1906, did you receive a call to go to 28th Street? A Yes, sir.

Q Do you recollect the fact or can you refresh your memory as to about what hour it actually was, after 1 o'clock,

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that you went to, or received this call to go to 28th Street?

A Yes, sir.

Q What time was it? A The call came in at 1.39.

Q When the call came in at 1.39, what did you do?

A As a rule--

Q You got in the ambulance and skipped? A Yes, sir; it was a hurry call and I hurried off.

Q When you got up to-- whereabouts on 28th Street did you go? A On 28th Street right near the corner of Seventh Avenue, on the southeast corner.

Q When you got to the corner, the southeast corner of 28th Street and Seventh Avenue, what did you find? A I found a man lying on the sidewalk about-- well, it was closer to the building than to the gutter; found him lying on his back supported by some man, a man who was holding his head.

Q Supported by some man who was holding his head? A Yes, sir; as well as I can remember.

Q Do you know Officer Sofsky? A No, sir.

Q Did the officer accompany you with the deceased to the New York Hospital? A I could not-- I don't remember.

Q When you took this person to the hospital, who did you hand him over to? A Why, I took him down in the ambulance room, in our accident ward, and I examined him there after being stripped I examined him; then I transferred him to the ward and turned him over to the House Surgeon.

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