

1946

## Marshalling of Proofs in Homicide Cases

Frederick T. Doyle

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Frederick T. Doyle, Marshalling of Proofs in Homicide Cases, 36 J. Crim. L. & Criminology 473 (1945-1946)

This Criminology is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

# AMERICAN JOURNAL of POLICE SCIENCE

---

## MARSHALLING OF PROOFS IN HOMICIDE CASES

---

Frederick T. Doyle

---

For some years, Mr. Doyle has been extending his reputation as a prosecuting attorney by virtue of his noteworthy success in the trial of felony cases as First Assistant to the District Attorney of Suffolk County, Massachusetts. In the present study he shows how the District Attorney's office must go about the "Marshalling of Proofs in Homicide Cases" if the vital evidence is to be brought under control in advance of trial.—EDITOR.

---

## THE PROSECUTING ATTORNEY AS A SERVANT OF JUSTICE

The prosecuting official is the most important agent in the administration of the criminal law. He affects to a high degree the liberty of the individual, the good order of society, and the safety of the community. He must administer his office wholly in the interest of the people at large, and with an eye single to their welfare.<sup>1</sup> In a criminal prosecution, the obligation of the prosecutor is not that he shall win a case but that justice shall be done. He may strike hard blows but he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. The average jury in a greater or lesser degree has confidence that these obligations will be faithfully observed.<sup>2</sup> In reporting a trial for murder at Rome A.D. 200, the writer described the interrogating magistrate as one who went about his investigation like a fair minded man who meant to favor no one, and to ferret out the exact truth.<sup>3</sup> The work of the prosecutor in a homicide case can be divided into three main divisions: the accumulation of the evidence; the presentation to the Grand Jury; and the trial of the defendant.

---

<sup>1</sup> *Atty. Gen. v. Tufts*, 239 Mass. 458 at 489, 132 N.E. 322 (1921).

<sup>2</sup> *Berger v. U.S.*, 295 U.S. 78 at 88, 55 S. Ct. 629 (1934); *Viereck v. U.S.* 318 U.S. 236, 63 S. Ct. 561 (1943); *DiCarlo v. U.S.* 6 F. 2d, 364, 368 (1925).

<sup>3</sup> Wigmore, J. H.: *A Kaleidoscope of Justice*, Washington, D. C., Washington Law Book Co., 1941 Ed., at p. 700.

## ACCUMULATION OF EVIDENCE IN HOMICIDE CASES

It is axiomatic that the accumulation of the evidence is of the essence of any case. Fluency of speech, ingratiating delivery, vehemence and ingenuity, while helpful, cannot serve as a substitute for evidence.

*District Attorney as Coordinator.* A homicide has been committed, the body has been sufficiently identified, and the corpus delicti established as described by Professor Perkins in his study "The Law of Homicide."<sup>4</sup> The prosecutor now directs the accumulation of the evidence; he does not assume the role of a police officer or a detective. His duties are of a wholly different nature.<sup>5</sup> His duty is to coordinate the efforts of all those engaged in the homicide case. He cooperates with the medical examiner. He studies with him the results of his post mortem examination and the circumstances surrounding the death. The medical examiner is one of the key men in the investigation of homicide cases. One who reads the study entitled, "The Post Mortem Examination in Cases of Suspected Homicide"<sup>6</sup> by Dr. Milton Helpern, will see how crucial is the medical examiner in proper preparation of a homicide case for trial.

The prosecutor must know the medical aspects of the case, the evidence that proves it was a homicide committed by violence, by poisoning or by asphyxiation. This necessarily involves intensive study with the medical examiner, the chemist, the toxicologist, and any medical experts that the medical examiner believes should be brought into the case.<sup>7</sup> From the study with the medical examiner and his associates, the prosecutor should be able to translate the medical aspects of the case from the verbiage of the professions into the language of the ordinary man. He should be able to clarify with reasonable certainty the type of the homicide.

*Legal Classification of Homicides.* In Massachusetts, a homicide can be classified as first degree murder, second degree murder, manslaughter, or justifiable homicide. A murder committed with deliberately premeditated malice aforethought, or with extreme atrocity and cruelty,<sup>8</sup> or in the commission or

<sup>4</sup> Perkins, R.: *The Law of Homicide*, in this Symposium series; this issue of the *J. of Crim. L. and Crim.*

<sup>5</sup> *Atty. Gen. v. Tufts*, 239 Mass. 458 at 498, 132 N.E. 322 (1921).

<sup>6</sup> Helpern, M.: *The Post Mortem Examination in Cases of Suspected Homicide*, in this Symposium series: this issue of the *J. of Crim. L. and Crim.*

<sup>7</sup> See, in the Symposium series "Scientific Proof and Relations of Law and Medicine" (1st series, 1943), the following studies:

Wigmore, John H.: *Circumstantial Evidence in Poisoning Cases*, *B.U.L. Rev.* 23: 277 (April 1943);

Walker, J.: *Scientific Evidence in Poisoning Cases*, *B.U.L. Rev.* 23: 292 (April, 1943); and in the present Symposium, Moritz, A. R. and Dutra, F. R.; *Scientific Evidence in Cases of Injury by Gunfire*, *N.C.L. Rev.* (April, 1946).

<sup>8</sup> *Com. v. Tucker*, 189 Mass. 457, 76 N.E. 127 (1905).

attempted commission of a crime punishable with death or imprisonment for life,<sup>9</sup> is defined by statute as murder in the first degree.<sup>10</sup> And it is further provided by statute that murder which does not appear to be in the first degree is murder in the second degree. The third general type of homicide is manslaughter, of which there are two classes: voluntary<sup>11</sup> and involuntary manslaughter.<sup>12</sup> The remaining type of homicide is justifiable homicide, a killing in the performance of a duty, or a killing in protecting one's person or the security of the home.<sup>13</sup>

*Work of the Homicide Unit.* In addition to the medical examiner, the prosecutor must work in conjunction with the police or the detective force, commonly known as the homicide unit. This unit is usually composed of handwriting experts, fingerprint specialists, photographers, draftsmen, ballistic experts, stenographers, photostatic experts, experienced police officers, and occasionally, other specialists. Together they form a unique team of skilled investigators who are on the job as soon as they learn of the homicide, dividing their efforts between two main tasks: (1) the apprehension of the suspect and the accumulation of evidence admissible on the trial; and (2) the gathering of *background information* concerning all aspects of the crime, including facts about the deceased, his mode of living, his associates, his activities, his reputation, and the same data concerning any suspects. *Background information* may explain obscure motivations, throw light on the mode of perpetration, serve as clues for new inquiries, and even fit into the chain of primary evidence as an indispensable link.

The captain of the homicide unit directs the taking of fingerprints, footprints, tire marks and photographs of the victim and his effects, and turns them over to the police. The medical examiner attends to the photographs of the victim, and his effects and turns them over to the police. A plan of the locus is drawn to scale, exhibits are collected, properly marked for identification and *put in a safe place*. The handling and the care of exhibits is most important. They should pass through as few hands as possible. If this practice is followed, much trouble will be avoided in establishing admissibility of the exhibits. Photostatic copies of any important documents,

<sup>9</sup> *Com. v. Gilbert*, 165 Mass. 45, 42 N.E. 386 (1895); *Com. v. Desmarteau*, 16 Gray 1 (82 Mass.) (1860); *Com. v. Devlin*, 126 Mass. 253 (1879); *Com. v. Feci*, 235 Mass. 562, 127 N.E. 602 (1920).

<sup>10</sup> *Com. v. Devereaux*, 256 Mass. 386, 152 N.E. 380 (1926); *Id.*, 257 Mass. 391, 153 N.E. 881 (1926); Gen. Laws of Massachusetts (Ter. Ed.) Chapter 265, section 1.

<sup>11</sup> *Com. v. Demboski*, 283 Mass. 315, 186 N.E. 589 (1933).

<sup>12</sup> *Com. v. Peach*, 239 Mass. 575, 132 N.E. 351 (1921); *Com. v. Guillemette*, 243 Mass. 346, 137 N.E. 700 (1923).

<sup>13</sup> Mays, J. W.: *Law of Crimes* (4th ed. by Sears, Kenneth C. and Weihofen, H.) Boston, Little, Brown & Co., 1938, secs. 162 *et seq.*

such as letters, receipts, bills or any papers that may assist in the investigation are made, and the originals are carefully filed with the custodian of the unit to prevent their loss or defacement. Witnesses are located and interviewed, particularly witnesses who can give direct testimony, or who have any knowledge or information about circumstances surrounding the crime. A tactful approach, based upon a sympathetic understanding of human nature, is most essential in the questioning of witnesses, as the average person "does not want to get mixed up in the case." The captain of the unit makes reports at least once a day to the prosecutor, and reviews the progress of the case, and details are checked. The prosecutor is the directing force of the investigation. He should, during the course of the investigation, visit the scene of the crime. He should read every statement that has been taken by the investigators and examine personally every witness who might be able to give material evidence or valuable information. He should point out to the captain of the unit the weak spots in the case and exhaust all leads in an effort to reenforce them. Corroboration is always important. Are all essentials established by evidence: are the witnesses corroborated in the important aspects of their testimony? If not, the investigation should be intensified. As Dr. Hubert Smith shows in discussing the psychology of proof, corroboration from different tangents by diverse types of evidence, if possible, is more convincing than corroboration along a single line.<sup>14</sup>

*Assuring Availability of Material Witnesses.* The prosecutor should take adequate precautions to assure the presence and the safety of the material witnesses; this sometimes necessitates having them held under substantial bonds, or submitting voluntarily to the custody of the police.

While the machinery of the investigation is operating, the prosecutor should mould his case for presentation to the Grand Jury. A brief of facts should be prepared; the witnesses should be classified according to the type of testimony they are expected to give. One method of classification is (a) witnesses to the crime, i.e., eyewitnesses to the fatal act; (b) witnesses to circumstances surrounding the crime, as the salesman who sold the lethal weapon, or the haberdasher who sold the hat or gloves left behind by the killer; (c) witnesses to establish a motive — not necessary, but of great weight in the proof of the case; (d) witnesses to the flight, as the landlady who would testify that the defendant did not return home from the time of the killing; (e) expert witnesses; (f) the defendant.

*Examination of Eyewitnesses.* The prosecutor should be pa-

<sup>14</sup> Smith, H. W.: Components of Proof in Legal Proceedings, *Yale L.J.* 51: 537 (Feb. 1942).

tient but exhaustive in his preparatory examination of the eye-witnesses. This is time and effort well spent. The witness should be asked to give a brief history of himself, his activities, and his conflicts with the law, if any. He should account for his presence at the scene of the crime and his acquaintance with either the victim or the defendant. He should then be permitted to tell his story in his own way, but he should be questioned in detail as to identification of the defendant. Did he know the defendant? Was this the first time he had ever seen the defendant? How long a time did he observe him? From what position? What attracted his attention to the defendant? To the victim? Has the witness identified the defendant since the latter's arrest? What were the circumstances surrounding that identification? The accuracy of a witness depends upon the facility of observation, the recollection of observation, and the ability to relate what he has recollected.

Once the witness has given an honest and truthful statement, he will be slow to repudiate it, if called as a witness for the prosecution. Should he testify for the defendant, the statement may be of incalculable value to the prosecutor as a basis for damaging cross-examination, particularly if the new version is contradictory to the first. The statement is also extremely helpful in refreshing the recollection of the witness. An exhaustive statement guards the prosecutor from being taken by surprise.

The prosecutor should study his witness and analyze him from a moral, intellectual and physical viewpoint. Is he the type that would yield to outside influences such as corruption, fear, or the solicitation of mutual friends? If he is of this type, he should be impressed with the seriousness of his position as a witness and the demands of the law; that the truth, the whole truth and nothing but the truth should be given from the witness box. If the witness is honest but weak, one who is easily confused or vacillates, it is better that he should not be called unless his testimony is indispensable. In this case, the prosecutor must examine him on direct examination by questions calculated to inspire such confidence in his inherent honesty as will overshadow any discrepancies or weaknesses he might disclose on cross-examination.

*The "Volunteer" Witness.* Every prosecutor in preparing important cases for trial occasionally encounters the "volunteer," an individual who has learned something of the crime from newspaper accounts or public discussions, and now presents himself at the prosecutor's office as a vital witness. Legitimate volunteer witnesses are very helpful, being usually actuated by a sense of civic duty. False witnesses are disastrous. A false witness is most readily detected by interrogating him about basic facts discovered in the investigation but still with-

held from public knowledge. His answers invariably reveal that his story is a fabrication.

*Physical Condition of the Witness.* The physical condition of the witness is important. Has he normal vision? Is his hearing unimpaired? Are his powers of observation good? Is his physical condition such that he might be unavailable at time of trial? Would the subjecting of the witness to the strain or excitement of the trial be accompanied with dire results? Is he emotional? Does he mix memory with imagination? Is he healthy and sound in body and mind? Has he the ability to relate facts audibly, briefly, correctly and clearly?<sup>15</sup> The prosecutor may have literally no choice about what witnesses he will use. He must take the witnesses who surround the crime and the testimony of each is so important that he may be unable to dispense with any of them. Some of these witnesses may have criminal records involving even felony convictions. The prosecutor should instruct such witnesses to admit their previous criminal records without hesitation or reservation. A criminal record so admitted never nullifies good, accurate testimony, but if denied or concealed, may destroy all confidence in credibility.

*Developing the Circumstantial Evidence.* The interrogation of witnesses to circumstances surrounding the crime involves a comprehensive examination of details. This is particularly true when there is no eyewitness to the crime, and the prosecution is based upon circumstantial evidence.

Tracing the lethal instrument, whether it be a gun or poison, is a most important and arduous task. In many homicides by violence, the lethal weapon is not found. In the more fortunate cases where it is found, the prosecutor calls in his ballistic expert and with him endeavors to trace the history of the weapon.

The ballistic expert obtains from the manufacturer all available data regarding sale and distribution of the weapon. In some cases, it is necessary for the ballistic man to visit the manufacturer in hope of getting special help from having the latter's representative inspect the weapon. The trail leads from manufacturer to distributor, to wholesaler, and so eventually to a retailer of firearms. If there has been a legal sale of the gun by the retailer, his books should declare the true name and address of the purchaser. Almost invariably the information as to the purchaser is not correct, and usually the fact is that the gun has been stolen between the time it left the manufacturer and its use in the killing. Has this larceny been solved? Has the thief accounted for the disposition of the loot? Will the thief disclose to whom he sold the gun? Was the thief the

---

<sup>15</sup> Osborn, A. S.: *The Mind of the Juror*, Albany, N.Y., The Boyd Printing Co., 1937, at p. 43.

killer? If the thief has not been apprehended, or the larceny solved, the investigators of the homicide unit must investigate this independent crime in conjunction with their homicide case.

Most homicides accomplished by the use of poison are crude "jobs." The killer either purchases the poison himself, or has some friend purchase it for him, giving the excuse that he wants enough to kill an old horse or a dog, or to destroy rats. A thorough canvass of the drugstores, hardware stores, and other places where that particular type of poison is sold generally gives good results. The friend, in most cases, is an innocent party, and once located tells for whom he purchased the poison, when and where he delivered it to the killer, and any conversation that he may have had with him in reference to the use of the poison. Sometimes the killer himself knows about poisons and is able to obtain it from his place of employment, or from a distant city. In such cases, canvassing local vendors will prove fruitless, and the effective tracing of the poison must await the identification of the killer, or of suspected persons. Then one endeavors to ascertain what opportunities the suspected killer had to obtain the particular type of poison privately, his knowledge of poisons, or his possession of poisons.

Circumstances surrounding the crime, to be established through available witnesses, include such diverse matters as the following: tracing to the defendant's possession any articles left by the killer; identifying the automobile that was used in his flight; establishing the defendant's familiarity with the locus of the crime; his knowledge of the victim, or if the victim was unknown to the killer, the latter's acquaintance with anyone who would point out the victim; evidence establishing the defendant's mode of living; the amount of his legitimate income, if any; data concerning defendant's criminal activities; his financial condition before and after the crime; evidence showing his efforts before and after the killing to establish an alibi.

*Proof of Motive.* Though proof of a motive is not legally necessary in a homicide case, the prosecution's failure to prove one furnishes powerful ammunition to the defense. An investigation cannot be expected to proceed in an orderly and intelligent manner unless the prosecutor has established by admissible evidence or information a motive for the crime. An investigation must be based upon a theory for the killing whether it be robbery, financial gain, a gangster feud, degeneracy, revenge, a love affair, the violation by the victim of the security of the killer's home or the debauch of his daughter, or one or more of the many motives that may actuate one person to kill another.

In examining witnesses to establish a motive, the prosecutor



should be courteous and sympathetic in questioning the daughter or a member of the killer's family allegedly outraged by the victim. In gangster killings, a vast amount of good information can be obtained from "motive" witnesses if the prosecutor by discreet questioning and tactful conduct convinces material witnesses that he knows all, or nearly all of the "inside" facts. This causes the witness to make franker and fuller disclosures. Trickery and sharp practices should be zealously avoided.

In a killing actuated by an illicit love affair, the third party should be questioned firmly and vigorously in detail to his or her illicit relations with the killer. As a rule, these adulterers are weak characters, and will try to protect themselves, and as a result, they tell all they know.

*Witnesses to flight* by the defendant are important in the accumulation of evidence. Police officers should search for the suspect at his home and usual haunts, and be in a position to testify that after the killing the defendant neither returned home nor visited his usual haunts. If the defendant was a lodger, his landlady can generally be depended upon to give material assistance, as most of the lodging houses and the hotels are licensed and subject to inspection by the police.

*Preparation of Technical Proofs.* It is especially important in connection with technical testimony that the prosecutor go over the subject thoroughly with his expert. Albert A. Osborn, the noted handwriting expert says: "It is a common experience of expert witnesses that they give in some cases testimony that is twice as effective as in other cases because of the proper and intelligent advance cooperation of attorney and witness."<sup>16</sup> This preparation not only helps in presentation of the direct case, but enables the prosecutor to discredit "the experts for hire." If the prosecutor is obliged to engage experts, their selection should be with care and caution, and only accredited men of excellent reputation should be retained. Fakery belongs with magicians, not with lawyers.

## PRESENTATION OF EVIDENCE TO THE GRAND JURY IN HOMICIDE CASES

The evidence of the case has now been accumulated and is ready for presentation to the Grand Jury. If the defendant has not been arrested, the prosecutor can proceed to place the matter before the Grand Jury. If, however, the defendant has been arrested, the usual procedure is first to question the defendant, and then have him arraigned before the local court, continue the case, and in the interim, present it to the Grand Jury.

*Questioning the Accused.* The questioning of the defendant

<sup>16</sup> Osborn, A. S.: *The Mind of the Juror*, *id.* at p. 47.

may give rise to nice legal problems, as where the accused complains that a confession was procured by coercion or induced by promises, or that third degree methods were used, or that he was refused opportunity to confer with counsel, or that he was held for an unreasonable time prior to being brought before the court.

The captain of the homicide unit should question the defendant in the presence of a stenographer. He should inform him of his rights against self-incrimination. If the prisoner does not wish to make a statement, or refuses to talk, that should be the end of any efforts to obtain a statement.

For psychological reasons, the prosecutor usually abstains from examining the accused before trial. There are clear exceptions to this rule, as where the accused wishes to confess, or to give an explanation of the crime, or signifies a willingness to assist the prosecution. If the prosecutor examines and cross-examines the accused before trial, attorneys for the defense may try to use this circumstance to create an atmosphere of hostility toward the prosecutor personally, or they may imply that unfair advantage was taken of the defendant, or that the prosecutor is more interested in front page publicity than in the merits of the case. In short, the defense may endeavor to put the prosecutor on trial.

Any statement given by the accused should be checked and verified.

*Tactical Uses Made of Grand Jury Hearing.* The presentation to the Grand Jury is of special importance in organizing the evidence of the case. In most jurisdictions, the defendant is entitled to a list of the witnesses who appeared before the Grand Jury. Having obtained this list, it is assumed that in preparation of the defense, these witnesses will be interviewed. The prosecutor should make out at least a prima facie case before the Grand Jury. It is to be presumed that only proper evidence will be laid before the Grand Jury. The law reposes confidence in the officers of the government in relation to this subject.<sup>17</sup> Occasionally the defense seeks to have an indictment dismissed on the ground that incompetent evidence was placed before the Grand Jury. It is settled law in Massachusetts, at least in absence of extraordinary circumstances, that the trial court will not inquire whether incompetent evidence was heard by the Grand Jury.<sup>18,19</sup> At the trial of the case, it is open to the defendant to discredit a witness by showing that his testimony before the Grand Jury was different from that given by him at the trial, and that when he supposedly related all the im-

<sup>17</sup> *Com. v. Knapp*, 9 Pick. 495 (26 Mass.) (1830).

<sup>18</sup> *Com. v. Lamm*, 310 Mass. 159, 37 N. E. 2d 250 (1941).

<sup>19</sup> *Com. v. Ventura*, 294 Mass. 113 at 120, 121, 1 N.E. 2d 30 (1936).

portant facts before the Grand Jury, the witness made no statement of significant facts to which he testified at the trial.<sup>20</sup>

There should be no undue haste in presenting the case to the Grand Jury. Reluctant witnesses should always be called before the Grand Jury in order that their testimony may be taken under oath. Grand Jurors interrogate the witnesses and this procedure is most helpful to the prosecutor because it indicates to him how the jurors react to the testimony.

If a witness is unable to sustain his testimony before grand jurors, it is certain that he will not be able to impress a trial jury. It is a boon to the prosecutor to have this advance notice of weakness in his case and an opportunity to correct it.

Reluctant witnesses, even after giving a statement, sometimes will refuse to testify. Their act in claiming benefit of the privilege against self-incrimination at the Grand Jury hearing, puts the prosecutor on notice that he must beware of placing over dependence on their testimony at the trial.

#### THE PROSECUTOR AND THE TRIAL OF A HOMICIDE CASE

*Preparation for Trial in Light of Anticipated Defenses.* After the Grand Jury has returned its indictment, the prosecutor should proceed to prepare for trial at a reasonably early date. This necessitates a preparation to meet the defense, whether the latter be self-defense, alibi, insanity, irresistible impulse, or a general denial.

The type of homicide generally indicates the type of defense. In homicides by violence, the defense is an alibi or justifiable homicide, particularly, self-defense. In preparation of a case of homicide by violence, the prosecutor should anticipate this defense and assemble the evidence to meet it. He must find out several things. What is the witness' attitude toward the defendant? Had the victim made threats of bodily injury to the defendant? Were such threats, if made, communicated to the defendant? Who was the person that conveyed such threats to the defendant? What were his relationships with the defendant, and with the victim, and would he be inclined to favor either the prosecution or the defense? Is this alleged conduit a witness worthy of belief?

In homicides committed by degenerates, the defense is often insanity or irresistible impulse. If the homicide has been well planned and executed, the defendant usually professes complete ignorance of the crime.

After a defendant has been arraigned on the murder indictment, he is examined by psychiatrists, and their reports are open for inspection by the prosecution, counsel for the defend-

<sup>20</sup> *Com. v. Homer*, 235 Mass. 526, 532, 533, 127 N.E. 517 (1920).

ant, and the court. From this report, the prosecutor can prepare to meet any issue of insanity or irresistible impulse. This often requires a thorough check of defendant's family for hereditary insanity, and a thorough investigation of defendant's past life by questioning such persons as his teachers, employers and associates.

The report of the trial of Charles J. Giteau for the assassination of President Garfield discloses a masterpiece in the exposure of a defendant's hypocritical claim of moral insanity and irresistible impulse, accomplished by a competent and well prepared prosecutor, Judge John K. Porter, of New York.

In preparing to meet a defense of mental irresponsibility, the prosecutor will find the report of the Giteau trial most helpful.<sup>21</sup>

The day of trial has arrived. The prosecutor should be prepared to present his case in a smooth, orderly manner with no halts or waste of time, but with deliberation and proper emphasis on vital things. These cardinal facts should be proved in slow motion tempo, to give the jury opportunity to hear the testimony, to understand it and to absorb it. Where he has a choice of witnesses, the prosecutor should select those that appear to be the most sincere and impressive, keeping the others in reserve in case of necessity. A trial brief of both the law and the facts should be prepared. If possible, he should have decisions to cover questions of evidence that he thinks might arise during the trial. His brief of facts should set out the order of witnesses and the outline of each witness's testimony with reference to the Grand Jury record, or his previous statements. The exhibits should be readily available with the necessary witnesses in attendance to establish their admissibility. The prosecutor should be the general ready to attack. As the attacking general, he must proceed according to plan, and not be drawn off on a tangent. Evidence often loses its probative value because of the crude and inartistic manner in which it is presented.

At the inception of the trial, the prosecutor should know all about the case while assuming that jurors know nothing about the facts. The prosecutor should attempt to convince jurors by evidence directed primarily to the intellect, not to sentiment and emotion. The proper accumulation and organization of evidence produces a complete, interesting and convincing story. There will be minor inconsistencies and contradictions in the testimony of government witnesses. This is something to be expected, for they are not rehearsed actors, but witnesses sworn to relate the truth. When the prosecutor be-

<sup>21</sup> Auerback, J. S.: *The Bar of Other Days*, New York, Harper and Bros., 1940 Ed., pp. 49-64.

lieves he has established one aspect of the case sufficiently, he should offer no further evidence upon it, for a repetition of proved facts annoys jurors. The witness must be confident that the prosecutor knows his story and that he will elicit it by proper questions. Such confidence is established in preparing the case for trial if the investigator or prosecutor permits the witness to relate his story and carefully forbears to suggest any desired version. A witness who lacks confidence in the prosecutor will testify in rambling fashion, give irresponsible answers, and inject improper remarks, so that the court may need to reprimand or admonish him, all of which things produce a most unfavorable impression upon the jury.

In conducting his direct examination, the prosecutor should not anticipate the cross-examination, but should be prepared to answer it in re-direct examination.

The direct testimony should be developed in logical sequence and presented in such manner that jurors will be attentive, will grasp the pertinent facts and at the completion of the direct case, will have a finished picture of the crime and its participants. A suggested order of witnesses in a homicide case is (a) witnesses to prove the "corpus delicti"; (b) to describe the locus of the crime; (c) to relate the circumstances leading up to the crime; (d) to establish motive; (e) to identify the defendant; (f) to relate the conduct of the defendant after the crime. There is no fixed rule or established procedure to guide the prosecutor or defendant's lawyer. From training, experience, study and untiring efforts in the preparation and trial of cases, prosecutor and defendant's lawyer alike become skillful in acquiring and organizing evidence in criminal cases.

---