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Supplementary Brief for Defendant-Appellant Artis (1-1-1979)

Lewis M. Steel '63

THE STATE OF NEW JERSEY, Plaintiff, Respondent, vs. JOHN ARTIS, Defendant- Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CRIMINAL INDICTMENT NO. 167-66 DOCKET NO. A-5167-76

SUPPLEMENTARY BRIEF FOR DEFENDANT-APPELLANT ARTIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Was Bello's Identification of Artis the Product of Such Impermissible Suggestion That It Should Have Been Inadmissible?

2. Did the Trial Court Properly Instruct the Jury on the Issue of Eyewitness Identification?

3. Was the Jury Verdict Contrary to the Weight of the Evidence?

INTRODUCTION

This supplementary brief is being filed on behalf of John Artis because Alfred Bello's eyewitness identification of him was particularly tainted, and because the case against him would unquestionably be insufficient as a matter of law without that identification.

It is also urged that in any event Artis' conviction was contrary to the weight of the evidence, and must be set aside on this basis as well.

This brief incorporates the joint brief by reference and especially those points which relate to Bello and reflect upon his credibility, and how he was manipulated into testifying. Defendant also reminds the Court that the review of the evidence in the joint brief clearly establishes that Artis was wearing light colored clothing (pants and shirt) throughout the entire night the crime took place, whereas Bello (and every other witness) has always described the man with a pistol as wearing dark clothing.

Additionally, the joint brief summarizes the evidence which establishes that John Artis has always been considered a man of high repute and was able, through his own testimony and that of corroborative witnesses, to account for all of his time on the night in question.

POINT I

THE IN-COURT IDENTIFICATION OF DEFENDANT ARTIS BY BELLO WAS THE RESULT OF A PROCESS WHICH WAS SO IMPERMISSIBLY SUGGESTIVE THAT THIS COURT SHOULD RULE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION. FURTHER THE TRIAL COURT ERRED IN REFUSING A REQUESTED CAUTIONARY IDENTIFICATION CHARGE.

The State's case against John Artis rested solely on Alfred Bello's in-court identification and testimony that he was the man he saw with Rubin Carter at the scene of the crime. It is absolutely clear that without this testimony, the trial court would have dismissed the State's case against Artis at its conclusion, that court having characterized the case against Artis as being "comparatively speaking, minimal" (36 T211-25 to 212-2).

The trial court, however, determined at a Wade-Gilbert-Stovall hearing, which it conducted out of the presence of the jury, that Bello's identification testimony was not the product of impermissible suggestion. (19 T146-21 to 150-4). This finding was incorrect as a matter of law. In evaluating Bello's eyewitness testimony, it must be remembered that the witness admitted he had never seen Artis prior to the night of the crime (18 T24-7) nor did he claim to see him after that night up until the time of the first trial (18 pmT 88-8-21). By contrast, Bello claimed that although he didn't recognize Carter instanteously at the scene of the crime (18 T61-16-19) soon thereafter he told Dexter Bradley that he thought one of the men was Carter (18 T61-23 to 63-24). Additionally, it must be remembered that between the time of the crime and the time that Carter and Artis were brought to the scene

of the crime, approximately thirty minutes later, it is uncontradicted that a third black man, John Royster, was riding around in Carter's white car with them. Thus, if Artis would have gotten out of Carter's car and Royster remained the police would have taken Carter and Royster to the scene of the crime. If that would have happened, this case may well have been styled State v. Carter & Royster.

Defendant Artis is not suggesting in this argument that the Court should accept the in-court identification of Carter as being accurate or free from impermissible suggestion. To the contrary, appellant Artis joins in the attack on Bello's credibility, and is convinced that his testimony must be rejected as being worthless and the product of coercion. If this Court accepts Bello's testimony in a light most favorable to the prosecution, however, his identification of Artis does not withstand constitutional muster under the tests set forth in Neil v. Biggers, 409 U. S. 188 (1973) and Manson v. Brathwaite, 432 U.S. 98 (1977).

Since United States v. Wade, 388 U.S. 218 (1967) it has been firmly established that a "jury [may] not hear eyewitness testimony unless that evidence has aspects of reliability." Manson v. Brathwaite, supra. 432 U.S. at 112. The test for reliability, as most recently set forth in Manson, is as follows:

> "[The factors] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting fact of the suggestive identification itself." 432 U.S. at 114.

In this case, there are two critical confrontations which must be subjected to analysis. The first occurred at the night of the crime, when Artis was brought to the scene one-half an hour after the homicide. The second confrontation occurred at the first trial. In the intervening time, Bello was also shown photographs of Artis under the most suggestive of circumstances. The facts regarding reliability and suggestion, within the framework of the Manson factors are as follows:

A. The Manson Criteria Were Not Met.

1. Bello's Opportunity to View the Criminal at the Time of The Crime.

At the time of the crime, Bello claims to have been walking toward the scene in the early morning hours on a street he variously described as being "lit up pretty well" (18 T10-17) and "it wasn't completely dark" (18 T74-2). As he was walking toward the Lafayette Bar, he saw two black men whom he assumed were detectives. They were moving toward him very quickly. When he determined they were not detectives, he turned to run as they were armed. At the identification hearings Bello admitted that he was unable to get a good look at the faces of the men, "because this was happening very fast." (18 T66-7-8).

2. The Witness' Degree of Attention.

At the time of the incident, Bello was supposed to be acting as a look-out for a burglary which was taking place up the street. Apparently he had lost interest in that endeavor and was walking toward the bar. He had just lit up a cigarette and believed himself to be "off duty." His level of concentration could

not have been very high. He testified that he did not recognize the barrage of shots for what they were, but instead thought that they were music from a band. (19 T159-21)

Prior to arriving in the area to pull his "B. & E.", Bello's ability to recollect what he had done on the day in question was extremely limited. He remembered having a couple of beers at a friend's house, and driving around aimlessly for hours, perhaps stopping into a bar for another beer. (18 pmT54-3 to 54-21, 65-5-14). But he could not remember whether or not he had committed other crimes that night, although "it was possible." (18 pmT49-16 to 51-6). With regard to the two men he claims to have seen leaving the Lafayette Bar, his attention level was so low that he did not know which of the two was wearing a hat (18 T11-20). Nor did Bello seem to have much interest in what had happened, except as it benefitted himself. Rather than giving aid to the victims, he proceeded to loot the cash register. The fast moving events left Bello feeling, by his own admission, "a little fucked up." (18 pmT57-2-7).

Bello denied being "intoxicated or flying high on some kind of pills," at the time the incident took place (18pmT 61-4-7), but admitted to having had an alcoholic problem since he was 15 years old and agreed that he normally drank when comitting crimes (18 pmT43-7 to 47-24). As a result of an industrial accident in 1960, the vision in one eye was at least 10% impaired and he had thereafter complained of getting blurring sensations (18 pmT37-19 to 38-16). At the age of seven Bello had a head accident which caused him to have blackouts. He admitted to being on drugs

for this up until at least 1964 but didn't remember whether he was still taking the medicine, sodium dilenpinum in 1966 (18pm T40-17 to 47-21). A 1974 hospital record, however, showed that he was still a heavy user of this medication (19T75-10 to 76-12; D-517).

3. The Accuracy of Bello's Prior Description of the Criminal.

Bello never gave even a basic description of the man he claims is John Artis.

Bello's initial description to the first policeman on the scene described the two men he saw as follows:

> "One colored male who was wearing a fedora and a sports jacket, thin build, five foot eleven inches. Second colored male, thin build, five foot eleven inches." (18T55-22 to 56-5).

On direct examination at the identification hearing, Bello was asked to describe the men. About the man he claims is Artis, he said only, "the taller one had a pistol in his hand. They were dressed very good . . . the other one (allegedly Artis) was wearing what appeared to be dark colored clothes, blue or brown, or something like that." (18T11-4-8).

On cross examination, Bello could provide no better a description even when he tried to remember what Artis looked like when he was brought to the scene later that night (18T80-24 to 81-8). At another point on cross examination, he described the man who was allegedly Artis as "well dressed, short coat, hat." (18T54-2). Then he decided he was not sure which man had the hat. (18T11-20).

Nowhere in the record is there a description of the

skin shade of the man who allegedly is Artis, his weight, the shape of his face, his hair styling, even his approximate age.

Bello did claim at the identification hearing that he told the police on the scene after Carter and Artis had been brought there in a white car surrounded by police that "they're the same two guys". (18T17-10-13). But he soon admitted, consistent with ten years of prior testimony, that he did not identify anyone to the police that night. (18T64 to 101). Nor did any police witness testify in this or any other proceeding that Bello stated he could identify anyone on the night of the crime. In fact, every police witness testified to the contrary.

At the end of Bello's identification hearing cross examination, he was asked, "By what feature or by what way" was he able to identify Artis. The question led to the following interchange:

> "A From walking. When I was coming down the street when they brought them same two people back it was the same people I seen coming down the street. It was just impressed in my mind that way.
>
> Q How do you know? Give us one objective criteria, one way, one similarity?
>
> A I was there.
>
> Q You can't give me one way?
>
> A I would have to say that was the same men.
>
> Q But you have no way to tell me how you'd do that other than to say it was impressed in my memory: is that correct?
>
> A True."
>
> (18pm T83-7-19).

Thus there is no description in the record which can even be subjected to a Manson accuracy test.

4. The Time Between the Crime and the First Confrontation

One half hour after the crime, Artis was brought to the scene with Carter in a police caravan. They were riding in a white car which was similar in looks to the car Bello claimed he saw leaving the scene. Thus, the circumstances under which Bello first observed Artis were maximumly suggestive. Nonetheless, Bello did not remember where Artis was once he got out of the car. All he could tell the court was that Artis appeared "a little taller" and "a little thinner" than Carter (18T81-13-24). When asked if he remembered anything about Artis, he answered, "that's about all I remember. Carter was out there more where people were talking. I was talking with other people also. I don't really remember. I don't think he had on a jacket at that time. I know that. He may have and he may not. I don't believe he did." (18T82-4-13).

Out of this suggestive confrontation, Bello at least was able to determine that Artis was taller than Carter, giving him possession of the one "fact" he was able to use thereafter by way of description.

It is undisputed that Bello did not identify Artis at this confrontation.

The next confrontation occurred on October 11, 1966, immediately prior to the arrest of Carter and Artis. As of that time, the witness still was totally unable to describe the man he claimed was Artis. During that taped

interview (S-42A, S42-B), Detective DeSimone said the following to Bello:

> "Now, insofar as face, if I show you a photograph -- I show you a photograph now of John Artice [sic]. Now this photo makes him appear quite light because of the photo."

Bello responded:

> "It's possible. But, uh, but, uh, I'm not actually sure." (Trial Exhibit S-42B at p.20; also at 3Da56).

10

5. The Level of Certainty Demonstrated at the Confrontation

It would be difficult to find a lower level of certainty than that demonstrated by Bello here: no identification at the scene, thirty minutes after allegedly viewing the killers and his quoted comment above when he viewed Artis' picture on October 11, 1966: "uh, I'm not actually sure."*

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* Bello's general ability to identify anyone was nil. At the identification hearing itself, Bello mistook Carter's counsel, Myron Beldock, for Artis' counsel, Lewis Steel. He did this despite the fact that six weeks earlier he had spent approximately 45 minutes with both counsel in Mr. Beldock's law office [pursuant to a court order] (18T34). Ironically, at the interview, Bello mistook Steel for one of the attorneys who conducted the recantation hearing a year earlier (18T35).

B. The Effect of the State's Suggestive Tactics

At the identification hearing during the 1976 trial, Bello was shown precisely the same picture he was shown on October 11, 1966. Now, however, the following occurred:

> "Q I show what has been marked as defense exhibit 515 and ask if you can tell me what that is. Can you tell me, sir?
>
> A It seems to be a picture of John Artis."
>
> (18pmT84-23 to 85-2).

The fact that Bello could identify a photograph of Artis in 1976 which he could not identify in 1966 is not surprising. From October of 1966, when Artis was arrested, to the time of his trial, Bello "learned" how to identify Artis. Nor is the learning process a mystery. Literally from the time of the arrest of Carter and Artis to the time of their trial, Bello was kept in the custody of the Passaic County Prosecutor's Office.

During this period of time, Bello not only saw the Artis picture which he had been shown at the taped interview, "laying all over the place" (18pmT86-17-18), the witness was shown another photograph of Artis (D-516), which was a mug shot, taken at the time of his arrest on October 15, 1966. This picture had written on it Artis' height (6'1") and the charge of murder. Bello was repeatedly shown this photograph before the first trial, as well as a mug shot of Carter (18pmT92 to 94; 96 to 98); nonetheless, Bello stated at the hearing that he never identified John Artis through pictures (18pmT91-13-14).

The above chronology establishes that Bello never had any independent recollection of the second man he claims to have seen leaving the scene of the crime. Yet obviously through the medium of continuously seeing two photographs of Artis (D-515 and D-516), Bello was carefully prepared to make his in-court identification at the first trial. In return, of course, he would receive the benefits of the DeSimone promises which are set forth in the October 11 tape (S42-B).

Thus, although he claims to have never identified the Artis mug shot as the second man, Bello knew that this was the picture of the man he was supposed to identify with Carter when he testified in court. (18pmT98-7-9). "I knew I was going to identify them," Bello said in describing his state of mind before the first trial. (18pmT87-25 to 88-7).

This record therefore demonstrates not only how a witness was convinced to identify a defendant at trial, but how he was educated to know precisely what that defendant would look like so that no mistake would be made. By the time of this trial, of course, Bello's education was complete. He could now identify a photograph of Artis which he could not identify at the time he said Artis was one of the killers. Only one conclusion can be drawn from the above summary of facts. Bello's in-court identification was not the result of any independent recollection of what the second man looked like. At no time did he have such a recollection. To the contrary, the identification was solely the product

of suggestion. Any second man would do, and Artis was the one because he happened to be with Carter after Royster got out of the car.

Applying the Manson factors to Bello's identification, it is obvious that the reliability level approaches zero. Bello's opportunity to view the criminal at the time of the crime was extremely brief; he was in motion, as were the persons he saw; the confrontation took place at night; Bello's degree of attention was so low that he could give no description of the person he was identifying. Bello himself had other things on his mind -- the commission of his own crimes. Moreover, Bello made no identification for four months, despite the fact that he saw Artis at the scene one-half hour later under the most suggestive circumstances.

Bello's only in-the-flesh identifications occurred at trial. But by that time, the witness had been shown two different photographs of Artis under even more suggestive circumstances. When he was shown these photos, he was actually told who he was viewing. When Bello came into court at the first trial, his mind was already made up. He would identify the taller black defendant as the second man he had seen. Nor could he make any mistake. He knew precisely what the man looked like whom he was supposed to identify from the repeated showing of photographs. These procedures, which led to the first in-court identification and made the second one inevitable simply do not pass constitutional muster. The Supreme Court in Simmons v. United

States, 390 U.S. 377, 383-4 (1968) taught:

> It must be recognized that improper employment of photographs by police may cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures...there is some danger that the witness may make an incorrect identification. This danger will be increased if the police...show him the picture of several persons among which the photograph of a single individual recurs or is in some way emphasized...the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

C. Bello's Identification Is Unsupported By Any Corroboration

Since Wade, the judiciary has given especially close scrutiny to those cases in which one witness provides the identification. As a result, a significant body of law has been developed that corroborative evidence should be required in such cases. Smith v. Paderick, 519 F.2d 70,75 (4th Cir. 1975); United States v. Jackson, 509 F.2d 499,507 (D.C. Cir. 1974); United States v. Telfaire, 469 F.2d 552,555, fn. 5, (D.C. Cir. 1972); United States v. Levi, 405 F.2d 380,383 (4th Cir. 1968).

Smith v. Paderick, supra, sets forth the judicial reasoning underpinning this approach:

> The exclusionary rule of Stovall and Biggers was a response to the very appreciable danger of convicting the innocent. Positive identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness if far more

> introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all of the influences that result in his say, 'That is the man.' And that enables him to speak with conviction and utter honesty -- further enhancing the danger.
>
> We have previously expressed our awareness of the danger and our confidence in experienced trial judges to guard against it. United States v. Levi, 405 F.2d 380,383 (4th Cir. 1968). Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically.

In Smith, the court upheld the eyewitness identification because it was substantiated by the testimony of an accomplice.

The earliest case in this series of decisions, United States v. Levi, supra, after holding that a trial judge had "the power to refuse to permit a criminal case to go to the jury even though the single eyewitness testifies in positive terms as to the identity..." instructed trial judges in the future:

> ...to consider with respect to identification testimony the lapse of time between the occurrence of the crime and the first confrontation, the opportunity during the crime to identify..., the reasons, if any, for failure to conduct a line-up or use similar techniques short of line-up, and the district judge's own appraisal of the capacity of the identifying witness to observe and remember facial and other features.

If the trial judge would have considered these criteria, which are similar to the Manson factors, he would have been forced to conclude that Bello made no identification at the first confrontation, could not describe either the man he saw at the time of the homicides or the man he saw at the first confrontation, never was required to pick the defendant out of a line-up, was subjected to overtly suggestive

photographic displays, received promises in return for his testimony, and could substantiate his identification with nothing more solid than his own asserted belief that the identification was accurate.

From study of prior New Jersey Supreme Court opinions regarding this case, this Court must be aware that Bello's identification was corroborated at the first trial in large part by such witnesses as Arthur Dexter Bradley and Ken Kellogg. In this trial, however, no such corroboration has been offered by the State.

Moreover, at this trial, Patricia Valentine testified that she was looking out of her window at the time that two men rounded the corner, jumped into a white car and sped away. She testified that she did not see Bello in the location he claimed to be in at the time these events occurred, nor did she hear him running away. (16T9-6-9; 16T39-6-20).

This Court should therefore set aside appellants' conviction because the lack of corroboration fatally undermines an already defective eyewitness identification.

D. The Trial Court's Failure to Consider the Testimony of Appellant's Expert in the Field of Perception and Memory at the Identification Hearing Contributed to its Erroneous Ruling.

At the identification hearing, defendants called Dr. Robert Buckout, whose credentials are set forth in a curriculum vitae submitted as D-518. Dr. Buckout expanded upon his credentials at the hearing, and among other things pointed out that he had testified 25 times in criminal cases regarding social and perceptual factors in eyewitness

identifications. In New Jersey, he testified at such a hearing in New Jersey v. Bolton before Judge McGrath in Union County. If he would have been allowed to testify in depth, rather than merely being allowed to answer preliminary questions, Dr. Buckout would have expanded upon the factors outlined by the Supreme Court in Manson v. Brathwaite, supra, and would have correlated these factors to the operative facts as had been testified to by Bello at the identification hearing. (19T97 to 130). The trial court, however, considered testimony of this nature, "of no value." (19T130-16). Instead, the judge was content to rely on what Bello said he saw, rather than to engage in an inquiry to determine what the probability was that Bello could have accurately identified a previously unknown person under the circumstances which existed on the night in question and in light of what happened thereafter. Appellant contends that it was improper for the court to have dismissed Dr. Buckout's testimony out of hand. Dr. Buckout's testimony has been rejected by some courts when the defense has sought to present it to a jury, e.g. United States v. Collins, 395F. Supp629, 636 (M.D. Pa 1975), aff'd mem 523 F2d 1051 (3rd Cir. 1975); United States v. Foster, F.2 24 Cr.L. 2381 (1st Cir. 1979). But here there was no jury to be prejudiced, only a judge who could have used the testimony to focus on the issues the court was required to resolve.

F. Under the Facts of This Case, It Was Error for the Trial Court to Refuse to Give the Cautionary Instructions on Identification Requested by the Defense.

Assuming the court did not err in letting Bello's identification of Artis go to the jury, it was incumbent upon it to carefully instruct the jury regarding the dangers of stranger eyewitness identifications. By the time of this trial, of course, the dangers were well known, and had been set forth in detail in Wade and its progeny. Consistent with these cases, the defense requested detailed charges on the issue of identification. (46T 130 to 135). For the convenience of the Court, this request for charge is reproduced at the end of this brief as an appendix.

Defendant's request set forth the circumstances under which Bello was able to observe two men fleeting the tavern. Citing applicable case law, the request pointed out that the value of the identification depended upon the opportunity of the witness to observe, the capacity of the witness, what the witness' state of mind was, how long he had been awake, whether he had been drinking, the accuracy of his original descriptions, his ability to make identification from photographs, and whether the authorities had engaged in any suggestive practices in order to obtain the identification.

The court ignored all of these requests to charge. Instead, it merely instructed the jury that it had to be satisfied beyond a reasonable doubt of the accuracy of the identifications and should consider the circumstances

of the identifications, including contradictions and inconsistencies in the evidence. (1Da41-24 to 43-11).

As a result, the court imparted none of the knowledge which had been absorbed by the judiciary over the years concerning the factors which a jury should consider in evaluating eyewitness identifications. Apparently, the court thought that it could be no more of a help to the jury in this regard than it believed Dr. Buckout could have been of assistance to the court. Evaluated by the standard of the Model Jury Charges, § 4.180 (identification) New Jersey State Bar Association (1977), the charge was sadly deficient because it did not summarize the factors the defense claimed diminished the ability of the witness to make an identification.

Detailed identification charges must be given where a witness has failed to disclose the identity of a person whom the witness later claimed was the killer. The failure to do so requires reversal. People v. Montesanto, 236 N.Y. 396, 406-7 (1923). Nor did the trial court charge the jury that eyewitness testimony should be evaluated with caution and scrutinized with care (T.46:132). As a minimum, such a charge is required where the issue of identification is hotly contested. United States v. Edward, 439 F.2d 150, 151 (3rd Cir. 1971); United States v. Barber, 442 F.2d 517 (3rd Cir. 1971), cert. denied, 404 U.S. 958 (1971); United States. v. Evans, 484 F2d 1178 (2nd Cir. 1973). See the model identification charge

contained in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). See also United States v. Collins, supra; People v. Martinez, 28 A.D.2nd 93, 282 N.Y.S. 2d 290 (2nd Dept. 1967).

At the completion of the charge, the defense called the court's attention to the deficiencies in its identification charge, without success (1Da 141-19-25). Since identification was the crucial issue in this case and since the identification evidence was weak and open to grave doubt, it was reversible error for the court below to refuse to give the requested instructions and the conviction should be reversed on this ground.

POINT II

DEFENDANT ARTIS' CONVICTION WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

After the jury verdict, and prior to sentencing, defendant moved that the verdict be set aside as contrary to the weight of the evidence. In denying this motion, the court below stated:

> "I have a right to consider the evidence which was presented and review it, which I did, in this particular matter. I find that the evidence was in accordance with the verdict, or at least could be in accordance with the verdict." (Sentencing Minutes, 2/9/77, 219-2,7)

It is respectfully suggested that in making this determination, the court below did not engage in the type of analysis required by Dolson v. Anastasia, 55 N.J. 2 (1969), which was made equally applicable in criminal as well as civil cases. State v. Sims, 65 N.J. 359, 373 (1974). Dolson explains the type of analysis required:

> "A process of evidence evaluation, - 'weighing' -, is involved which is hard indeed to express in words. This is not a pro forma exercise, but calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury. (55 N.J. at 6)

Dolson explains that in fulfilling this function, a trial court must consider "not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally, peculiarly within the jury's

domain, so-called 'demeanor evidence', and the intangible 'feel of the case' which he has gained by presiding over the trial. [quoting another case] 'The question is whether the result strikes the judicial mind as a miscarriage of justice...'" 55 N.J. at 6.

The court below, in ruling, apparently failed to separate out the testimony which went against Carter only, when evaluating Artis' motion. The court's remark, "in this particular case, you have a situation...where you had 31 days of testimony and you had many witnesses on both sides" (2/9/77 T220-17,20), was indicative of his approach. He lumped all the evidence together, as did the prosecutor in summation before the jury, and ruled on that basis.

Using the prosecutor's so-called "six strands of evidence" by which he broke the case down in summation, it is obvious that the great bulk of this evidence simply does not apply to Artis. These strands are (1) the Bello identification, dealt with in Point 1, (2) the car identification, (3) the bullet and shell, (4) the evidence of a false alibi, (5) the evidence with regard to racial revenge as the motive, and (6) the evidence with regard to where the defendants Artis and Carter were seen during the course of the evening.

These "strands" simply do not support a case against Artis.

a. The Evidence Established That Carter and Artis Were Rarely Together on the Night of the Crime.

It is uncontroverted that Carter picked Artis up in his car at Bridge Street in Paterson around 11:00 P.M.

on June 16th and drove him to the Nite Spot, after Carter stopped at the La Petite Club to see his manager. (42T201-22 to 204-23). Earlier in the evening, Artis was with a girl friend in another city, Passaic. (42T199-8 to 201-21).

Carter, at some point in the evening - the time was never clearly established - in the company of others, went to a friend's apartment in order to determine who had stolen his guns from his training camp. (39T40-5 to 43-8; 39T130-19 to 131-12). Artis was not with Carter at this time. During this time, Artis was in the back room of the Nite Spot dancing and drinking. (42T205-12 to 206-20). Even when both Carter and Artis were in the Nite Spot at the same time, they were rarely together. According to Elwood Tuck, whom the prosecutor conceded should be believed, Artis was in the back room, while Carter stayed in the bar area with his set of friends. (39T221-5 to 223-25; 39T249-18 to 250-12).

Sometime before the time of the crime, Artis left the Nite Spot, and went to Donald Mason's apartment, got sick on the way back, and was taken to an all night restaurant for some food, then dropped off back at the Nite Spot (42T206-22 to 209-21). The prosecutor did attempt to attack this portion of Artis' testimony by producing Mason. On direct, Mason testified Artis was not with him that night, but on cross Mason stated that the prosecutor had failed to show him his 1967 sworn statement in which he stated that indeed Artis had come to his apartment on the evening in question,

or the previous evening. When shown this statement, Mason stated that it was true, rather than his testimony on direct. (44T146-18 to 165-23). Counsel notes that the prosecutor made no other attempt, either while Artis was on the stand or through the witnesses, to challenge Artis' testimony as to what he had done before leaving the Nite Spot with Carter at approximately or shortly after the time of the crime.

Thus, there is nothing in the record which would support a theory that Artis had either the time or the inclination to get together with Carter in order to plan to do anything.

When Artis was stopped driving Carter's car shortly thereafter, Artis was wearing a light blue initialed shirt and light colored pants. (29T172-2-3; 33T107-2-3; 42T217-3-9). There is absolutely no testimony in the record to dispute his testimony that those were the clothes he was wearing all evening, and there is the grand jury testimony of De Simone that Artis would not have had time to commit the crime and change his clothes in the intervening period. Yet this clothing change is what the prosecutor, without any supporting evidence, asked the jury to believe, and the jury could not have convicted Artis without so speculating.

It is conceded that at the time Artis was stopped, he was driving normally, stopped on command, did not appear to be nervous or hiding anything, was cooperative, but unfamiliar with Carter's car to the extent that he did not

know where the registration was and did nothing to arouse police suspicions. (30T130-131).

Some fifteen minutes later, the Carter car, still containing three persons, was seen in the vicinity of another bar, within a few minutes drive of the Lafayette Grill. (31T164 to 166). A short time later, after the third man, Bucks Royster, was dropped off, Artis once again was stopped. Again he did nothing suspicious and was completely cooperative.

Artis was fully cooperative after being brought to the scene and taken to the station house. (30T141-9; 30T144-16). He talked to police interrogators, accompanied the police to a hospital so he could be viewed by a victim, who failed to identify him. At the time he was a youth and totally unfamiliar with police techniques as he had never been arrested before. Although he was not in the best of mental condition to resist police interrogation (De Simone admitted that Artis seemed to be somewhat affected from drinking, and was fatigued and was kept in a hot stuffy room), Artis stoutly maintained his innocence. Moreover, the police released him without even asking him to sign a statement, although they were taking sworn statements from other witnesses that night (Valentine, Ruggiero, Bello). Thereafter, Artis testified before a grand jury which, rather than seeking to indict him, sought his cooperation in helping to solve the crime.

b. <u>The Car Identification</u>

Given the fact that there were three men in the

Carter car when it was stopped shortly after the crime, Pat Valentine's car identification cannot sustain a verdict against Artis. Additionally, Valentine's testimony that the car brought to the scene some thirty minutes later was the same car which she saw leaving the scene cannot be deemed conclusive. This is so for the following reasons: Valentine was unable to take down any of the car's license plate numbers and did not know whether it was a 2 or 4-door vehicle, or whether it had whitewall or blackwall tires (16T97-7-11). She claimed to be able to identify the car because it was white and because of its tail lights and because it had out-of-state plates. Yet, on cross examination, Valentine admitted that she only had an instant to view the car. Furthermore, it became apparent that the tail light configuration which she described better fit a Dodge Monaco, rather than a Dodge Polaris. (16T138-10 to 139-21; 42T143-12 to 144-5). Even if the court were to accept Valentine's conclusory testimony that it was the same car, however, the only evidence which would place Artis in the car at the time of the killings is the testimony of Bello which has been analyzed above.

c. The Bullet and Shell

Assuming the court accepts the police testimony that a bullet and shell were found in the Carter car in the police garage in the early morning hours of June 17th, these items would have no relevance to Artis unless the court accepts Bello's identification of Artis. As pointed

out above, this is so because the car did not belong to Artis, and three men were in the car shortly after the crime.

d. The False Alibi Testimony

The court ruled during the course of the trial that the evidence relating to a false alibi at the first trial could be held against Carter only. None of the prosecution witnesses with regard to this evidence claimed that Artis' attorney, Arnold Stein, told them what to say. Nor, did any witness receive a letter from Artis similar to the letters received by Carter alibi witnesses and used by the prosecution to buttress their testimony. Thus, there is no evidence of consciousness of guilt in the record with regard to Artis.

e. The Evidence of a Racial Revenge Motive

The prosecution presented absolutely no evidence to substantiate its theory that John Artis was prejudiced against white people to any extent, let alone to the extent that he would kill white people he did not know merely because the stepfather of a friend of his was killed by a white man.

Not only did the prosecution fail to present a single witness who could testify that he ever heard Artis say anything against white people or knew him to have anti-white feelings, when John Artis took the witness stand in his own behalf, the prosecution did not ask him a single question with regard to its racial motive theory. The fact

that other black people may have been angered by the killing of a black man earlier that night may not be used to assume that Artis had a motive to commit the crime. Clearly the prosecution did not even meet its own standards of admissibility of this theory, which was set out in its letter to the court dated November 26, 1976. In that letter, the prosecution said:

> The first step is showing that a particular emotion is a circumstance showing the probability of appropriate ensuing action. Hence, a showing of the hostility of the defendant toward the race of the victim should be a circumstance which makes the desired inference (i.e., that the defendant killed the victim) more probable. (emphasis added). (4Da21 to 23).

The prosecution presented no evidence showing hostility on the part of John Artis toward the race of the victim. Moreover, the prosecution presented no evidence to show that Artis was aware of the allegation that the Lafayette Grill bartender did not serve blacks. Thus, the prosecution failed to meet the burden of proof which it set out for itself in order to substantiate its own theory in its November 26, 1976 letter.

f. The So-Called "Six Strands" Do Not Apply to Artis

Put simply, the so-called six strands of evidence which the prosecution referred to in his summation, come down to one strand against Artis. That strand is Alfred Patrick Bello, a strand so rotten that it disintegrates at the slightest touch.

When the court considers "the intangible feel of the case", it should remember that a sketch of the defendant's

life was presented. John Artis' background and character were put in issue, and did emerge unscathed from this trial. Every bit of evidence which was presented negated any inference that John Artis could have cold-bloodedly walked into a bar, approached to within feet of the patrons, and executed them.

CONCLUSION

For all of the above reasons and the reasons set forth in the Joint Brief, the convictions against John Artis should be set aside, and the indictment dismissed. Alternatively, this Court should order a new trial, or remand this matter for hearings on the issues of prejudicial pretrial publicity and prosecutorial misconduct.

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APPENDIX

Defendants' Requests to Charge

defendants for their confirmation. Thus, in its form, the evidence was poorly prepared." State v. Carter, 54 N.J. 442.

Moreover, Detective De Simone testified both defendants vigorously asserted their innocence. Additionally, "neither statement was at all incuptatory [explain word] of either man" Carter, supra.

Additionally, you must consider the condition of the defendants, whether they had been drinking, whether they were tired or confused, or had been interrogated for many hours, etc., before you decide what weight, if any, you will give to these statements on the sole and limited issue for which the Court has allowed them to be introduced, which is _____.

STATE V. CARTER and ARTIS

The defendants request the following charge on the issue of identification.

The State has presented the testimony of one witness, Alfred Bello, to identify the defendants as the persons seen running from around the corner of the tavern shortly after he heard what he thought was shots or music.

Defendants' Requests to Charge

Both defendants, by pleading not guilty and by their separate evidence, have denied being at that location at that time.

The defendants have therefore placed in issue the accuracy of Bello's identification.

Where the identity of the person or persons who committed the crime is in issue the burden of proving that identity is upon the State. The State must prove beyond a reasonable doubt that these defendants are the persons who committed the crime. The defendants have neither the burden nor the duty to show that the crime, if committed, was committed by someone else or to prove the identity of that other person or persons. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that these defendants or either of them, are the persons who committed it.

Identification testimony is an expression of belief or impression by the witness. Its value depend on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable

identification later. You should consider identification evidence with great caution. No class of testimony is more uncertain and less to be relied upon than that as to identity (U.S. v. Edward, 439 F. 2d 150, 151 (3d Cir. 1971). In this case, of course, the defendants have challenged the truthfulness of the identification as well as the witness' ability to make an identification. Before you consider whether or not Bello could have identified one or both of the defendants, you must decide what weight, if any, you give to Bello's testimony in light of other contradictory sworn statements and testimony. I will discuss issues of credibility in other areas of my charge. If you determine beyond a reasonable doubt that Bello was truthful about his testimony that he had the ability to make an identification or identifications, you must then consider the circumstances of the identifications. Because of the possibility of an honest mistake, identification testimony should be scrutinized with care (U.S. v. Barber, 442 F. 2d 517 (3d Cir. 1971) cert denied 404 U.S. 958 (1971); U.S. v. Evans, 484 F. 2d 1178 (2d Cir 1973); U.S. v. Telfaire, 469 F. 2d 552 (D.C Cir. 1972), especially where there is no physical evidence, such as weapons or stolen property to connect

Defendants' Requests to Charge

the defendant to the crime.

In appraising the identification testimony of the witness, you should consider the following:

Are you convinced beyond a reasonable doubt that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, (whether it was day or night, how good were the lighting conditions, whether the witness had occasion to see or know the person or persons in the past.

In general a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight - which is the claim in this case. In assessing the testimony, you should also consider:

Whether the identification was made under conditions of stress and fear, which may distract a witness, and what the identifying witness was doing at the time, how long he had been awake, whether he had been drinking. You may also consider whether the descriptions

Defendants' Requests to Charge

originally given by the witness to the police were different than later descriptions or his testimony at trial, and

You should also determine whether the fact that the witness observed the defendants after they were brought to the crime scene suggested to the witness whom he should identify. If you determine that it did suggest to the witness whom he should identify, you must reject his identifications.

You should also consider whether or not the witness Bello was able to identify the defendant or defendants from photographs. If you determine that the witness was shown photographs of one or both of the defendants, and that these photographs bore reasonable resemblances to one or both of the defendants, and that he was unable to identify one or both of the defendants, you may reject the identifications on this ground alone.

You should consider all these factors in determining what weight, if any, you should give to the eyewitness identification testimony.

If you have a reasonable doubt as to the eyewitness identification testimony of Bello you must acquit the defendants as there is insufficient other

Defendants' Requests to Charge

evidence upon which to base a verdict*.

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* Counsel for both defendants believe their clients are entitled to all of this charge, including the last paragraph. Counsel for Artis especially refers the Court to its own decision at the end of the State Case: Evidence minimal.

ALIBI

The defendant as a part of their denial of guilt contend that they were not present at the time and place that the crime was alleged to have been committed, but were somewhere else and therefore could not possibly have committed or participated in the crime. Where the presence of the defendant at the scene of the crime is essential to show its commission by him, the burden of proving that presence beyond a reasonable doubt is upon the State, and never shifts to the defendants. The defendant has neither the burden nor the duty to show that he was elsewhere at the time and so could not have committed the offense. You must determine, therefore,