In the

Supreme Court of the United States

ROBERT H. DONNELLY,

Petitioner,

v. No. 72-1570

BENJAMIN A. DeCHRISTOFORO,

Respondent.

Washington, D. C.
February 20, 1974

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The above-entitled matter came on for argument at 10:57 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID A. MILLS, ESQ., Assistant Attorney General, Chief, Criminal Appellate Section, State of Massachusetts, Boston, Massachusetts, for the Petitioner.

PAUL T. SMITH, ESQ., 89 State Street, Boston, Massachusetts 02109, for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1570, Donnelly against DeChristoforo.

Mr. Mills.

ORAL ARGUMENT OF DAVID A. MILLS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MILLS: Mr. Chief Justice, and may it please the Court:

This case is on Certiorari to the First Circuit Court of Appeals to review a judgment of that court vacating an order of the District Court for the District of Massachusetts which had denied without prejudice a petition for habeas corpus presented by the respondent pursuant to Title 28, Section 2254.

The basis of the State custody of the petitioner in that proceeding had been effected by a conviction in the State Trial Court of murder in the first degree and possession of firearms violations.

The respondent was indicted in May of 1967 for murder in the first degree and firearm possession charges. He was apprehended approximately twenty months later and was brought to trial with a co-defendant, one Gagliardi, in April of 1969.

The petitioner wishes to stress the component of that trial. The trial was a seven-day trial. It was preceded with pre-trial discovery, including eight pre-trial discovery motions,

seven of which were allowed.

One of the pre-trial discovery motions was a motion for bill of particulars, which, according to Massachusetts practice, was read to the jury.

Additionally, the trial included opening instructions by the judge to the jury, opening remarks by counsel, the testimony of two primary police witnesses, two secondary police witnesses, a chemist, a ballistician, a pathologist, two FBI agents and several civilian witnesses.

Additionally, at the course of the trial, several exhibits were introduced, including weapons and documents.

Additional components of the trial included closing remarks by the Assistant District Attorney, defense counsel, closing instructions by the jury and an unsworn statement by the respondent as a defendant, a practice which was in effect in 1969 in Massachusetts.

It should also be noted that the trial was preceded by a view.

Those are the components of the trial, the fairness of which is in question before this Court today.

The uncontradicted evidence before the Court tended to show that the respondent, along with three other persons, was seen in a car at approximately 4:00 o'clock in the morning on April 18, 1967. He was seen there by two police officers, each of whom testified at the trial.

The uncontradicted evidence further tends to show that when Gagliardi, the co-defendant, was the driver of the car, that the respondent in the case before this Court, then defendant, DeChristoforo, was a passenger in the rear seat of the car, seated behind Gagliardi, that a third live passenger, one Oreto, was also seated in the back seat, and that a fourth person, one Lanzi, who appeared to be asleep, was in the front passenger seat of the car.

The evidence further tends to show that DeChristoforo and Gagliardi were questioned by the police at the scene prior to the determination by the police that Lanzi was not, in fact, asleep, but was dead, having been shot once in the head and three times in the side.

Apparently, and according to the uncontradicted testimony, DeChristoforo and Gagliardi were questioned at the scene. Evidence which is contested, in part, was introduced at the trial to show that at the scene, respondent DeChristoforo, when questioned as to his own identity and purpose, gave the police a wrong name, a wrong description of the reason why they were there in that place and identified the deceased victim by a name other than his own. In effect, the respondent said -- did not say that his name was DeChristoforo, said that the deceased person had been injured in a fight in Revere and was being taken to the hospital and gave a wrong description, a wrong name with respect to the deceased.

Gagliardi and the respondent DeChristoforo then left the scene. It was then determined that Lanzi was dead.

The third occupant, the third live occupant of the car,was arrested at that time.

During the course of the trial, additionally there was evidence that death had been caused by gunshot wounds that occurred in the car between 3:00 and 4:00 o'clock in the morning.

Additionally, at the scene, the police found a 38 revolver in the back seat where Oreto had been seated,that had been shot once.

An additional weapon, a Derringer, fully loaded, on the floor in front of the seat where respondent DeChristoforo had been seated, and it was also evidenced at the trial that a third revolver was later found buried in an area adjacent to the location of the car, and evidence by way of ballistics was introduced to show that the wound in the head of the decedent had been caused by the gun that was found on the back seat and that the three shots in the side of the decedent had been caused by that revolver that was later found buried near the scene.

Now, at the close of all of the evidence, co-defendant Gagliardi pleaded guilty in the absence of the jury. When the jury was brought into the courtroom, the trial judge instructed, or remarked to the jurors, and I quote, and the quote is contained on page 7 of the petitioner's brief.

"Mr. Foreman,and gentlemen of the jury, you have

noted that the defendant Cagliardi is not in the dock. He has pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChristoforo."

That is contained also in the Appendix record at page 99.

At that time, consistent with what the petitioner suggests were the admirable trial tactics of defendant's counsel, no objection was made to that remark. No instruction was asked and no instruction was given. Therefore, respondent's counsel proceeded with his closing argument to the jury.

The prosecutor's argument, as is the custom in Massachusetts, followed the defence counsel's closing argument.

And, at the beginning, I hesitate to read to the Court, and yet I am reluctant to read a single remark to this Court without reading some of the context in which that single remark occurred.

Q What are you reading from?

MR. MILLS: From petitioner's brief, page 9. The prosecutor's closing remark in its entirety appears in the record Appendix.

The prosecutor's closing argument. Let me preface my argument by saying that, first of all, I am aware that what I say is really an argument, because the word "argument" presupposes that I am prejudiced to the cause that I represent,

which, of course, I am.

"I think that the very nature of the system, being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it."

I would like to skip down one paragraph and I will cease reading.

"And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that, and I am sure that my opening statement to you is in no way evident in the case and won't be considered by you as evidence."

The prosecutor, in his argument, the Assistant District Attorney, then went on to explain to the jury his version of the case, but suffice it to say that he argued to the jury. His argument is included in full in the record Appendix.

During that argument, the Assistant District Attorney made a statement which is contained in all of the papers in the case and in petitioner's brief at page 11.

"I don't know what they want you to do by way of a verdict. They said they hope you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."

An objection to this remark was immediately made and although the record is not completely clear on the point, and I respectfully direct the Court's attention to the record Appendix at page 129, at that point, Mr. Smith said, "I object to that." The court said, "I don't think -- ." "Mr. Smith: That's not fair argument." "The court: No." "Mr. Smith: That isn't so."

I think it is fair to say that the Assistant District Attorney then proceeded with his argument, talking about another topic.

The record shows that the trial judge indicated that had an objection -- that the objection had, in fact, been sustained, and that had counsel requested instructions at that time, they would have been given.

Q Mr. Mills, I am just curious. The prosecutor here was a Mr. Irwin, wasn't it?

MR. MILLS: Yes, Your Honor.

Q Is he the one who is now the Assistant AG of Massachusetts?

MR. MILLS: He is an Assistant Attorney General in Massachusetts, Your Honor.

Q Whose name is on the briefs here.

MR. MILLS: It is, yes, Your Honor.

May it please the Court:

Following the closing argument of the Assistant District

Attorney, the defendant, now respondent in this Court, was allowed to make an unsworn statement to the jury. Thereafter, followed the instructions of the court.

Q So the unsworn statement by the defendant comes after the closing argument of counsel in Massachusetts?

MR. MILLS: Yes, Your Honor, it does, although there is a question as to whether or not there is any such thing any more in Massachusetts called an unsworn statement.

Q But it did at this time?

MR. MILLS: In 1969, yes, Your Honor.

The judge, in his charge -- first, I think it is only fair to say something about instructions that were requested by the defendant, now respondent's counsel.

Specific instructions to the jury, by way of a writing, were made to the court. They are also contained in the record Appendix. The court did not give the specific instructions that were requested by defendant's counsel.

The court charged the jury, and the portion of the charge which we wish this Court to consider is contained on page 142 of the record Appendix.

Given the fact that the defendant's unsworn statement had been the most immediate preceding event in the trial, following the charge, the trial judge -- and we suggest properly -- first commented upon the unsworn statement, basically saying we suggest that it is not evidence.

And at page 143, the judge instructed the jury -- and I beg the Court's indulgence for permission to read his instruction.

"Let me begin this charge by saying to you, that, as I have said with regard to unsworn statements, not subject to cross-examination of the defendant, it is not evidence, nor are arguments of counsel nor the opening of counsel -- whether it be the Assistant District Attorney in this case or whether it be Mr. Smith -- It is not evidence for your consideration.

"Opening of counsel made by either the District Attorney or Mr. Smith on behalf of his client are not evidence, but they are merely the statements by the District Attorney or by Mr. Smith, the defense counsel, for what they respectively hope to prove."

Drop down two lines.

To the next full paragraph, excuse me, Your Honors.

"The closing arguments, too, Madam and gentlemen of the jury, the counsel very often become over zealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard."

And now, with particular reference to that paragraph of instructions, beginning at page -- at the bottom of page 143 of the record Appendix, the judge continued.

"Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made."

The jury returned a verdict of murder in the first-degree with a recommendation that the death penalty not be imposed and verdicts of guilty on each of two counts of a firearms charge.

The case -- prior to appeal in the State courts, the defendant moved for a new trial in the State court, and the case was then appealed to the Supreme Judicial Court of the Commonwealth on several assignments of error, including an assignment of the denial of the defendant's motion for mistrial.

In other words, the question of the propriety and the alleged prejudice of the remarks made by the Assistant District Attorney in his closing were brought to the full court in Massachusetts.

Q The factual situation -- you've already pointed out that the record shows that there were three pistols involved here, two in the car and one had been removed from the car, and

there are three live passengers in the car.

Was there anything in the record that identifies any of those firearms with the specific defendants, the three passengers, by way of gun registration, or that sort of thing?

MR. MILLS: Your Honor, interestingly enough, the only identification of a weapon, as to any particular defendant, had to do with the position of the weapon in the car, and the fact that one weapon was found in an area where the driver, Gagliardi, had left after being questioned by the police. And the record explicitly shows that all identification had been previously removed from the firearms.

The case was seasonably appealed to the Supreme Judicial Court on this question, and the court, by a solid majority, and over a then very strenuous and explicit dissent by our Chief Justice, which was concurred by another justice, concluded that the --

And I should note, excuse me, Your Honors, that our court, the Supreme Judicial Court, unanimously noted the impropriety of these remarks and soundly condemned them, finding, however, that the argument, as a whole, did not require a mistrial.

And I would like to suggest the criteria that the court used in coming to its conclusion, and they are, of course, contained in the Opinion of the Supreme Judicial Court which is reprinted in full in the record Appendix.

Q Did the defense counsel, in his opening statement to the jury, outline some evidence that he intended to prove which he later did not support with evidence?

MR. MILLS: It is the position of the petitioner, Your Honor, that several items in the opening and in the closing made by defense counsel were never proven at trial.

Q It is not unique --

MR. MILLS: Unique in what --

Q Well, it is not unique in the experience of trying a case that something you say in your opening statement, it turns out that you can't prove.

MR. MILLS: Unique in the sense that it is also contained in your closing statement, Your Honor. We suggest that it perhaps is unique.

The Supreme Judicial Court explicitly examined the whole argument and the whole trial proceeding, consistent with an obligation under Massachusetts law, that in capital cases the entire trial proceeding be examined.

The Supreme Judicial Court examined the judge's instructions, the lack of an immediate request for instructions after some of the remarks were made.

Q Your opponent contends, as I understant it, that court adjourned rather suddenly after the argument in the afternoon and that he really didn't have an opportunity to make the request to the trial judge until the next morning.

MR. MILLS: I suggest there is nothing in the record to indicate, Your Honor, that respondent's -- excuse me, defendant's counsel could not have continued his objection and requested a bench conference at that juncture in the instructions, as he had at various portions in the trial.

And, it should be noted that as additional components of this trial objections numbering approximately 200 were made, and there are 105 explicit exceptions noted on the record of this trial.

So it was not a trial with inactivity on the part of defendant's counsel.

Q Is the lobby conference the Massachusetts equivalent of a conference in chambers?

MR. MILLS: There is nothing in the record, Your Honor, but I can only suggest that there are lobby conferences and bench conferences. Lobby conferences would be in the judge's office, perhaps, for setting ground rules and schedules of trial. A bench conference is during the course of live testimony in the courtroom.

The Supreme Judicial Court -- our Supreme Judicial Court also noted the weight of the evidence that had been introduced against the accused and the improbability that a jury in Massachusetts would draw the subtle inferences that have been suggested by the defendant in the State court, in the Federal District Court, that have been adopted by the

Circuit Court and that are suggested before this Court today.

I have noted the dissent, I am sure, of our Chief Justice, to the majority opinion in Massachusetts.

A petition for habeas corpus was filed in the District Court for the District of Massachusetts.

The petition, the return, the memorandum of United States Magistrate Davis, and the transcript of the arguments before the District judge on this petition are contained in whole in the Appendix. The petition was denied without prejudice, the District judge concluding with respect to the claim of prejudice based upon the Assistant District Attorney's remarks the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial.

On appeal to the Circuit Court, the court concerned itself, and concerned itself explicitly, solely with what the petitioner claimed had been improper argument by the prosecuting attorney, and determined that that particular remark, "I don't know what they want you to do by way of a verdict," when read in the light of the preceding instruction to the jury at the time of the plea of co-defendant Gagliardi, in effect, amounted to a representation by the Assistant District Attorney to the jury that the defendant DeChristoforo had offered to plead guilty, and that his plea had been rejected.

The parties stipulated before the Circuit Court, after

argument in this case, that no offer to plea had been solicited, that no offer to plea had been made, and that the defendant insisted upon a trial at all times, and this is contained within the text of the Circuit Court's opinion.

The Circuit Court vacated the order of the District Court.

The primary point that the petitioner suggests to this Court this morning is that the Court of Appeals failed to fairly consider the entire trial of the respondent in concluding that this remark, when read in the light of an earlier instruction, deprived him of a fair trial.

In this regard, we refer, again, to the 105 exceptions to the 12 or 14 witnesses, to the 7 days of trial, to the view, to the bill of particulars, to the pre-trial discovery, to all of the items that have been mentioned, including the items that have been mentioned in this Court's December decision of Cuff v. Norton, which, as the Court recalls, involved the question of a particular instruction by a trial judge, and a standard of review.

We suggest that the standard of review which has been applicable in lower Federal courts, including our First Circuit, in the Patriarca case which is cited in the brief, makes it incumbent upon the Circuit Court and the District Court if it is to examine an allegation of impropriety by a State prosecutor, to examine all of the trial and not to look at

one particular remark in a vacuum.

We suggest that it may not have been an absolute vacuum, but when compared to the standard of review employed by our own Supreme Judicial Court when it examined this case, we suggest that the examination tendered by the Circuit Court was a virtual vacuum because, although it examined one additional earlier instruction, we do not feel that that court adequately examined the entire trial and that this is a basis of error.

Additionally --

Q Was the full trial record before the Court of Appeals?

MR. MILLS: Yes, Your Honor, the entire --

Q How can you assume they didn't look at it?

MR. MILLS: Well, explicitly, the court did not say that it looked at it, Your Honor, and stated --

Q -- feel better?

MR. MILLS: I suppose the petitioner would have felt better if the court said it had examined all of the trial, Your Honor, including all the components of the trial. And the court did explicitly say at the outset that we are concerned solely with what petitioner contends were improper closing argument.

The Circuit Court, the petitioner suggests, was also in error on the basis of certain premises that it used in reaching its conclusion that this remark was effectively a

representation by the Assistant District Attorney to the jury that the defendant had offered to plead and his plea had been rejected.

First, the Circuit Court, without any foundation in the record, suggested that the co-defendant's plea was a plea to second-degree murder.

The court further suggested that a jury must always wonder, to some extent, why a defendant has not pleaded.

We suggest there is no basis for this in the record, and that it is an unfair conclusion to draw with respect to a jury, that a defendant -- excuse me, that a jury knows that a defendant who has not sought to plead, either did not wish to plead or he was deterred by the belief that the prosecutor would be unreceptive, a sophistication and attributing to the jury knowledge and belief that we do not feel is supported by the record and is not fairly attributed to a Massachusetts jury.

The Circuit Court also suggested that the jury does not know whether or not a defendant's offer of plea has been made and refused, but the jury knows that the prosecutor knows.

And, we suggest that this is violative, factually, of the stipulation that was entered into by the parties before that court.

We suggest that the First Circuit has concluded that plea bargaining takes place in all criminal trials in

Massachusetts, and we suggest there is nothing in the record to support that and nothing in this particular case. Indeed, the parties stipulated that no offer of plea had been accepted and -- excuse me, no offer to plead had been made and no offer of a plea had been solicited.

And, finally, with respect to the argument by the respondent that what was substantially done by the Assistant District Attorney was a misrepresentation of fact, that as a matter of fact, he did not believe what he said when he made an improper statement of opinion to the jury that he did not believe what he said.

We suggest that if the Circuit Court were to engage in speculation, it would have been more reasonable to speculate that, as a matter of Massachusetts law, based upon the elements of manslaughter as contained in Massachusetts cases, the improper suggestion of opinion by the Assistant District Attorney was referring to manslaughter, and, in fact, was an opinion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mills.

Mr. Smith.

ORAL ARGUMENT OF PAUL T. SMITH, ESQ.,

FOR THE RESPONDENT

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This is a case involving an affirmative falsity of a

prosecutor's statements, and not a case of a procedural error, arising from a technically improper argument, rectified by curative instructions.

As the Court of Appeals said, at Appendix 241, "We have before us a case where the prosecutor, despite the fact that it was totally untrue, strongly indicated to the jury that the defendant had offered to plead guilty."

Q Mr. Smith, why was the Court of Appeals able to reach that conclusion as emphatically as it did on the basis of the statement, "They hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."

There is no reference in the prosecutor's comment to anything about a plea.

MR. SMITH: Well, I think, Mr. Justice, that the rationale of the court and my argument is that when a prosecutor made that statement he well knew, at the time, that the respondent had not sought to plead guilty to any offense. He also well knew that if the respondent was seeking something a little less than first-degree murder, he could have had it for the asking, because there had been two other defendants, Oreto and Gagliardi, both of whom had pleaded guilty to second-degree murder on the recommendation of the same prosecutor, and had been given life sentences.

Q But the words used weren't that he sought them. They

were, "You find him guilty of something a little less than first-degree murder."

Why isn't the fair inference from that that what you, as his attorney, want, you said you want a verdict of acquittal, but really you would be damn happy to get a verdict of second-degree murder?

MR. SMITH: I would not. Oh, I see.

Q I am not suggesting you would have, but why isn't that the fair inference from the prosecutor's statement?

MR. SMITH: Because he couldn't have had that opinion, Your Honor.

Knowing that Oreto and Gagliardi -- and I am sure Mr. Mills didn't intend to mislead the Court -- the Commonwealth in its closing argument conceded that Oreto was the one who fired one shot into the head of Lanzi, the deceased, and that Gagliardi had fired three shots into his side, and conceded that DeChristoforo had never fired any shots.

So that, you had a situation where the two triggermen, Gagliardi and Oreto, were allowed to plead guilty to second-degree murder and were given life sentences --

Q Do we know that from the record, that both of them pleaded guilty to second-degree murder?

MR. SMITH: Yes, Your Honor.

And, the District Attorney knew that, and, as they say in their petition of Certiorari and in their brief, and

I think in petition for cert at page 25 and in their brief at page 24 that it would be silly to argue to say that they wouldn't have given DeChristoforo a plea to second degree had he asked for it. So that at the time the District Attorney made that argument, Mr. Justice Rehnquist, he knew that that was a false argument. He knew that we weren't looking for something a little bit less because we could have got a little bit less, just as the other two did.

Q Do I understand that the Court of Appeals said that the jury could interpret that there had been plea bargaining?

MR. SMITH: I didn't read anything in the opinion of the court that says anything about plea bargaining.

Q Offered to plead guilty?

MR. SMITH: Oh, there was a stipulation --

Q No, no, I am talking about in the trial. Did the jury know anything about plea bargaining?

MR. SMITH: Not that I know of.

Q It didn't know anything about pleading guilty?

MR. SMITH: They knew that Gagliardi had pleaded guilty.

Q Well, did they know what it meant, or anything?

MR. SMITH: No.

Q So, how can you draw any conclusion from what the prosecutor said, other than that this man expects to get a lesser crime conviction right here on the basis of what he's

put in.

MR. SMITH: That he is seeking something less.

Q Yes.

MR. SMITH: Well, I think the conclusion is obvious that he was saying to the jury that I, as a prosecutor who went along with a plea of guilty for Gagliardi, after the evidence had been in before that jury that Gagliardi had shot the deceased three times in the side, that I, as a prosecutor, having agreed and recommended to the court, in effect, that the court accept a plea of guilty to second-degree murder --

Q The jury didn't know that the prosecutor recommended it. All they knew the man had pleaded guilty.

MR. SMITH: That's so, Your Honor.

Q Right.

MR. SMITH: That's so.

Q I am just limiting this to what he said, and I could interpret it, as a juror, I think, that this man would like to get a lesser conviction than first-degree murder. He would rather not get the death penalty.

MR. SMITH: This may be so, Mr. Justice.

Q Well, what else can you get out of that language?

MR. SMITH: I beg your pardon?

Q What else can you get out of the prosecutor's language?

MR. SMITH: I think that what you get out of that

language is that the -- that the respondent was admitting his guilt. If he were seeking something a little less than first-degree murder, he obviously was admitting that he was guilty.

Q In Massachusetts, is it permissible for the defense counsel to argue that his man is innocent, but at the same time if you find him guilty give him guilty of manslaughter? Is that ever done?

MR. SMITH: Yes.

Q Well, that's what I am talking about.

MR. SMITH: But, Mr. Justice, that wasn't the case here. By way of the very stipulation, the respondent here --

Q The sipulation came in after this.

MR. SMITH: Yes, but --

Q The jury hadn't seen the stipulation until yet, right?

MR. SMITH: That's correct, Mr. Justice.

Q And you are talking about the effect on the jury. So what good is the stipulation if the jury never saw it?

MR. SMITH: Well, I am only saying that the stipulation establishes that DeChristoforo had never sought to plead guilty to any offense, and that the statement by the prosecutor knowing that he had never sought to plead guilty to any offense, and knowing also that if DeChristoforo had sought to plead guilty he could have had it for the asking.

The statement by the prosecutor, I quite frankly think

that they hope you find him guilty of something a little less than first-degree murder, is a false statement.

Q Now, let me pursue that with you a little. You've said that twice now. False statement. It is expressed as an opinion, of course, is it not? You say there is no basis whatever for an opinion.

Laying aside the propriety of the remark, now just going to your claim that the prosecutor knew this was false, you say there is no basis in this record for an opinion that this man might be simply hoping for a lesser included offense?

MR. SMITH: That's correct and I would like to explain why, Mr. Chief Justice.

Q Let me pursue it a moment.

There's three pistols in the car and three men and a dead man.

Don't you think a jury, or juror, could reasonably infer from that that each of these men had had a gun, and that each of them was prepared to do whatever was necessary to dispose of this fellow?

MR. SMITH: Yes, that may be so, Mr. Chief Justice.

Q It would be a reasonable inference that a juror could draw from the physical evidence in this case.

MR. SMITH: I think that Mr. Mills unwittingly mislead Your Honor in answering a question put to him by you.

The Commonwealth conceded that the gun that was found

on the seat where Oreto had been seated, had been fired by Oreto into the back of the head of the deceased, that the gun that was later found elsewhere was the gun that had been used by Gagliardi to fire the three shots. The third gun that was found in there was a Derringer, fully loaded, had not been used. During the course of the trial there was evidence that Oreto had worn black gloves, black silk gloves, kidskin gloves. The evidence appeared to be, and certainly there was no evidence to the contrary, that DeChristoforo had no gloves. There were no fingerprints on the Derringer which was found and which was fully loaded in the back of the car.

Now, as to whether or not the prosecutor could have had an honest opinion, in saying well, I don't know what they want, I think that what they want is something a little less than first-degree murder, I'd submit that,one, a matter is within the personal knowledge of the speaker, that qualifying the phrase by the words, "I think," doesn't convert a falsehood into a possible truth or a factual statement into an opinion.

Now, he knew the prosecutor was speaking of a factual proposition. He knew that no offer, no attempt had been made to plead to anything in the case.

Q But what he said was that they hope that you find him guilty of something. He didn't say anything about a plea.

MR. SMITH: Mr. Justice, he is testifying from his knowledge. That jury sitting there has a right to believe that

when a district attorney says to them, "I quite frankly believe" something, that he has a source of information unknown to them, not in a record, not put on in the trial of the case, that, as a District Attorney, he knows something, and when he says, "I quite frankly believe," and knows that he can't believe that, but he says this to a jury, I think that the jury has a right to draw the conclusion that DeChristoforo made some overture to plead guilty to something.

Q Mr. Smith, what offenses were the jury given a choice of in the instructions?

MR. SMITH: Under the Massachusetts law, the court is required to instruct on first-degree, second-degree and manslaughter.

Q So, what he is saying is that you, the counsel for the defendants in this case, really would like to get manslaughter.

MR. SMITH: I think he went further than that. He said he quite frankly believed that DeChristoforo wanted.

Q Well, what's wrong with that?

MR. SMITH: Well, because it isn't the fact, and he knew it wasn't the fact, and stating that to the jury,obviously, is a statement that DeChristoforo has indicated he is guilty of something.

Q So?

MR. SMITH: Now, this was a case of a joint venture

charge. Although during the whole course of the trial I made every effort to get the Commonwealth to concede that Gagliardi had fired the three shots, that Oreto had fired the one shot, and that DeChristoforo had never fired any shots, --

Q He still could have been guilty of first-degree murder, or is it not so in Massachusetts?

MR. SMITH: Yes. If he had been engaged in a joint venture here, and I argued that to the court in the lobby or in chambers, and the District Attorney said that he would not agree to that.

As a consequence, we had to try this case on the theory that the Commonwealth was going to try to show that DeChristoforo had fired some shots here, and it wasn't until after my closing argument, when the prosecutor made his closing argument, that for the first time he conceded, and he said to the jury the theory of the Commonwealth's case is that Gagliardi shot him three times in the side and that Oreto shot him once through the head.

Q The defense attorney opens the closing argument?

MR. SMITH: Yes, Your Honor.

Q And then the prosecutor responds. Then do you have a right to rebuttal?

MR. SMITH: No, Your Honor, we have no right to rebut, and our position is that when the prosecutor made this statement he was, in effect, testifying. We had no right to cross-examine

him. We had no right to rebut it, and that was left with the jury. The impression was clearly left that DeChristoforo was seeking something less than first-degree murder and, in effect, a representation to the jury that he, the prosecutor, had reason to believe that, because he quite frankly thought that to be so and, as a consequence DeChristoforo was, in effect, confessing to the crime, but was seeking to get maybe a better deal.

Now, I submit that -- I submit that this false statement, and it is false; it wasn't simply an opinion. It was an unequivocable statement that he frankly believed a matter that he couldn't possibly frankly believe, because he knew right along that there was -- that we were going to trial all the way through on this thing, and when he made that argument, which the petitioner concedes is an improper argument, I say it reaches constitutional dimensions and that we were deprived of due process as a result.

Q Mr. Smith, let me ask you what is obviously a hypothetical question to probe at the impact of this kind of statement on the jury.

Suppose instead of putting it the way he did, he had said, after his first sentence, "I don't know what they want you to do by way of a verdict," but then went on, "But I suggest to you when you get in the jury room you ask yourselves whether what they really want is that you find him guilty of

something a little less than first-degree murder."

Would you have thought that was all right?

MR. SMITH: I don't think it would have reached the dimensions that his argument made, but I don't approve of that type of an argument, but I don't think I could quarrel with it to the extent that I am quarreling with this argument.

Q You are suggesting that it would be an impropriety to pose the kind of questions the jurors should consider?

MR. SMITH: No. I think that is perfectly proper, Mr. Chief Justice. I do think -- I think that had he said that the evidence, or the argument by defense counsel is such as to lead you to believe that this is only a case of manslaughter, which, of course, it couldn't be in this instance, because it was a joint venture, and this was a first-degree murder case. There isn't any question about it.

It was a joint venture and if he was guilty he was guilty at least to the same degree as the others who actually pleaded guilty to second-degree murder. And I don't see how there could have been a manslaughter unless the jury got very --

Q Isn't it quite common for the jury to find the triggerman, as he would be called, guilty of a higher degree of homocide than the driver of the car, for example? Isn't it a common thing every day in every State in the Union?

MR. SMITH: Yes.

Q So, you had a reasonable case for a lesser offense than first-degree murder here.

MR. SMITH: Well, frankly, I wasn't thinking in those terms of manslaughter, or anything else, certainly by the very fact that we didn't make any attempt to negotiate a plea, whereas the prosecutor points out in his brief, he says it would make not a whit of sense to refuse to give DeChristoforo at least the same type of consideration as they gave to the triggermen, to Gagliardi and the other fellow.

To get back to your first -- now that I think more of it, I think, Mr. Chief Justice, that that is so. I think that perhaps in the trial of a case an advocate does have in mind the possibility that if the jury is going to come in with a guilty, that it be the least possible degree, and I think that the statement, as you put it, if he had made that statement to the jury, I don't think there would be any quarrel.

Q You mean as to the question they should ask themselves.

MR. SMITH: Right. I don't think there would be any quarrel, but I think when he said, "I quite frankly believe this. "I quite frankly think that he is seeking something other than first degree murder," I think that a jury sitting there has every reason to believe that he knows of something that they don't know about, and that that is testimony, and that we were deprived, of course, of a right of confrontation.

And, I might point this up. Although he says, in

his brief, the petitioners say in their brief, that it doesn't make a whit of sense that they wouldn't have offered him, DeChristoforo, something less than first-degree murder, but at the time of trial it made a good deal of sense to the prosecutor, because he argued to the jury, "And he (pointing to DeChristoforo) more than anybody else, I think, is more reprehensible than the other two combined, because he was the man who supposedly was the friend of Lanzi, the victim.

So, during the trial, he had it appear that DeChristoforo was the real bad man in the situation, that the two triggermen weren't the bad fellows, and so the posture at trial was that he wouldn't give DeChristoforo a plea of second-degree -- except a plea of second-degree.

In short -- and then he compounded it. After the objection was made to the argument, by saying to the jury that, "I believe that there is no doubt in this case, none whatsoever."

Now, all I'm arguing to this Court is that the statement made by the prosecutor goes beyond a technical error in arguing. It was a false statement. It is tantamount to the introduction of false evidence and that -- and that this Court should regard it in the same fashion that it has regarded the Alcorta case, Napue, Miller v. Pate, Giglio. A false statement made by the prosecutor which had, at least -- which at least created an impression in the minds of the jury

that the defendant here had offered to plead guilty and had not.

I just close by saying that there was some reference to provocation. I would submit that that is a specious argument. There was no provocation. We've set forth in our brief the opening and the fact is that in the opening, as Mr. Justice Rehnquist pointed out, a lot of us make openings which we can't necessarily establish, but virtually every matter stated in the opening was either introduced in evidence or there was a proffer of proof. For example, I offered to prove that DeChristoforo, when he fled, fled to his grandmother's house, fled because he was in fear of his life. And we made an offer of proof on that. The fact that the court didn't permit us to introduce that evidence certainly should not be used as an argument for provocation.

Q How were you going to prove that, Mr.Smith? By what kind of evidence?

MR. SMITH: Well, the grandmother was prepared to testify that he came running up to the house, and the offer of proof was, "Nanna, they've just killed"-- whatever Lanzi's first name was -- "They've just killed Joey, and I am afraid they are going to kill me and I've got to hide."

Q Did he speak to that effect in his own sworn statement?

MR. SMITH: He did not use that language, as I recall, Mr. Justice.

Q Did he not indicate he was afraid of his life?

MR. SMITH: That's correct.

Q So it came in to the jury in any event, through his mouth.

MR. SMITH: That's right, but not as evidence.

The statement by a person accused of first-degree murder is an unsworn statement.

Q Yes.

MR. SMITH: And is not regarded as evidence.

Q Did the prosecutor argue that if DeChristoforo really had been innocent, if his claim was bona fide, in this respect, that he was merely a passenger, that he would have welcomed the presence of the officers and immediately told the officers the whole story of what had happened.

MR. SMITH: He did argue that, and I might point out that -- the evidence against DeChristoforo was that he was in the automobile at the time they found a man dead, that he made false statements to Officer Carr concerning his own identity, concerning the identity of the man in the front seat of the automobile, the deceased, and that he then fled.

The facts were that Officer Carr,in a prior hearing, on a probable cause against Oreto, under oath, stated that it was Oreto who had given a false name of the man in there, that it was Oreto who had made the false statements which at this trial he was attributing to DeChristoforo.

Now, this is not a case where the evidence was overwhelming, by any means.

Q Was there any evidence of motive at all?

MR. SMITH: None at all. In fact, the evidence was that DeChristoforo and Lanzi were close personal friends and that was brought out by the Commonwealth itself.

As I say, I am sure that Mr. Mills didn't intend to mislead the Court with respect to the guns. There was nothing to tie DeChristoforo up to the Derringer that was in the back seat. There was no evidence that he had ever owned a gun. In fact, there was uncontradicted evidence from a police officer in the district, from friends, that this young man had an excellent reputation, not only for honesty, but for non-violence in the State House where he had worked as a page for seven or eight years just prior to getting this other job, and in the community where he lived.

The only evidence that there was involving a gun was the argument made by the prosecutor when he said -- and there was no foundation for this -- "You know these people. These are the kind of people who carry guns that can never be identified and never be traced."

I don't believe that the argument, picking out an argument that was improper, and there were many improper arguments, in and of themselves, would warrant this Court to sustain the Court of Appeals, but I do believe that there was a

false argument made here, he knew it was false, and it was done for the purpose of misleading that jury and that the jury was mislead.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:54 o'clock a.m., the case in the above-entitled matter was submitted.)