1986

Exhibit A to Appellees' Motion to Strike Appellants' Brief and Appendix and For Related Relief

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

EXHIBIT A TO APPELLEE'S MOTION TO STRIKE APPELLANTS' BRIEF AND APPENDIX AND FOR RELATED RELIEF

EXHIBIT A

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

Circuit Court No. 85-5735

District Court No. 85-745

ORDER

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

Pursuant to the order of the Third Circuit Court of Appeals (Gibbons, J.), dated April 29, 1986, to determine the

contents of the record herein, and pursuant to the order of this Court, dated August 19, 1986, and argument of counsel having been heard on July 28 and August 20, 1986, this Court finds that the following materials are not contained in the District Court record and should properly be stricken from the record submitted to the Third Circuit Court of Appeals. Designations contained in parentheses indicate the location of these materials in the appendix submitted by appellants to the Circuit Court.

1. Court Clerk's records of jury deliberations, December 21, 1976 (1aF1-3).

2. Court Clerk's records of jury deliberations, May 26, 1967 (1aF4-6).

3. Photographs of Rubin Carter's car (1aF7-8).

4. Testimony of Patricia Valentine from first trial on May 10, 1967 (1aF99-178).

5. Typewritten notes of oral interrogation of Rubin Carter (1aF12).

6. Typewritten notes of oral interrogation of John Artis (1aF18-19).

7. Grand jury testimony of John Artis on June 29, 1966 (1aF24-98).

8. Excerpt from "The Sixteenth Round" (1aF10-11).

9. Agreement dated September 17, 1975 among Alfred Bello, Melvin Ziem and Joseph Miller, regarding "The Lafayette Bar Massacre" (2aF188-191).

10. Testimony of Alfred Bello to Essex County grand jury on December 19, 1975 (2aF245-288).

11. Agreement dated December 8, 1975 among Jerry Leopaldi, Alfred Bello, Joseph Miller and Melvin Ziem, regarding motion picture production (2aF192-196).

12. Letter of Joseph Miller to Sherry Lansing, MGM Studios, dated September 2, 1975. Letter of Joseph Miller to Sohcha Metzler, The Viking Press, dated September 2, 1975 (2aF179-182).

13. Outline of script for "The Lafayette Bar Massacre" (2aF183-187).

14. Portion of defense affidavit filed with Appellate Division, ¶ 29 (3aE543-546).

This Court declines to rule on the non-record matters included in the brief submitted by appellants to the Third Circuit Court of Appeals.

IT IS SO ORDERED.

Sept 3, 1986

U.S.D.J.

If you look at this and that and so forth, then they know how to respond in their responding brief, and you're presiding over the test run of the brief. It is not fair. In the appearance of the whole process, it's offensive, and we don't think they should have come to you in the first place and ask you to look at a brief to deal with the opinion your Honor made.

THE COURT: I will take a recess, and I'd imagine in no more than a half-hour I will come back out.

(A recess was taken.)

(After recess.)

THE CLERK: All rise.

THE COURT: Be seated.

This matter is before the Court by reference from the Court of Appeals to settle the record in this matter.

Despite the applicable rules, the decision of the Court of Appeals and the decision of this Court, all of which clearly establish the parameters for the record, the appellant-respondent has and continues to insist that the record on appeal may include evidence not presented to this Court.

The State contends that it has the right

to present evidence to the Court of Appeals to refute the factual basis for this Court's decision, notwithstanding that such evidence was not presented to or considered by this Court in arriving at its decision.

This Court has and continues to respect that contention. Indeed the matter was remanded to this Court to determine the record before it, but not to determine whether the record could or should be supplemented in connection with the appeal.

The parties were directed to meet and seek to reach agreement on the record pursuant to this Court's direction, that only those matters which were presented to this Court were to be included in the Appellate record. Notwithstanding that clear direction, the State choosing to ignore it, persists in its efforts to expand the record beyond what was presented to this Court.

Petitioners have conceded that items D, K, M, do appear in the record and have accordingly withdrawn their motion to strike these matters from the appendix.

The State concedes that none of the remaining items were in the record before this Court in the form they have presented to the Appellate Court.

Some were in evidence in the prior trials, and some were not. Some of the items are referred to in the record presented to this Court, but not in the form presented originally to this Court. For instance, where a witness was confronted with grand jury testimony, the State now wishes to present to the Court of Appeals the original grand jury testimony, item N, although not part of the trial record or the record before the Court in that form.

The State argues that this will simplify the work of the Court of Appeals, but it totally ignores the obligation of the Court to review the matter in the same form as submitted to the Court below.

The State also seeks to go entirely outside the record and present excerpts from a book written by one of the petitioners, item J, arguing that it refutes some of the Court's findings. Those excerpts were never evidence in any proceeding, and it is inconceivable that they should now be considered on appeal for the first time.

The State argues that the Court of Appeals should have materials that this Court did not have, because the State did not know how this Court was going to rule.

First, the petitioner's contentions, some of which were ultimately adopted by this Court, were clearly enunciated from the outset.

Second, the State was invited by the Court to submit anything and everything it wished in response to petitioner's contentions and in support of its own. For the State to contend that it should now be able to present evidence to the Court of Appeals never presented or considered by this Court, because it failed to anticipate an unfavorable ruling is ludicrous.

Petitioners have also moved to strike certain portions of appellant's brief on the ground that it too relies upon matters outside of the record. Appellants, consistent with the unflagging position they have taken in this Court have made factual ascertions and arguments based upon matters outside of the record or unsupported by it. However, the reference from the Court of Appeals related to the appendix only, and this Court deems it inappropriate and presumptous to rule on petitioner's motion to strike portions of appellant's brief. That controversy is more appropriately one to be resolved by the Court of Appeals and not the Court from whom the appeal has been taken.

For the foregoing reasons, appelee's motion to strike from the record items A through R is granted, excluding therefrom D, K, and M, the motion to strike those items having been withdrawn.

Counsel for petitioner should submit an appropriate order immediately, because I understand that this obviously is one of the matters that must be resolved for the appeal to be expedited.

MR. MARMO: May I ask something of your Honor?

Item Number F, trial testimony of Rubin Carter, is not in the appendix. You made no reference to that. You made reference -- there's nothing to be stricken from the appendix. The affidavit says it, but I think we're in agreement it is not.

THE COURT: F is not in the appendix, but was referred to in the brief. To make the record clear, I am not ruling on anything in regard to the motion to strike on the brief. So excluded from the order should be any reference to F. You can say the Court has not ruled upon it.

MR. FRIEDMAN: I think you said you ruled on our material going into it --

THE COURT: I have signed an order to that effect. If it is in the record and you requested to make

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Circuit Court No. 85-5735
District Court No. 85-745 (HLS)

RUBIN CARTER,

Petitioner-Appellee,

-vs-

JOHN J. RAFFERTY, ET AL.,

Respondents-Appellants.

TRANSCRIPT OF PROCEEDINGS

August 20, 1986

Newark, New Jersey

BEFOR

H. LEE SAROKIN
DISTRICT JUDGE

Appear

LEON FRIEDMAN, ESQ.,
Attorney for Petitioner-Appellee.

RONALD G. MARMO, ESQ.
-and-
JOHN P. GOCELJAK, ESQ.,
Attorneys for Respondent-Appellant.

A L S O P R E S E N T:

BELDOCK, LEVINE & HOFFMAN, ESQS.,
BY: EDWARD S. GRAVES, ESQ.

PURSUANT TO SECTION 753 TITLE 28 UNITED STATES CODE, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN STENOGRAPHICALLY IN THE ABOVE ENTITLED PROCEEDINGS.

Phyllis T. Lewis, CSR

PHYLLIS T. LEWIS, OFFICIAL COURT REPORTER

THE COURT: Be seated.

May I have the appearances, please?

MR. FRIEDMAN: For the appellee, Leon Friedman.

MR. MARMO: Ronald Marmo and John Goceljak from the Passaic County Prosecutor's Office.

THE COURT: Gentlemen, where are we? Still not agreed?

MR. FRIEDMAN: We met on July 30th, and I don't think we advanced much beyond what our papers had said.

I think it's fair to characterize what Mr. Marmo said at the meeting was the material we were fighting about, that we were contentious about, were not before the Court in that form, and we said we will put it in the form it was before the Court, and if it wasn't in that form before the Court, that it can't be part of the record, and I don't think I'm misstating it. (their) Our position is as stated in their answering papers, and we didn't get beyond that, so that we have to fight out the whole thing item by item. Unless Mr. Marmo wants to characterize it some other way, I think that's what happened.

MR. MARMO: We'd like the opportunity to be heard and present our views with regard to each of

these items. Won't take very long. That's what we're seeking to do.

We have a fairly good idea about your inclination as based upon what transpired in court last time, but I think we believe we have a reasonable and legitimate argument with regard to each of the matters, and why you should permit these matters to remain in this appendix that has been submitted to the Third Circuit.

THE COURT: Let's deal with the list. Suppose we take the motion to settle the record --

MR. MARMO: Page 3 you're referring to, the affidavit of Myron Beldock.

THE COURT: Yes.

MR. MARMO: The items are listed on Page 3.

THE COURT: Let me make a note what we're working from for the record. All right. So I take it looking at Page 3 and Page 4, and those are the items A through R inclusive, that it's the position of the State that all of those items are and should be in the record? You concede none?

MR. MARMO: Yes.

THE COURT: Do you contend they were in the record before me?

MR. MARMO: In effect they were in the record

before you, many of them, or they were exhibits at the trial, or that there were things that your Honor said in your opinion, which would justify their being in the record before the Third Circuit. There's a different position with regard to each item.

THE COURT: Take them one at a time.

MR. MARMO: The first two items --

MR. FRIEDMAN: Should Mr. Marmo go first?

THE COURT: I think so, because the way I read it now, Mr. Friedman, is that Mr. Marmo in effect is saying that these aren't in the record, but that for some reason he has the right to include them in the appendix.

MR. FRIEDMAN: The three items we'll concede. We'll go through --

MR. MARMO: Some of the items in Beldock's affidavit he said were not in the record. When we responded and delineated our basis for the items, they have conceded that they themselves put some of those items in the record.

THE COURT: Let's take the conceded ones --

MR. FRIEDMAN: That's D, Item D, Item K, Item M, M as in mother. Those three. We're fighting over 15 items.

THE COURT: All right. So let's start then

with A.

MR. MARMO: Your Honor, A as well as B are the Court Clerk's records of jury deliberations. Those records constitute, I believe, two pages, each have a total of three pages. I'm not sure. But just those few amount of pages in a record of 20,000 pages, and the records were presented to the Third Circuit to support our argument that with regard to the nature of the jury deliberations in your Honor's ruling in this matter, you decided it on two grounds. Each of those grounds was premised, we contend to the Third Circuit, on the position that it was a close case that was presented to the jury.

In support of that premise and that element of your Honor's ruling, your Honor cited United States ex. rel. Haynes v. Mc Kendrick and took from that opinion and incorporated in your opinion the language about the case being close, prejudice being great, and that was the justification for a referral in Mc Kendrick, although your Honor doesn't suggest factually the cases compare.

In fact, you mention in your opinion Mc Kendrick is a severe case, and that factually the information in the case is different. Your Honor cited that opinion as the basis for the proposition, the premise, foundation of both rulings that the case

was close.

In Mc Kendrick, the Court in determining that the case was close examined the jury deliberations and found that the jury deliberations were extensive for the amount of the case involved, and that they were eventful in that there were four questions that the jury asked during the course of their deliberations.

We contend that that is a valid way to -- a valid consideration in determining whether or not, in fact, the case was close as it was presented to the jury ultimately.

Your Honor never in your opinion examined the jury deliberations.

THE COURT: Were they submitted?

MR. MARMO: Let me finish. They are, in fact, submitted, and I'll tell you where they are. The jury deliberations in our case, sir, were very brief, and they were uneventful. This was a case that lasted for months, that was hotly contested, involving many issues. The fact is that the jury did not struggle with the case.

We have argued this case throughout the appeal that the jury did not struggle with this case, and that this was not a close case. That can be seen in the transcript, because by looking at the

transcript, you can see how long the jury deliberated. It's in the record. By looking at the transcript, you can see that the jury did not ask any questions during the course of the deliberations, simply because the jury goes out according to the transcript at a particular time and comes back at another time, and there are no questions in the record. So this information is in the record. But I suggest to your Honor, it facilitates the argument we want to make. It causes no prejudice to the defense, and it's so much easier to make the presentation for an appellant court to look at the docket sheet and see the notes.

They contain nothing that is in any way prejudicial or harmful to the defense. They contain information that is in the record. It's just easier to see. And if it's easier to see --

THE COURT: When you say in the record, you mean the record before me?

MR. MARMO: Yes. In the transcript of the trial. It's just instead of having to ferret out and see there were no questions asked, because the transcript doesn't have any --

THE COURT: That's not my question. A and B, were they in the record before me?

MR. MARMO: Those items, your Honor, A and B

were not in the record in that form. I'm suggesting to you, your Honor, your Honor can take the tact with me, can respond to me and say I'm following the strict letter of what Judge Gibbons' note is, in effect his order to me. It says to decide on what the context of the appendix should be based on what was in the record before me. You can follow the form.

I'm suggesting to your Honor there is a very good reason to deal with the substance of this matter. It's important that this appeal be prosecuted expeditiously. The defense had years to prepare the argument they submitted to you. They have had more time than they'd ever need to prepare the responding brief and respond to this. This isn't some information that in some way is harmful to them, some way ties their hands in their responding brief. It just makes it easier for the Court to see this point, and if it's easier for the Court, if they can look at that one document and don't have to search throughout the transcript, why shouldn't it be in there? Judge, shouldn't your Honor deal with the substance of this matter, so we don't have to delay the matter to make a motion to the Third Circuit to supplement the record?

The information with regard to the jury, the jury -- the Court Clerk's sheet with regard to jury

deliberations, with regard to the first trial, we think is a valid and proper submission to the Third Circuit, because your Honor concluded in your opinion that it was the motive issue that made the difference in the verdict or probably made a difference in the verdict. The motive issue was not in the case of the first trial. There's no question about that, and the jury deliberations were almost identical.

THE COURT: Are you suggesting that this would give the Appellate Court an opportunity to find factually contrary to what I found?

MR. MARMO: Sorry?

THE COURT: Are you suggesting that the Appellate Court should have this, because if they had it, it might cause them to conclude other than I concluded on this issue?

MR. MARMO: Yes. I'm suggesting to your Honor that you concluded it's a close case. I'm suggesting to your Honor in our brief we cite many, many reasons why that is not a valid conclusion. You stated in Haynes versus Mc Kendrick -- we didn't have this case. Your Honor stated that case, in your opinion, that case deals with -- we're deciding whether or not that's a close case. We conducted a very close study of the jury deliberations. Your Honor stated that. That

wasn't a case we were responding to before your Honor.

THE COURT: But what you're suggesting is something factual --

MR. MARMO: It's factual and legal, because you made legal conclusions based on this determination.

THE COURT: We've been through this ten times already.

MR. MARMO: Don't think we've been through it ten times.

THE COURT: You're saying I made certain factual conclusions, which were the basis of my opinion, and that you want the opportunity to present to the Appellate Court facts in contravention of those conclusions that were not presented to me, and which I did not consider.

MR. MARMO: I don't agree with that.

THE COURT: Tell me --

MR. MARMO: Those facts were before you. They were there in the transcript. We know how long the jury deliberations were. It says in the transcript. We know there were no questions by the jury, that they were brief and uneventful. I can make that argument, and it can't be disputed based on the transcript you had before you.

I'm saying it's fair, just and reasonable

to make it easier for a reviewing Court.

THE COURT: Suppose there was a newspaper article that summarized what the jury did that day, and how quickly they arrived at their opinion. Could you give that to the Court and say this is all condensed for you, even though the trial court never saw it, this will make it easier?

MR. MARMO: Most respectfully, that's not a fair analogy. I'm suggesting the Court have the records of the presiding Court itself, two sheets of paper in an appendix of 20,000 pages that was prepared with many hours of expenditure of time, and we got this order from Judge Gibbons the day before the appendix was to be transported to the Third Circuit Court of Appeals. That's when we got the order.

The defense went over the phone, however they did it, got this order from Judge Gibbons and we had an order that said no further extension of the time limit. March 28th is the day you have to respond.

On March 27th we received this order, volume 600 -- 600-some volumes --

THE COURT: That goes to the efficiency of complying with the order. That isn't what Judge Gibbons directed me to do. It's so simple, and I don't

know why we can't seem to agree on this. Judge Gibbons said there's a dispute as to what was in the record before you. Not should the record be supplemented and you continue to make this same argument that it ought to be supplemented, that the Appellate Court should have the right to see evidence that it did not see and did not consider, and I think you're wrong. I don't think the rules permit it. I don't think the decision of the Court of Appeals permits it, and my prior rulings have all been consistent. I have been asked to tell the Appellate Court what was before me, what was in the record, and I don't know why we keep coming back to this.

MR. MARMO: For one reason, your Honor, because you presented the Mc Kendrick case, in your opinion, and the Mc Kendrick case is based on the examination of the jury deliberations, and we think we'd make a valid reasonable argument to the Third Circuit when we say the jury deliberations and examination of the jury deliberations here are not consistent with what Judge Sarokin found. At least it's one consideration to be looked at in deciding whether or not there is a close case. That's the case you chose to rely upon in your opinion, and we are responding to that opinion on appeal.

I know technically the language of your order. You're absolutely right. But I'm suggesting to you to expedite this appeal, because this is not information that is prejudicial or disputable, because this is a valid response to the argument, and the position that your Honor took in your opinion, because this information in a different form was in the record before your Honor, and because it makes it easier to present the argument and more importantly easier for a court to examine the argument by just looking at that one document of the deliberations, it's just right for your Honor to deal with the substance of the matter, rather than the form and permit these two or three pages to be contained in that 20,000 page appendix.

THE COURT: Let's move on. What's next? C?

MR. MARMO: C, which is the photos of Rubin Carter's car. Those photos were marked as exhibits during the course of the trial. The jury saw the exhibits at the trial. Those -- what that car looked like is critical to the identification of the car. No one would suggest anything different. It's a distinctive looking car. The car was identified. The defendants were found in the car minutes after the murder. There is no reasonable way to look at the

evidence and suggest that is not the murderer's car, but -- you can appreciate that when you look at the photograph of the car.

The photograph is described all over the record. It's described intimately in the tape recording that the defense played for the jury, the statement that Bello made on tape to the police officers early on in the case. The photograph of this car, an identical photograph was submitted to your Honor in one of the volumes that was submitted to you by the defense. When I say, "identical," I mean identical in this term. I've compared it to the photograph we submitted. It's identical except the photocopying has it infinitesimally enlarged, but if you look at it, the car across the street, the porch, the leaves on the trees, the photo is exactly the same picture.

The other difference is in the testimony, the identifying witness or one of the witnesses who identified the car circled a portion of the tail lights that she contended light up when the car's brake lights were engaged. That is in the photograph we submitted to the Court. That's in the record. The jury had the exhibit during the trial. It seems most unreasonable to say a reviewing court can't look at the document, shouldn't be able to see it in light of

the fact that the distinctive features of the car are a critical issue in the identification and critical issue in this case and something your Honor dealt with.

Now, I can show you the two photographs. One that was submitted by the petitioners, appellees, and the one that we've submitted in the record, and your Honor can see that we're talking about the same view of the car.

MR. FRIEDMAN: Can I say one thing about the car while he's looking through --

MR. MARMO: I have it here.

MR. FRIEDMAN: They didn't put in any exhibits from the trial -- exhibits from the trial were not submitted to you. None of the exhibits. Mr. Marmo will agree, so the trial exhibits were not submitted to you. We submitted one photograph, one photograph, which is slightly different in form than the trial exhibit. They put a second photograph into the record, which we did not submit, and which nowhere appears in the record. We wouldn't be fighting over, you know, the slightly cropped photograph. That's not the issue. They put in a second photograph, which wasn't submitted, and it was changed. Why didn't they put in the photograph that was before your Honor?

THE COURT: That is not in at all, the one that you submitted to me was not in the record?

MR. FRIEDMAN: Not in the record. We're perfectly happy to have this one in the record. Now, that is smaller, and it has a circle around it --

MR. MARMO: Your Honor can examine it, and if it's smaller, it's infinitesimally smaller. Perhaps the photocopying, that is so tiny a difference.

THE COURT: Why did you object then? Why did you object --

MR. MARMO: Judge, should we tear apart our appendix for this ridiculous reason?

MR. FRIEDMAN: If that were the only thing -- it's the second photograph. The second photograph was not submitted.

MR. MARMO: I'd say, your Honor, customarily I'm not accustomed to being in Federal Court, but state appellate courts call our office and ask to see things. I just got a call yesterday, in fact, from a court that wanted to see a jury form. It wasn't in the record before that --

THE COURT: But the difference is that is an appeal from a trial court, and the Court has the right to see any evidence that was presented to that jury, and that judge, because they considered it. Maybe that's

why you and I are having such difficulty here. I'm sitting as a court reviewing an application for a writ of habeas corpus. You can't supplement the record on appeal when you're asking the Appellate Court to look at things you never submitted to me.

MR. MARMO: I'm taking issue with you. You have the photograph of the car in front of you. Does your Honor see any difference of any significance other than the circling of the tail lights between the two photographs?

THE COURT: I will rule on it. I want to hear your position. Let's move on.

MR. MARMO: My position is the same as with the former thing. I think it makes it so much easier for the Court to deal with this issue. We're dealing with resolving what is just here, and it seems to me if it's easier for the Court to understand the testimony and know the truth about this case, and this is something which was an exhibit at trial, and it's not a disputable item as to validity or accuracy, and it's part of an argument that responds to what your Honor said in your opinion, then we suggest it should be in the record before the Third Circuit.

THE COURT: We've discussed this a number of times. Suppose in connection with this application that

the defendant -- the State left out in its submissions to this Court half of the evidence that would have submitted the conviction, that you just didn't give it to me. I didn't consider it, and I ruled against you. You mean on appeal you could say, "Wait a minute. We've got all this terrific evidence that the judge below never considered. We didn't give it to him, but now you ought to look at it." Isn't that exactly what we're talking about?

MR. MARMO: No, not at all. You have the picture of the car. You had that in front of you. The record is full of talk about the picture of the car.

THE COURT: Let's not focus on the car. That's the most minute of the --

MR. MARMO: We're doing the items one at a time, and I'm telling you there's a valid basis for your Honor not to conform to the strict letter of what that note is that we have from Judge Gibbons. I'm suggesting to your Honor that the Court should be concerned about expediting the appeal,concerned with what's fair and reasonable, even though it's your opinion that's the subject of this appeal.

I don't suggest for a minute that that makes a difference, but rather than protract this matter, since it doesn't cause any harm, since there's no dispute about

the validity of what we're submitting to the Court, since it makes it easier for the Court to understand our position, and what you said, why shouldn't the Court have the benefit of that --

THE COURT: Move on, please. Did you submit a photograph other than the one which is an enlargement of the one submitted by the petitioners?

MR. MARMO: There's a photograph of the side view of the car, which was marked as an exhibit during the trial.

MR. FRIEDMAN: That was not in the record. We didn't submit it. I think Mr. Marmo would concede that.

THE COURT: All right. Let's go to D.

MR. MARMO: D was submitted to you in three different submissions that the defense gave you, and they concede it.

THE COURT: D is conceded.

MR. MARMO: E is the testimony of Patricia Valentine from the first trial.

In your Honor's opinion, you said that she testified at the first trial that the car was similar, and at the second trial she said the car was identical. That's not correct, and the record even at the trial shows this. It was the defense attorney who suggested

to her that the car was similar, and she didn't agree with that. She said it looks the same, just like the car, which I suggest to your Honor, and which we argued to the Third Circuit, is consistent with her testimony.

Your Honor's opinion suggests there is the clear implication that she was upgrading her testimony from the first trial to the second trial. Your Honor was factually incorrect in your recitation of the record. It was not her who said similar. It was the defense attorney.

Your Honor said she testified it was similar. She wouldn't. The defense attorney tried to get her to say it, but she wouldn't say it. She said looks just the same. That's consistent with identical.

I suggest, and we argue to the Third Circuit that is not a fair characterization of this witness, and it wasn't fair to suggest that she upgrade her testimony from the first to the second trial, because the fact of the matter has been this woman has been consistent right along in the 20-year history of this case whenever she talked about the tail lights, so said it looks exactly the same, just like the car.

THE COURT: Does her testimony from the first trial support that contention?

MR. MARMO: Positively.

THE COURT: But it wasn't submitted to me?

MR. MARMO: Part was. The business about similar was submitted to you, because they confronted her with that at the second trial, so it's in the transcript of the second trial, where the defense attorney suggested to her, but you're saying the car was similar, and she wouldn't agree with that.

THE COURT: What do you want to add?

MR. MARMO: I'm saying since your Honor incorrectly stated what the record says about her testimony, and since your Honor suggested that she upgraded her testimony from the first trial to the second trial, which is both wrong, and unfair to this woman, and this witness, who has been burdened with this case all these years, it's fair and appropriate and just for us to show the Third Circuit what this woman has said, whenever she talked about that car from the first trial, in light of the fact that your Honor is suggesting she's upgrading her testimony. She's improving her testimony --

THE COURT: What do you suggest that this testimony was not before me would show?

MR. MARMO: Consistent all along and looked like the car that left, exactly like it.

THE COURT: You're saying that that would make my decision erroneous?

MR. MARMO: The record that you had before you shows you were erroneous.

THE COURT: I'm asking you: What does this add?

MR. MARMO: This shows not only was your Honor wrong in your characterization of the portion of her first trial testimony that was read at the second trial, but in fact, this witness has never upgraded her testimony.

THE COURT: Could you have argued that to me, that this testimony was before me?

MR. MARMO: We didn't know you were going to attribute to her what the defense attorney said. We didn't know you were going to say that in your opinion and make statements.

THE COURT: Well, you move for reconsideration, don't you? You say the decision is erroneous and here we have something we want to supplement the record --

MR. MARMO: We chose after reading your opinion, we found many errors where your Honor made statements about the case that we think are wrong.

THE COURT: Obviously.

MR. MARMO: I think unquestionably wrong.

It's not a question of interpretation, just a question of a cold record. Your Honor said Mrs. Valentine testified that the car was -- the fact of the matter was, she did not, and they tried to get her to say that, and she wouldn't.

THE COURT: You're suggesting that the Appellate Court in reviewing my deicision should look at something I never saw.

MR. MARMO: Yes, because of what you said in your opinion. You accused that woman of upgrading her testimony. The fact of the matter is, that's not so. She has been consistent, and I think in fairness to her and in justice to this case, the Third Circuit ought to see every time she talked about the car at the first trial, her testimony was consistent with what she said at the second trial. She wasn't trying to embellish and wasn't trying to mitigate her testimony. She was trying to be as honest and as straight as she could be, and it wasn't fair in light of the record for your Honor to say she was upgrading her testimony between the first trial and the second trial. That's our position.

THE COURT: Let's talk about this basically again. Let's take a simple negligence case, the Court sitting without a jury. I say I find witness A was

telling the truth when she saw the plaintiff's car hit by the defendant. Can you on appeal say I've got a witness that can prove that that witness who testified against my client was in Florida at the time?

MR. MARMO: That's not like our situation.

THE COURT: Of course, it is. What you're arguing is that you have evidence to refute the facts presented to the Court, but that the Appellate Court should consider those even though they were not presented to the trial court.

MR. MARMO: If your Honor said I concluded I heard the testimony of that witness, and she said the car was red, and we looked at the record and we saw it was the defense attorney who said, "Madam witness, isn't the car red," and she said, "No, it's blue," if your Honor in your opinion said I don't place much credibility on her testimony. It's weak testimony. The reason it's weak is because she said the car was red, and the defense attorney tried to get her to say red. She didn't say red. She said blue. Here's her interrogatories. She never said that car was red, always said blue. And the judge said this witness said red, and not only that, I find she'd upgraded her testimony from what she gave previously.

I think in fairness to that witness, we have every right on appeal of your factual conclusion to show the Appellate Court this witness hasn't been upgrading her, enhancing her testimony --

THE COURT: Showing them things out of the record is not evidence --

MR. MARMO: If the testimony at the trial was the opposite of what you said it was in your opinion --

THE COURT: How would I know that?

MR. MARMO: Because you were there when you heard it. You read the record and --

THE COURT: This isn't in the record. What you are offering was not in the record before me.

MR. MARMO: Okay. What is in the record before you is the fact that you misstated what she said about that car.

THE COURT: Right.

MR. MARMO: Then you went onto say, See where her testimony is weak, and why I find it frayed, in quotes, because she'd upgraded her testimony. It was only similar at the first trial and became identical for the second trial. I'm suspicious of this witness and her testimony, and I think it's weak. The fact that it's weak is important because ultimately I find

it's a close case, and I've inventoried all this testimony and show you in each area where it's weak, and when on appeal she had why it wasn't weak, why it was so overwhelming, and why the jury didn't struggle --

THE COURT: You are suggesting that the Appellate Court should conclude otherwise?

MR. MARMO: I'm suggesting the Appellate Court has a right to know in justice to this case and the witness, that she hasn't changed her testimony, always been consistent. The reason I say that, number two, the record shows it, and number three, because your Honor -- because of what your Honor said about her in your opinion. We didn't know your Honor was going to accuse her of upgrading her testimony.

THE COURT: If you don't present evidence --

MR. FRIEDMAN: Let me say --

MR. MARMO: There's no evidence she upgraded her testimony, your Honor.

THE COURT: Wait a minute, please. We have been through this before. You are free to argue to the Appellate Court that any conclusions that this Court reached are unsupported by the record. That isn't what you are saying to me. You are saying, and we also want to show that the conclusions reached by the Court are wrong, because there is evidence out there that he

never saw, never considered, that he's wrong --

MR. MARMO: Only because of what you said in your opinion. We're dealing with responding to that opinion, and your Honor's opinion said not that there is a difference, but she's upgrading her testimony, and that makes her identification testimony weak, and we want to show the Third Circuit we think it's fair to this woman who is only a witness in this case, that she has been consistent throughout her experience in this case.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Obviously I could answer every one of these. We're half arguing the appeal.

Number one, her first trial testimony wasn't submitted to the second trial. She had every chance to put all of her first trial testimony into the second trial. They didn't do that.

MR. MARMO: I'd say --

MR. FRIEDMAN: Please. It's even worse there were parts of her first trial testimony that were read into the second trial. That's in the transcript. That's before you. They can argue whatever they want from the first portion of the first trial that was submitted as part of the second trial.

Number two, we made the point in our original

submission that she upgraded. We said that in our brief that her testimony changed, in our opening brief. They had months, months to respond to it, to put in anything. Not like you said, something out of the blue that had never been mentioned before.

We made the argument on all of this. You encouraged them to put in anything they wanted to answer our arguments. Anything. They didn't submit. Now, after our submission, our support from the record, for our position, now they discover, oh, we should have put in something else that wasn't in the second trial, and that was in the first trial to answer the argument that we made,the submission, that we made, and that we forwarded on and that you accepted. I mean, that's even more bizarre than anything else.

For Mr. Marmo to say you brought it up and that's the first chance we had to respond to it, it's not true. All of these things we've argued, and you've made a finding to that effect. Now, they think up things outside of what was submitted to you and outside of what is even in the second trial, and now want to give it to the Third Circuit --

MR. MARMO: That's not correct. They made this argument to you, but that's not what the record shows.

THE COURT: Your argument is that the reason you didn't anticipate, and the reason you didn't submit this evidence was that my finding came out of the blue, and what Mr. Friedman is saying, you were alerted to their position from day one.

MR. MARMO: All you had to do was look at the record and see it's not so.

THE COURT: I did look at the record, and I decided --

MR. MARMO: The record you had in front of you shows it was the defense attorney who used the term, similar. You said Mrs. Valentine said it was similar.

THE COURT: You must believe that this adds something to your case, or you wouldn't be insisting that it go into the second --

MR. MARMO: In response to you --

THE COURT: -- but it's relevant to this issue, but not submitted to me for consideration --

MR. MARMO: The records show that you had before you that she didn't upgrade her testimony.

THE COURT: Nobody is challenging the record that was before me. You want to add to the record.

MR. MARMO: You misinterpreted that record, and you characterize this witness' testimony wrongly and

unfairly, and in fairness to her and in justice to this issue, we think that the Court should see this woman who has been a witness and shuttled back and forth all these years, and accused of things, has been honest and forthright and candid as she could be, and as fair as she could be in her testimony. She wasn't leaning this way or that way. It wasn't fair to her to say she upgraded her testimony.

Your Honor confused what the defense attorney said and what Mrs. Valentine said is what we argue to the Court, and what we say the record shows --

THE COURT: What about F?

MR. MARNO: Trial testimony of Rubin Carter is not in the appendix. There was a footnote in the brief that makes reference to it. It's not in the appendix, and our position with regard to what your Honor's role is, your Honor is following the strict letter of Judge Gibbons' order, or your responses to me suggest that. That order does not deal with our brief. Deals with our appendix, and we contend it's unfair in appearance, and certainly in reality as well, for a court whose opinion is the subject of attack in a brief to be presiding over a hearing without taking out parts of that brief or taking out

parts of that argument. That's not what the order says, and it would be unfair, and it would be improper for your Honor to do that.

THE COURT: What is the appendix on appeal? Did it include the trial testimony, F --

MR. MARMO: It said it did.

MR. FRIEDMAN: He said appendix and brief. Can we deal --

THE COURT: One at a time, please.

MR. FRIEDMAN: That's not the only item where there are citations in the brief to the matters not in the record. I think what we should do if we deal with the appendix --

THE COURT: Deal with the appendix as it relates to the brief only.

All right. G.

MR. MARMO: G and H are the typewritten notes of the interrogation of John Artis. There are typewritten and handwritten notes. The handwritten notes you had. There's no dispute. The typewritten notes were made from the handwritten notes and marked as exhibits during the course of the trial and were read from by the detective who made the notes verbatim at the trial, so the notes are in the record, we contend, in the form of the transcript. If it's easier for the

Appellate Court to have the notes in front of it when it's going through arguments about these notes, your Honor dealt with the notes in your opinion, we contend your Honor said things about the notes that are wrong, that your Honor -- I don't want to go into the specific references, but your Honor said things about the notes that we contend are just factually wrong, and we present the notes to the Third Circuit. It's so much easier for the Court to look at the few pages of notes dealing with an appendix of 20,000 pages, to sit there and have that document in front of it, than to go through the transcript, which has the information in it.

Di Simone (phonetic) read from his notes during the course of the trial. So we contend for those reasons, because your Honor dealt with this on appeal, because the information is in the record, and because it's so much easier for a court to have the document in front of it and look at it, since it's not anything that is disputable as to what it is, that it should be in the record.

THE COURT: What about I?

MR. MARMO: Grand jury testimony of John Artis or a substantial part of it was read to the jury. It was read to the jury at the end of the State's case.

At that point just before the State rested, the grand jury testimony of Rubin Carter and John Artis was read to the jury. We deleted certain references in the grand jury testimony of John Artis when we were reading it to the jury. The Court didn't order us to do it. It wasn't the subject of argument or ruling. We did it. Those references deal with John Artis talking about what he heard with regard to retaliation with regard to the murder of a black man who was killed by a white man several hours before the Lafayette where the bar owner was killed and the patrons of that bar.

We suggest that should be given to the Third Circuit -- to the jury.

THE COURT: You mean it wasn't given to me or the jury, and it should go to the Court of Appeals?

MR. MARMO: Yes. Your Honor's case we made an appeal to racism. Your opinion has a number of statements that are rather sensational and received a lot of attention. We contend the opposite is correct, that the racism was in the murder, and the reasons for the murder, and we realize the sensitivity of this issue and dealt with it responsively and fairly, and nothing in the record that suggests we didn't, and there's an awful lot in the record to suggest we did.

These are rather strong statements that your Honor made about the way the prosecution dealt with this issue in this case. Artis' grand jury testimony said that there was talk of retaliation and the talk was about killing whites, killing whites. We didn't read that to the jury, because at that point in the case we contend there was no doubt at all why these people were murdered in the Lafayette Bar in the context of everything the jury heard. The motive for the killing was as clear as anything could be.

This information had the testimony to be inflammatory and perhaps be the subject of argument on appeal, and we unilaterally to avoid this issue and recognizing the sensitivity of this issue, didn't read that information to the jury. The only way anyone can ever know that is to read the transcript of the trial and read along with it the transcript of the grand jury testimony and see where it follows word for word --

THE COURT: Why couldn't that argument be made to me?

MR. MARIO: We didn't know what you were going to say.

THE COURT: You knew what they were going to say --

MR. MARMO: I know, but we can't deal with things not in the record. That is not in the record. The racism attributable to the prosecutor is not in the record. No Court has ever found that in the record. Eleven judges looked at the records and didn't find any merit to it. Didn't find anything in the record to support it.

The cases you cite don't compare to this case in any way. It was not in the record, and we didn't know what your Honor was going to say, and it's most unfair to the prosecution of this case, to the jurors, who sat on this case to the judge who permitted this appeal to racism for us not to be able to show the truth of the matter that we bent over backwards to deal with the sensitivity --

THE COURT: How are you prevented from showing the truth?

MR. MARMO: Because you said we made an insidious appeal to racism. We deleted unilaterally sensitive --

THE COURT: What prevented you from making this argument and presenting this evidence to me?

MR. MARMO: Your Honor, we didn't know what your Honor was going to do. We knew --

THE COURT: That is true in every case.

MR. MARMO: I know, but we knew eleven other judges looked at the argument and didn't want -- didn't say the sensational things that you said. We were appalled by what you said about the prosecution and presentation of the case. We think it's outright unfair, because we think the opposite is in fact true. We can't help that the defendants committed murders, because they were motivated by race considerations, but we didn't think it was responsive for us to stick our heads in the sand and say this is a sensitive issue, we don't deal with it.

We dealt with it in a fair and responsive way, and there was no way for us to believe that your Honor, after eleven judges didn't agree with the argument they made, and they gave you the exact same argument, exact same words, we didn't expect your Honor would believe it either, because it's not in the --

THE COURT: Doesn't that mean you don't present evidence to refute it?

MR. MARMO: This evidence responds to what your Honor said in your opinion.

THE COURT: It does not respond to the allegations made by the petitioner --

MR. MARMO: Your Honor adopted arguments they made in their brief. You adopted them, and they're

wrong.

THE COURT: Is this evidential on that issue?

MR. MARMO: Yes.

THE COURT: Why wasn't it presented --

MR. MARMO: On appeal of your --

THE COURT: Are you suggesting that if I had it, that I might have found otherwise?

MR. MARMO: I don't think you would have in the way you wrote the opinion. I don't think the record supports your Honor's opinion, and frankly there's no evidence of appeal to racism in this case. There's a wealth of evidence --

THE COURT: Let's not reargue the case. We are talking about a very narrow issue here.

MR. MARMO: There's another reason to argue the basis. Your Honor in your opinion said that the record shows there was talk of a shake. Mr. Carter testified to that. That was read to the jury. Carter said I heard talk of a shake retaliation for black man. I didn't think it would be murder. I thought they were going to break windows, overturn cars, didn't think it would be murder.

Your Honor said that a shake does not mean murder. That's not what the record shows, and nobody ever --

THE COURT: The record before me or the record not before me?

MR. MARMO: The record before you and the record of Artis' testimony who says shake means killing whites in no uncertain terms.

THE COURT: You didn't think it was important --

MR. MARMO: How did we know you were going to misinterpret what he said to the grand jury?

THE COURT: How could I misinterpret it? That wasn't presented --

MR. MARMO: Carter did not say shake includes murder. You said it in your opinion to support the rulings you made.

We can go into the Third Circuit and say the record doesn't support it, but we think we have a right to show more in light of the sensational and very strong statements that your Honor made about attributing racism to the prosecution, and in light of the potency of those statements and the sensationalism of those statements, we think it's fair and right and it's proper for us to show when Judge Sarokin said there was appeal to racism, look at all the reasons there wasn't. When he said shake means -- includes murder, not only is he wrong, not only has he changed what the record says, but in fact, Artis told the

grand jury that a shake means killing whites.

THE COURT: All right. What about J?

MR. MARIO: That refers to the excerpt of the sixteenth round.

I think the term, excerpt, is wrong. It is taken from the sixteenth round, but what that refers to is the boxing record of Rubin Carter. Those two pages in this appendix of 20,000 pages simply recite fights, when they were fought, what the outcome was, and who he fought. It's not a narrative kind of statement, where Carter was saying something prejudicial or that might hurt the defense.

It's the record of his wins and losses, and that record shows what your Honor said in his opinion, and we didn't know you were going to say that, that Carter is a contender for the title and his career was peaking. That's not in the record anywhere.

What's important about that is your Honor went on in your opinion on three different pages to make arguments based on these profiles that you presented, that Carter and Artis, the man who is going to fight for the title, whose career is peaking -- by the way, Artis who you said was enrolled in college on a scholarship, he was never in college, didn't have a scholarship. The only time he went to college was

after he was convicted of murdering three people. The taxpayers sent him to Glassboro State, but he wasn't enrolled in college at the time of the murders.

There's no question about it. Never ever had a scholarship.

THE COURT: What does that have to do with the sixteenth round?

MR. MARMO: You presented these profiles that these two people, the college student and boxer fighting for the title and peaking, they're not likely to do these crimes at this time in this way. They are not likely to be caught up in the racial tensions of the time, because they have so much individually --

THE COURT: Was the sixteenth round and the boxing record before me --

MR. MARMO: It wasn't before you, but you put it in your opinion.

I can go to the Third Circuit and say Judge Sarokin said things you won't find in the record. He wasn't a contender for the title, and his career wasn't peaking, because from two years before these murders, his career was going to --

THE COURT: When was his --

MR. MARMO: '74, I think, but the boxing record is not a statement from the book. It's an

indisputable record of what his boxing career was, and we took it from the book, because it -- that makes it undisputable. This is what Carter says the record was.

In light of what you said in your opinion, it's not in the record, only in the publicity the defense put out, but not in the record anywhere of the trial, that since you said that and used it to be the basis of argument, we think we have a right to show, and in light of all of the other arguments, we make about your interpretation of the evidence is not simply the judge said things that are not there in the record. We don't know where we got the information from, but in fact, the opposite is true.

If he's not likely to commit these crimes, because he's peaking, let me show you the fact of the matter. His career was in down swing. He fought six times in '66.

THE COURT: This goes back to my original hypothetical. You can bring in an article that says when he had fights, even though they weren't submitted to me --

MR. MARMO: If you said something that wasn't in the record, and the truth is ultimately -- that's the bottom of everything. That's what justice should be.

You said in your opinion, a search for the truth. If the truth is not only not in the record, but the opposite is true --

THE COURT: You can bring in a newspaper article?

MR. MARMO: No. Statements made by the defendant as to what his record was, not a narrative statement, just a compilation of the boxing record.

THE COURT: The date of the last trial was what?

MR. FRIEDMAN: '76.

MR. MARMO: That was the date of the last trial, but the date of the murder was '66, and the boxing record is forever.

MR. FRIEDMAN: They tried to put the book in at the second trial. It was ruled out. The jury couldn't look at the book.

MR. MARMO: This has nothing to do with statements made about that. We weren't dealing with that at the trial. Your Honor put it in your opinion, and we are responding to your opinion before the Third Circuit.

THE COURT: All right. K?

MR. MARMO: That's -- you have three or four copies of that.

THE COURT: No. There's no objection.

MR. MARMO: No.

MR. FRIEDMAN: No.

THE COURT: All right. L?

MR. MARMO: L is an agreement between Bello, Ziem and Miller. That agreement was testified to at the trial. The essential elements of that agreement, whatever is necessary for this argument is in the record, but scattered throughout the record. It's in the testimony of various witnesses, but the contents of the agreement, whatever relevance that has, is in the record. It's just scattered through the record. It's so much easier for the Court to have the agreement in front of it. The agreement was an exhibit marked into evidence in the course of the trial. The jury had the exhibit in front of it. There's testimony about this agreement. This agreement was made between two men who were involved with Bello at the time Bello gave this story of being in the bar, a rather sensational account, what the defense has labeled in the bar story, where Bello shielded himself behind the body of a woman, who was shot numerous times, and somehow he survived.

This was a story that was put out when the two men along with Bello were attempting to present a more

sensational story. This was at the time they were making tape recordings and Bello was trying all different versions of the case, and they were doing this in conjunction with the defense. Numerous telephone calls with the defense, getting all the documents from the defense, notes of the conversations with Mr. Beldock that were given to us on the eve of trial, even though this happened a year before, even though they knew about it, even though they knew Bello was being taped, and even though they were working with the men and turning documents to them. We didn't learn about it till a month before the trial when Bello took the polygraph examination, and then he told us how the bar story came out, and we checked into it, found the agreement, found letters from the two men, found they had gone to Essex County when Bello testified before the Grand Jury, found they were surveying the assemblyman and attempting to take photographs of the Bello's meeting and all of this, the essence which the defense knew a year before --

THE COURT: What does this agreement do that you don't have --

MR. MARMO: Shows the basis and background for that in the bar story, and it's in the record. But it's so much easier for the Court to just look at the agreement that would probably only take a minute looking

at it. But it would show them the agreement, and the signatures, what the agreement was about, all of which was in the record that they were trying to commercialize Bello's involvement meeting with Mr. Beldock from the defense and other people associated, trying to sell the story.

There are witnesses who talked about these men coming to the witness and attempting to sell this story. Or if you don't like this version, let me give you another version, and if you don't like that version, we have this version on tape.

This whole side of Bello in the bar story is not touched upon in your opinion. Your opinion deals with the fact there are changes in Bello's testimony, that first he was candid, didn't see them. Then he said he was in the bar, but you don't deal with the background of how this came about. This case wasn't simply a situation where Bello was presented to the jury, and the jury heard --

THE COURT: That goes to the question of relevance. I'm interested in knowing -- all you're saying is, this agreement is in the record, was in the trial record. There's testimony too, but the agreement was not presented to me.

MR. MARMO: The agreement was marked in evidence. The agreement was not before you, the best we can

determine.

THE COURT: Move on to M.

MR. MARMO: M. You had several copies of that. In any event, no argument about that any more.

THE COURT: That's in. Okay.

MR. MARMO: Testimony of Alfred Bello to the Essex County Grand Jury.

This is when Bello gave the story of being in the bar. That has been the basis of the defense argument, what they called the in the bar story for years. They have characterized that testimony, synopsized it, submitted affidavits about it, dealt with it extensively in the brief. You accepted much of the argument about the in the bar story in your opinion, but you didn't have the transcript itself.

THE COURT: Would it have made a difference, or do you suggest --

MR. MARMO: It makes it easier for somebody looking at the argument, at your opinion and the arguments on both sides, and the in the bar story is so essential to that polygraph issue, that it seems to me it makes plain simple good sense instead of having to ferret this out of that affidavit and that transcript, and it was read line by line, page by page, to Bello in the course of his cross-examination, so much of it is there

verbatim, but it has to be culled from here and there in a record that is very difficult to deal with. It just makes good sense to make it easier for the Court to see this argument.

Let them call it whatever way they want, but why labor over it. If the information was there, and if your Honor chose to base your opinion on this point, on the in the bar story, if this is the verbatim in the bar story, and if there's no dispute about this evidence, no one can claim we're arguing about what was said if it's the basis for the defense position, if it's a position that the Court adopted --

THE COURT: When you say it was read to Bello, you mean it was read in the record, or was he asked questions about it?

MR. MARMO: Question and answer form.

THE COURT: Isn't that different than offering his testimony in evidence?

MR. MARMO: Sorry? His testimony was read to him at the trial. Did you say were you asked this question --

THE COURT: Was it admissible? Does that make it evidence?

MR. MARMO: It's in the record. It was evidence.

THE COURT: Did you say before the Grand Jury, you were in the bar; no, I didn't say that --

MR. MARMO: It's in the record.

THE COURT: You mean, the Grand Jury testimony about this response becomes --

MR. MARMO: He said, I said it's not true. Here's why I said it and told all about Miller and Ziem. The Grand Jury transcript we're submitting that defense is changing,much of it was read. Maybe more than -- maybe most of it. I want to be careful what I say, but pages and pages were read by Mr. Beldock, I believe, to Bello while he was on the stand, so the contents of the transcript verbatim, large significant portions there in the record. But it's so much easier to have the transcript and follow it. No one is going to claim Beldock read it wrong. He read it to Bello. Bello said --

THE COURT: It's really not evidence. His Grand Jury testimony is not evidence. It was never offered in evidence, was it?

MR. MARMO: At the trial it was read to the jury. The jury read it.

THE COURT: It was not offered except in response to questions and answers.

MR. MARMO: Are you talking about the volume of

the Grand Jury testimony itself, was that marked into evidence? It was marked for identification. I would doubt it went to the jury, because it was read to the witness on the stand.

THE COURT: How does it become part of the record on appeal?

MR. MARMO: Because it's in the record. It's been argued. The defense has been arguing for years, because it's an argument that you accepted, because they synopsized it in affidavits and briefs, and because much of it is in the transcript. We can cull it out from here and there and a Court can sit with five documents and say this is what Bello said in the Grand Jury. This is what they call the bar story. Instead of having five or six documents in front of them in different volumes, have an appendix. The Court on appeal can read those -- read through those 40 or 50 pages, however many there are, and it makes it easier. It makes sense. It's in the record. It's the basis for their argument.

Now, you can tell me, well, I have to stand behind the strict letter of what Judge Gibbons said, and you have an argument, say it's part of your argument, go argue it to the Third Circuit.

I'm suggesting courts often don't do that. They say I want to deal with the substance of the issue. Let's

get the appeal back on track. There is nothing unfair about it.

THE COURT: Is the evidence what Bello said before the Grand Jury, or what he testified to in the presence of the jury regarding that Grand Jury testimony?

MR. MARMO: What he said before the Grand Jury is the basis for the argument you accepted in your opinion, so you considered it evidence.

THE COURT: I'm asking you --

MR. MARMO: Why isn't it easier for them to have the verbatim record of the in the bar story?

THE COURT: That wasn't the way it was presented to the jury.

MR. MARMO: It was presented to the jury. The jury heard it read.

THE COURT: No. They heard questions asked of Mr. Bello --

MR. MARMO: Verbatim to the transcript.

THE COURT: Did he respond?

MR. MARMO: Yes. I said that.

THE COURT: But it's not true, you don't think it adds a little --

MR. MARMO: The defense got up and said, Don't believe him. Look what he said in Essex County. The prosecutor doesn't say that. He lied in Essex County.

How do you know he's not lying to you? The standard defense argument. We presented a whole gambit of evidence to show what the in the bar story was. There's documents, evidence, testimony, stuff we learned a month before we went to trial and put it all together, and the jury didn't have any problem seeing what was going on.

THE COURT: All right.

MR. MARMO: It's certainly evidence, and I suggest it makes so much sense not to have a court, in light of what they're dealing with in that case, not to burden them with going through six volumes when they could have one volume in front of them. That's not disputable information.

THE COURT: O?

MR. MARMO: O is an agreement dated December 8, 1975 among Jerry Leopaldi, Alfred Bello, Joseph Miller and Melvin Ziem, re: motion picture production.
This is something that was marked in evidence during the course of the trial. The jury had it in front of them. It was testified to extensively by Mr. Leopaldi, who was a witness for the State. It was part of our evidence to show what the genesis of the in the bar story was, and the defense knew a year before trial, and we found out about it a month before trial. The essense of what is in the agreement, what's in the record, it's testified to by

Leopaldi, by Ziem, I believe, Bello. So it's in the record. It's in various volumes. Various places. Has to be culled from here. There's a hunt and peck process that the Appellate Court has to go through. They have a tremendous, tremendous amount of information to deal with. This is an enormous volume that the Court has to deal with. Why should we say you rule on this matter, but we're going to close one eye and make you hunt it out? Have your clerks pull out the volumes and get the pages in here and pages there, and it's all there. Why should we have to, if we can make it easier for them -- if it's information no one can dispute, if the document was an exhibit and evidence at the trial, why can't we deal with the substance instead of having to make a motion to supplement the record, and say you're judges of the Third Circuit. We want to make it easier. Don't want you to find this in six different places. It's so much easier to have the volume in front of you. I think you'll agree that it's easier and prefer to deal with it that way. If you can make my job easier, it makes good sense. Why not. And I'm suggesting for those reasons it's right, and it's just that your Honor not just simply follow the cold letter of what Judge Gibbons wrote in his note to you, but deal with the substance of the matter to get the appeal back on track. Defense doesn't need any more

time than they already have.

THE COURT: All right.

P?

MR. MARMO: Letter of Joseph Miller to Sherry Lansing, MGM Studios. They're both the same item.

It's also a letter of Joseph Miller to Sohcha Meltzer of the Viking Press. They are two men associated with Bello trying to present a more sensational story. The letters were marked in evidence at the trial. The jury had the letters before them. They letters were read into the record during the testimony of Miller and Ziem. The contents of the letter, I believe, I read on cross-examination. It's in the record, scattered throughout the record. I don't even believe they're in the same volume. You could put this letter together by culling it out of one place and culling it out of another place and make the third circuit go through the very difficult task of dealing with one tiny issue in this case by hunting and pecking throughout the record. But the letters are one page each. Again, we're dealing with items that are a page or two pages, and talking about taking apart an appendix of 20,000 pages, 600-some volumes for these two pages. There's no dispute about it, that the contents of this letter are in the record.

Miller talked to these people, says I have Bello on tape and more sensational account, and talking and working with Beldock, he notes I'm on the right track. The heck with him. Here's the script for the story we want to write. They're marked in evidence, testified to in the trial. If it makes it easier for the Court, why in the world doesn't it make good sense to let the Court have it? Why do we have to --

THE COURT: What about Q?

MR. MARMO: Part of the same submittal marked as Exhibit -- marked as an exhibit. It was an enclosure in the letter. The letter talks about it. It was testified to, the outline of it. It's the script for at least one version that they were trying to sell the Lafayette Bar murders --

THE COURT: What about R?

MR. MARMO: R is a portion of the defense affidavit filed with the Appellate Division.

THE COURT: What is that?

MR. MARMO: That's an affidavit where the defense says that the Harrelson polygraph is important because Bello told Harrelson that Carter and Artis were not the trigger men in the in the bar story, that they were just on the scene, so the most they could be was aiders and abetters. The Supreme Court accepted that account and

sent the case back, and in their remand opinion made the same opinion that they're not trigger men. We didn't talk to Harrelson, because we were concerned what might be attributed to us, but the defense spent a long time talking to him.

When he got to the defense, he said, I never told anybody Bello gave me an account of four people doing the killing, and they were not the trigger men. The only story had Carter and Artis as the trigger men, and the Supreme Court got the wrong idea and one place was from this affidavit, where the defense said we've talked to Harrelson, and this is what Harrelson said, and the defense attorneys got up and said in the remand hearing, he never told us that. Never told us that Carter and Artis were not trigger men. There were four people involved. He didn't tell us Bello told him that --

THE COURT: How does that aid the Court of Appeals?

MR. MARMO: Because it's part of our argument with regard to the polygraph. This is a document that was -- and I made an error here -- this is a document listed in the appendix that was submitted to you. However, there are several items in that appendix that have asterisks, and say when you follow the asterisks, we did not include this exhibit. S-1035, I think it was at the remand hearing.

We didn't include it in the appendix, because it was submitted to the Superior Court on an earlier appeal, so you have that.

When I saw it listed in the appendix, and that appendix was sent to you, I assumed this was in the appendix, but it was brought to my attention at a meeting that there was an asterisk alongside, and this is not one of the items of the dozens, and dozens that were sent. Two or three were not included in the appendix, even though listed on the inventory.

THE COURT: Was the content of that affidavit ever presented to a jury?

MR. MARMO: Read at the remand hearing to Mr. Steel when he was testifying. I read it to him. It's in the record. It's in the transcript, portions of that affidavit --

THE COURT: What about to a trial jury?

MR. MARMO: No, not read to the trial jury, but one of the issues deals with his polygraph. You had all the transcripts of the remand hearing, and you had all of their briefs regarding that, and this was listed in the appendix, and it was marked as an exhibit during the remand hearing, and there are dozens of volumes from the remand hearing, which lasted for --

THE COURT: All right. Mr. Friedman?

MR. MARMO: Let me see if there's another area.

Okay.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: I have to restrain myself, because I could talk for an hour and a half on every point he has raised, and I know that's not the point of being here, so I have it all on one sheet of paper, if I can get some general observations.

First of all, I heard Mr. Marmo say again and again, it's easier for the Court in this form. Appeal Courts are not supposed to have it easy. They are supposed to consider the record before the District Court. That's the rule. I don't think the State of New Jersey is any different than the Federal Government in terms of considering only those matters in the record, so that it's not a question of easiness. It's a question of following the rules, and that's not what they did in this case.

Now, again and again he said it's here in a different form. Well, fine. Just cite it in the right form in which it was in the record. He said, Well, it's scattered around. We want to make it easier for the Third Circuit.

All they have to do was cite the scattered around material, and we would have been before the Third Circuit

already.

Now, I just want to show your Honor all the material we're talking about. I don't know how the court reporter can get these dimensions down. It's these three volumes. We're talking about 80 volumes, but these are the three in contention, about 300 pages. That's what the 15 items are all about.

Now, they could have without any trouble at all made it easier for the Third Circuit, put the material only in the record, and we would have been long gone before the Third Circuit already. They didn't. They didn't do it. We made -- and as I said to your Honor before, we made several arguments that your Honor ruled upon, we laid it out to them. We put it into our briefs very early in the game.

Our original brief was in April of last year, and they didn't respond to that brief until September, and during the hearing that we have before your Honor, you said anything you want to submit in response to them, submit it. So they had all that time to look at our brief to know what our arguments were, to put in material, and as you may remember, we were chasing after them to put the material in. They didn't put the material in. They had to be dragged, kicking and screaming to put the material before your Honor, and we had to submit a lot of it. So they had every chance

to submit it in response to the argument that we had initially made in our petition, which was filed in February, and our motion for summary judgment, which was filed in April, and they didn't do it.

Now, what are we talking about? I mean, I heard Mr. Marmo talk about tiny little issues, five items relating to a movie contract. They're so far away from the core issues in this case, that it's astonishing that they say we want to submit the other material. It's a tiny little issue way out in left field, and we want to submit stuff in some cases obviously not before you, and in many of the cases not before the jury in the second trial, and in some cases not before the jury in the first trial. They want to make it easier for the Third Circuit. That's not what the rules are about.

Fourthly, we can answer everything. We're not trying to hide the truth. We can answer everything that they're putting in there, and their characterization of the grand jury testimony and Carter's trial testimony. We can answer all of that. But if we did, we'd have to submit a hundred pages, a thousand pages, two-thousand pages of stuff from the first trial, from the second trial outside the record. We can answer all of that. Fourthly -- I mean, that would

just extend the record to some enormous length, and that's not what the rules are talking about. I mean, some of the things Mr. Marmo said, I'm just astonished at. He said "we could have made a lot worse on appeal to race, and we didn't"--

MR. MARMO: I did not say that. I'm sorry to interrupt.

I never said anything like that, and that's exactly the kind of misrepresentations we're dealing with on appeal. That's not a fair statement. I never said anything like that, and your Honor shouldn't permit that on the record, because you heard a very lengthy argument from me, and you know there's nothing in there like that.

MR. FRIEDMAN: I didn't interrupt him on his argument, and I was astonished at some of the things he said, "the defendants did it for race."

We think the record shows it's absolutely innocent, and for him to reargue the merits, it's just astonishing. The most important thing here is they didn't follow the rules. They didn't follow the Third Circuit's order. If they had followed the rules and followed the Third Circuit's order, not made it easier for the Third Circuit, only submitted things in the record, and again, and again they say

it's there, substantial form.

Fine. Submit it in the substantial form it was in the record, and that's all that we're talking about here.

I really would like to respond to all the merit issues that Mr. Marmo argued, but I just don't think that's what the whole hearing is all about.

THE COURT: Yes. Gentlemen, what I'm going to do, because I know that the resolution of this motion is necessary for the expeditious appeal, I'm going to take a recess right now, and I assume I can come out in a half-hour and decide the motion.

MF. FRIEDMAN: Two other items.

We had designated stuff and if I can read from Mr. Marmo -- sorry -- Mr. Goceljak -- we had designated 15 items that they didn't include.

THE COURT: I have already ruled, have I not, that if they were in the record, they are to be included. That is in the order I already signed.

MR. FRIEDMAN: Can I say something about the brief issue?

THE COURT: I'll hear from you on the brief issue.

MR. FRIEDMAN: In addition to the material

we say was not in the appendix, they put into their brief all kinds of material that was not in the record before you. Granted, Judge Gibbons' order doesn't say anything about the brief in that form, but we're going to argue to the Third Circuit that they argue in their brief matters not of record.

We just want to save the Third Circuit the time of another remand hearing to determine where the particular matters that they cite in the brief were in the record. We want citations. We don't want to anticipate the argument or defend the argument. We want to know where they got this stuff from, and if they can't show where they got it from, it shouldn't be part of the record.

We have as Exhibit 4, there are about 12 pages of material, which they just invent from out of nowhere. There's no citation from the record we can find. Just to, you know, just to look at the first one, the bar and the statements of facts, Page 7. It was the bartender's custom to count the day's receipts from the cash register at this time. No citation to anything. We dispute that. Where is that in the record? If they have a citation, fine. Let's look at it. But when, you know, the only relief we want from you is not to strike that from the

brief. We want an order saying support it with reference to the record. That's all we're looking for with respect to the matters discussed at Page 4 or Exhibit 4 of our motion.

THE COURT: All right.

Mr. Marmo, you wish to be heard on the brief question?

MR. MARMO: Yes.

Our position with regard to that is contained in my letter to you of August 11th, 1986, where I felt it necessary to respond to Mr. Beldock's previous letter to you.

Our position is that our brief deals with attack upon opinion that your Honor gave, and we don't think it's fair or appropriate in appearance, and in reality for your Honor to be looking into that brief and making rulings on it.

If they have some question about us saying something in the brief, they should deal with it through the vehicle of their responding brief, and we'll deal with it in our reply brief. But we don't think it's fair for your Honor to be put in the position of presiding over a hearing, where they say what's the basis for this, and I'll say here is where I got that from.

If you look at this and that and so forth, then they know how to respond in their responding brief, and you're presiding over the test run of the brief. It is not fair. In the appearance of the whole process, it's offensive, and we don't think they should have come to you in the first place and ask you to look at a brief to deal with the opinion your Honor made.

THE COURT: I will take a recess, and I'd imagine in no more than a half-hour I will come back out.

(A recess was taken.)

(After recess.)

THE CLERK: All rise.

THE COURT: Be seated.

This matter is before the Court by reference from the Court of Appeals to settle the record in this matter.

Despite the applicable rules, the decision of the Court of Appeals and the decision of this Court, all of which clearly establish the parameters for the record, the appellant-respondent has and continues to insist that the record on appeal may include evidence not presented to this Court.

The State contends that it has the right

to present evidence to the Court of Appeals to refute the factual basis for this Court's decision, notwithstanding that such evidence was not presented to or considered by this Court in arriving at its decision.

This Court has and continues to respect that contention. Indeed the matter was remanded to this Court to determine the record before it, but not to determine whether the record could or should be supplemented in connection with the appeal.

The parties were directed to meet and seek to reach agreement on the record pursuant to this Court's direction, that only those matters which were presented to this Court were to be included in the Appellate record. Notwithstanding that clear direction, the State choosing to ignore it, persists in its efforts to expand the record beyond what was presented to this Court.

Petitioners have conceded that items D, K, M, do appear in the record and have accordingly withdrawn their motion to strike these matters from the appendix.

The State concedes that none of the remaining items were in the record before this Court in the form they have presented to the Appellate Court.

Some were in evidence in the prior trials, and some were not. Some of the items are referred to in the record presented to this Court, but not in the form presented originally to this Court. For instance, where a witness was confronted with grand jury testimony, the State now wishes to present to the Court of Appeals the original grand jury testimony, item N, although not part of the trial record or the record before the Court in that form.

The State argues that this will simplify the work of the Court of Appeals, but it totally ignores the obligation of the Court to review the matter in the same form as submitted to the Court below.

The State also seeks to go entirely outside the record and present excerpts from a book written by one of the petitioners, item J, arguing that it refutes some of the Court's findings. Those excerpts were never evidence in any proceeding, and it is inconceivable that they should now be considered on appeal for the first time.

The State argues that the Court of Appeals should have materials that this Court did not have, because the State did not know how this Court was going to rule.

First, the petitioner's contentions, some of which were ultimately adopted by this Court, were clearly enunciated from the outset.

Second, the State was invited by the Court to submit anything and everything it wished in response to petitioner's contentions and in support of its own. For the State to contend that it should now be able to present evidence to the Court of Appeals never presented or considered by this Court, because it failed to anticipate an unfavorable ruling is ludicrous.

Petitioners have also moved to strike certain portions of appellant's brief on the ground that it too relies upon matters outside of the record. Appellants, consistent with the unflagging position they have taken in this Court have made factual ascertions and arguments based upon matters outside of the record or unsupported by it. However, the reference from the Court of Appeals related to the appendix only, and this Court deems it inappropriate and presumptous to rule on petitioner's motion to strike portions of appellant's brief. That controversy is more appropriately one to be resolved by the Court of Appeals and not the Court from whom the appeal has been taken.

For the foregoing reasons, appelee's motion to strike from the record items A through R is granted, excluding therefrom D, K, and M, the motion to strike those items having been withdrawn.

Counsel for petitioner should submit an appropriate order immediately, because I understand that this obviously is one of the matters that must be resolved for the appeal to be expedited.

MR. MARMO: May I ask something of your Honor?

Item Number F, trial testimony of Rubin Carter, is not in the appendix. You made no reference to that. You made reference -- there's nothing to be stricken from the appendix. The affidavit says it, but I think we're in agreement it is not.

THE COURT: F is not in the appendix, but was referred to in the brief. To make the record clear, I am not ruling on anything in regard to the motion to strike on the brief. So excluded from the order should be any reference to F. You can say the Court has not ruled upon it.

MR. FRIEDMAN: I think you said you ruled on our material going into it --

THE COURT: I have signed an order to that effect. If it is in the record and you requested to make

it be in the appendix, it should be in the appendix. There is an order I saw yesterday when I got back from vacation.

Thank you, gentlemen.

MR. FRIEDMAN: Thank you, your Honor.

(Whereupon, the matter was concluded for the day.)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

Circuit Court No. 85-5735

District Court No. 85-745

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

ORDER

Pursuant to the remand order of the Third Circuit Court of Appeals (Gibbons, J.), dated April 29, 1986, to determine the

contents of the record herein, and on motion by the appellee for an order settling the record, and argument of counsel having been heard on July 28, 1986,

IT IS ORDERED that:

1. Only those matters which were before this Court shall be included in the submissions to the Third Circuit Court of Appeals.
2. Appellant shall include in the record and appendix on appeal all matters designated by appellee which were before this Court.
3. The book entitled "The Sixteenth Round" was not before this Court and no portion thereof shall be included in the record on appeal.
4. Counsel are directed to meet in person to attempt to reach agreement as to any disputes concerning the contents of the record. If counsel cannot resolve those disputes, they are to so advise my Clerk by August 7, 1986, and the matter will be set down for a hearing on August 20, 1986.

U.S.D.J.

Aug. 9, 1986

M78

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

85-745 (HLS)

RUBIN CARTER,

Petitioner,

-vs-

JOHN J. RAFFERTY, ET AL,

Respondent.

TRANSCRIPT OF PROCEEDINGS

July 28, 1986

Newark, New Jersey

BEFORE:

HONORABLE H. LEE SAROKIN
UNITED STATES DISTRICT JUDGE

Appearances:

LEON FRIEDMAN, ESQ.
Attorney for Petitioner.

RONALD G. MARMO, ESQ.,
Attorney for Respondent.

PURSUANT TO SECTION 753 TITLE 28 UNITED STATES CODE, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN STENOGRAPHICALLY IN THE ABOVE ENTITLED PROCEEDINGS.

Phyllis T. Lewis CSR

PHYLLIS T. LEWIS, OFFICIAL COURT REPORTER

THE COURT: Carter versus Rafferty.

Enter your appearances, please, Counsel.

MR. FRIEDMAN: Leon Friedman for the movant, Carter. F-r-i-e-d-m-a-n.

MR. MARMO: Assistant Prosecutor, Ronald G. Marmo, and acting prosecutor.

THE COURT: Yes, Mr. Friedman.

MR. FRIEDMAN: This is a motion to settle the record, the appellate record, and Rule 10(e) of Appellate Procedure. I might say at the outset why we're here at this late date.

THE COURT: Yes. I was going to ask that question myself.

MR. FRIEDMAN: We are here because respondent did not follow the procedures laid out in the Federal Rules of Appellate Procedure 10 and 30. They didn't obey the order, a specific order of the Third Circuit, and they didn't bother to call the Court Clerk to find out what basic procedures had to be followed, and they went right ahead and filed the huge appendix and brief while a motion was pending in the Third Circuit on what should be done about the dispute on the record.

Let me go over the sequence of events, because I think that would put everything in order. Now, when we were here exactly a year ago before your Honor on the merits,

you asked the parties to put in everything they wanted relating to anything in dispute on the petition, and if I may say so, the prosecutor -- we had to take the laboring on some of this material. We put in a whole bunch of material. The prosecutor put in a whole bunch of material. Everybody said it's not necessary to put in anything.

You said that they could put in anything they wanted that bore on the issues. We and they submitted some. After this Court's decision in November, a scheduling order was laid down in January. On January 24th the respondent put in a statement of contents of the appendix. In that statement there was no reference at all to Pat Valentine's first trial testimony, to Rubin Carter's first trial testimony, to John Artis' grand jury material. There were four or five items never mentioned. It's a very short listing about a page and a half, Exhibit B to our moving papers in this case, and there's some rather general statements, police reports, 1966 murder investigation police reports. We don't know whether they were trial exhibits, first trial, second trial, whether submitted to the record general statements, police reports.

On February 5th we objected to this statement of contents of the record. We counterdesignated, and we made a motion before the Third Circuit that matters not of record should not be submitted to the appendix. This is

February 5th, pending motion before the Third Circuit.

February 14th, they put in an answer to us, in which they accepted some of our designations. They countered again no reference at all to the Valentine first trial testimony, to the Carter first trial testimony, to the Artis grand jury testimony, to the pages of the 16 rounds. No reference at all to those four pieces of material in particular, and in addition there's a little more elucidation about what police reports we're talking about.

Now, on February 19th we put in a reply saying you haven't answered our objections. You still are including things in the record which in the appendix were not of record, and you haven't answered our contention. That's the last piece of paper. There's a pending motion before the Third Circuit.

Now, in the meantime, the respondent is going ahead, putting together all this material. Now, we made a couple of phone calls to the Third Circuit saying what's the status. If there's a motion relating to the record, and it hasn't been settled yet, what is the status of the scheduling order. And we were told if the record wasn't settled, then the scheduling order obviously can't be followed. And sure enough, on March 25th Judge Gibbons, the Third Circuit, hands down a decision that's Exhibit 2,

March 25th, Carter's motion to limit the appendix to matters of record before the District Court is granted.

Now, at that point we informed -- Mr. Graves informed Mr. Goceljak that the order is there. We are told this upsets the scheduling order, that the scheduling order issued in January, and there was one extension, and it can't be --

THE COURT: Had the appendix been filed?

MR. FRIEDMAN: Not at that point on March 25th.

Now, Mr. Goceljak in his last papers admits on March 27th he received the order, so it's in his hands. I grant you that they were well along to putting everything in together, but he in his conversations with Mr. Graves and conversations with the Clerk, he said the difficulties are minor, and we can settle them. And on that basis the Third Circuit Clerk apparently accepted the appendix, and the Clerk -- we don't know why --

THE COURT: When was it filed?

MR. FRIEDMAN: March 28th.

Now, immediately there is another round of motions and cross-motions before the Third Circuit, and then we have the Third Circuit issuing the second order in this case. This is Exhibit 1 to our moving papers. It appears that the parties are unable to agree on what matters are of record before the District Court pursuant to this Court --

pursuant to this Court's order of March 25th. The matter is referred to the District Court for determination, and that's why we're here. Within three weeks we filed the current motion in which we specifically indicate what the trouble was. Now, among the troubles were that the four items that I specifically refer to, the Valentine first trial testimony, the Carter first trial testimony, the Artis grand jury testimony, and the pages from the 16 rounds were never indicated anywhere in any piece of paper, that they would be part of this record, and they just appear in the appendix for the first time ever, and as to those items, there's absolutely no doubt they are not of record in this court.

Now, we have -- and I don't know how else to do it, but to go over each of these --

THE COURT: The only problem I have, Mr. Friedman, why can't counsel agree? Judge Gibbons' reaction would be the same as mine. The rule is very simple that nothing should go before the Third Circuit that was not before this court. I cannot concede that counsel do not know what was before the Court. As a practical matter, I guess the respondent picked up -- am I right -- you got the transcripts back? Your office took the transcripts back?

MR. MARMO: In response to a call from your office, your Honor.

THE COURT: I'm not saying there's anything improper. I'm just saying I don't even have the files as to how the Court can make a side-by-side comparison. Why don't counsel know?

MR. FRIEDMAN: Of the 18 items we admit three of them are before the Court. As to the -- as to ten of the items, they admit that they were not part of the record. There are five items where there is, if I can say this, a dispute. For example, there's handwritten police notes. They say that the typewritten notes were before the Court. We say they weren't. They say they're identical. We will dispute that, because things were added to the typewritten notes, so at least there's a dispute. There's a confrontation on those five items. On three items we've said -- ten items they admit they don't have records. Furthermore, some of these items they weren't even admitted to the second trial. They -- these are first trial items. First trial items, and as to some of them the Judge specifically ruled them out.

Now, I don't know how something that happened at the first trial,that was ruled inadmissible in the second trial,was not submitted in the record in this case can end up in the appendix in the Third Circuit. I mean, again the rules are clear. The Third Circuit -- the two Third Circuit's orders are clear. If it's not part of the

record, it couldn't be part of the appendix and shouldn't be referred to in the brief.

There's another side issue of matters referred to in the brief that aren't in the appendix. I don't know how they can cite that, and we're not asking this Court to rule. That the Third Circuit has to do, but whether there is any issues as to whether it was part of the record, it seems to me, that's something the Court can do. If we deal with specific pages of the brief that are referred to, that are not anywhere in the record, not even of record in the trial court --

THE COURT: Assuming we now have -- and I don't know whether Mr. Marmo agrees -- we have five items that are in dispute, how do I resolve that? I assume first I'd have to have the items delivered. What was there, 20,000 pages of testimony?

MR. FRIEDMAN: It was --

THE COURT: It would be hard for me to go back for a year and say what was in or not.

MR. FRIEDMAN: Say 20,000 pages,we're fighting over a few hundred pages. 17,000 of those pages were trial transcripts. We're not disputing that, and a lot of exhibits we're not disputing, but there may be 45 percent of the other material that is in dispute. The car -- there was a car photo. They say this was a trial photo. What

they did with the car photo, and again this is the sort of thing that we can resolve maybe, they took a car photo and blew it up, changed it, focused it differently. Now, that's not what was submitted. We have the actual photograph, which was submitted to this Court. That's what should go in. We're not saying no car photo should go in, but the right one should go in, not something that was blown up or enlarged, and that had a circle put around it unlike the one that was submitted to this Court. That's a genuine factual dispute. Those are the matters where I suppose I think your Honor's suggestion is appropriate. Let them submit --

THE COURT: Let's hear from Mr. Marmo as to what is really in dispute. See if he agrees there are 13 that they concede with in the --

MR. FRIEDMAN: Ten. Three we admit were in the record. I'll say one thing before I'm finished. I want a chance to say about our counter designation, which they didn't put in the appendix. That will take one minute.

THE COURT: Let me hear from Mr. Marmo.

MR. MARMO: We don't agree that we made concessions about things that are -- that were not in the record. Our position is there is a legitimate basis of each of the 16 items to be before the Court of Appeals, and we're prepared to argue as to --

THE COURT: Do you not accept the basic concept that if it was not before the Court, it cannot be before the Court of Appeals?

MR. MARMO: There are some matters we say don't fall within the category. The one is Mr. Carter's boxing record that consists of two pages in the appendix of 20,000 pages. Let me say something before we deal with that item in that area.

With regard to the sequence of what happened here, in the appellate process after your Honor ruled, we became involved in a motion to revoke enlargements that used up our time for prosecuting the appeal of your Honor's decision. After that matter had been disposed of in the Third Circuit, we asked for an extension of 30 days. We were given the date of March 28th, and on the record it specifically recited no further postponements would be granted, and that our appendix and brief had to be filed that day.

We then became involved in a tremendous project, where we worked many, many hours every day, Saturdays and Sundays, to meet that deadline. It's different when you're taking an appeal, and when you're filing an initial application. You can spend two years preparing for an application for petition for Habeas Corpus. You have 30 days to respond when the judge rules on the matter.

We had to deal with that deadline, and it was crystal clear in our mind that it was the Court's direction and mandate that no further postponements would be granted.

We then began a process of submitting statements of appendix and issues to be presented. The defendants responded. We adjusted our submission based on their response, but we were concerned that we didn't want to be involved in nitpicking when we've got to put together an appendix of 623 volumes. We got that Third Circuit order, which was granted without -- written by Judge Gibbons, without any appearance from us or any notification to us the day before. Those 623 volumes were bound. They were collated. They were put into boxes, designated in seven separate sets.

We couldn't be involved in March 25th, 26th, or 27th in going through that appendix and undoing the monumental project that we worked day and night to put together. We sent that down to the Third Circuit, so that's the context in which that occurred.

By the way, when we submitted our counter-statement of the contents of the appendix on February 19th, we never heard another word from the defendants from February 19th until the day Mr. Graves called Mr. Goceljak and said, I understand there's an order coming down from the Third Circuit, which we got the next day, March 27th, the day

before we had to send a station wagon with 623 volumes of appendix to the Third Circuit. We couldn't become involved at that point in tearing apart that appendix a day before it was due and a day before we had an order that said no further postponement is going to be granted. That's the context of the way this appendix was put together.

What counsel says about the boxing record of A. Carter, it was supplied to the Third Circuit, and that consists of one or two pages of this appendix of 20,000 pages. In your Honor's opinion, you said Mr. Carter was a contender for the middle weight crown, and that his boxing career was peaking at the time. Then your Honor's opinion goes on. We contend in our appeal to draw argument from that and to make the argument that this man Carter is not a person likely to commit this kind of offense this way. We responded to that by taking what Mr. Carter said his boxing record is, which shows in no uncertain terms that he was not peaking as a fighter, that he peaked two years before --

THE COURT: Are you suggesting that you can go outside of the record that was before me?

MR. MARMO: You did --

THE COURT: To refute it --

MR. MARMO: -- you did, your Honor. There is nothing in the record to say that Carter --

THE COURT: If I made factual findings unsupported by the record, you can argue that. But I never heard that saying that the factual findings can be disputed by something that is not before the fact finder or not before the judge or jury making the decision. I don't think I'm the --

MR. MARMO: We're doing it because your Honor did it in your opinion. There's nothing in your opinion that says Carter was a contender for the middle weight, and we think the opinion that his career was peaking, in light of the fact you made that statement, we have a right to show not only is that not in the record, but happens to be opposite of what the facts are. That's why we submitted those two pages that are undisputable. Mr. Carter's statement about his record of wins and losses, and it clearly makes the point that his career --

THE COURT: Let's go back to the theory of that. Let's assume that there is a trial, and the Court makes factual findings, and you argue that those factual findings are unsupported, and are not in the record. Is it conceivable you can then submit something to the Court of Appeals to prove the opposite, that you didn't submit to the trial court?

MR. MARMO: If the trial court makes factual findings that are not in the record and the facts as stated by the defendant are the converse of what the Court

determined the facts to be, and those facts form the basis for legal arguments that the Court made, I certainly think we have a right to bring it to the attention of the Appellate Court that not only are these facts not anywhere in the record, but that the truth of the matter is the opposite of what the judge determined the state of affairs to be.

THE COURT: You're saying in a trial, if I were sitting as a fact finder, and I found that a particular person was on the scene of the crime, that on appeal you could submit airline tickets to show, that you didn't submit to the trial court, to show that the person was in Mexico at the time?

MR. MARMO: That's a different situation. This is a two page rendition of Mr. Carter's boxing record, undisputed information that we took from his book.

THE COURT: But I didn't have it.

MR. MARMO: I suppose you didn't. But I don't know where you got the basis for the statement you made in your opinion.

THE COURT: I may be wrong. It may not be supported by the record, and your argument to the Court of Appeals, I should have considered something that wasn't before me --

MR. MARMO: No. I suggest to the Court of

Appeals you should not have considered it, and it was wrong for you to consider it and wrong for the Court to base its argument on facts that are in fact not true. I don't think there's anything wrong in showing the Court of Appeals what the truth is about this particular item, particularly since it involves only two pages of appendix of 20,000 pages, and particularly since it is indisputable information.

THE COURT: Let me say this. This will be a blanket rule. First of all, there's no question in my mind insofar as an appeal is concerned, the appeal must only contain what was before the Court below, and I think that would be the rule irrespective of any determination by the Court of Appeals. But now we have in this case, and I can't imagine there's any dispute about it, an order by the Court of Appeals signed by Judge Gibbons saying that the record is to be limited to what was before the Court below. I think there's no -- and I certainly can understand the logic of your argument, but as to those items that were not before this Court, the record should certainly on appeal, should certainly not include anything that was not before this Court. So anything that you feel should go before the Third Circuit that was not before this Court, that application should be made to the Court of Appeals. If you think that the record should be supplemented by matters not before this

Court, then you're certainly free to make the application. But I understand that the record from the Court of Appeals for me to determine what was before me, what the record was before me, not to supplement it based upon something they might or might not want to see, so if that covers all the ten items --

MR. MARMO: Certainly does not, your Honor. Covers one or two of them. Does not cover 18 items referred to by counsel. Furthermore, I think the record should note, Judge Gibbons did not notify us of this order. We had no opportunity to say to him what I'm saying to you is the basis for our position. There are telephone calls that counsel makes to the various courts that they're before, and then we get an order like this the day before we have 623 volumes of appendix put together. I think it's unfair to suggest to us that we now have to go back and go through those volumes and take out two pages.

THE COURT: Well, following the Court's directive, I have been directed to resolve the record that was before this Court for the purposes of appeal. That's all I'm doing.

If your argument is there were matters that were not before this Court, that should be considered by the Court of Appeals, then I have neither the right nor am I authorized to make that determination. This is to settle the

record before this Court, and you can see that was not before this Court.

MR. MARMO: I can see it was not before the Court. That's exactly my point. You wrote about it in your opinion, and you argued from it, and I think in light of that, it's only fair and appropriate for us to present the two pages of undisputable information which makes our point, which makes our argument that when the Court said this, these people are not people likely to commit these kinds of crimes, this way the Court didn't have the right facts and built an argument upon it. I think we should have the right to submit that to the Court of Appeals.

THE COURT: You may be right. I don't think I have the right to grant you that right. I think if you want the Court of Appeals to consider matters not before the trial Court, you have to go to that court for that --

MR. MARMO: What we want most and we haven't gone to the Court of Appeals is that we want a resolution. We want a right to prosecute that appeal. What this has done, it has sidetracked the appeal. The defense has already obtained two or three additional months, four months of time to work on their response.

THE COURT: Well, their answer is that if the

appendix included only what it should have included, you wouldn't have the problem.

MR. MARMO: The proper way to deal with it is for them to respond in their responding brief and say the respondents-appellants are saying things they don't have any right to say and not in the record, and there's no basis for it, and what they've said to judges of this Circuit Court of Appeals is wrong, incorrect, inaccurate, and take the task that way and let the prosecution have this appeal proceed in the ordinary course. We're ready to respond to those things in our reply brief. We think there is an appropriate basis for every word we said.

THE COURT: You're asking me to ignore the order of Judge Gibbons. I can't do that, nor am I inclined to do it. He has referred the matter back to me for a single purpose, that is, to determine what was the record before this Court. Based upon that direction, that mandate, and based upon the rules, anything that was not before this Court in rendering the decision should not go into the appendix without the Court of Appeals --

MR. ~~MARMO~~ Friedman: But the fact is they submitted that on their enlargement motion to the Third Circuit. What happened was, we answered it. The fact is he was

at the top of his boxing record. You can't look at one loss. There are a lot of other things to introduce. We've had affidavits from other boxing promoters and Carter was at the top of his boxing career. Are we going to have a whole trial on whether he was at the top, middle top, lower top? Because the minute we put in those two pages, we have to answer --

THE COURT: Gentlemen, I've ruled on this. There is no reason to pursue it any further unless you want to pursue it with the Court of Appeals. It is not before me.

MR. FRIEDMAN: Pages 14 and 15 of our reply brief affidavit, those are the only matters in dispute. Items 4A and B and C and N and R. Those are the only things we have a genuine dispute about whether it was in the record.

THE COURT: And do I have the actual exhibits that are referred to?

MR. FRIEDMAN: I don't know whether you sent them back. Again, there's a dispute. They say it was all in or virtually all in. We say it was not in. This is a factual dispute that we can handle by submitting what we think, or let them submit what they think was submitted to the Court, and we'll take dispute with it. It's only on items on Pages 14 and 15,

where we specifically discuss --

THE COURT: Who has those things physically now? Does the Court Clerk have them, or does counsel have them?

MR. FRIEDMAN: I think they're up before the Court at this point. I don't know whether the record was transmitted --

THE COURT: Let me ask my clerk.

Off the record.

(A discussion was held off the record.)

THE COURT: My understanding is that everything that was of record in this case was delivered to the prosecutor's office.

MR. FRIEDMAN: Sent back to them in terms of exhibits or --

THE COURT: For the purposes of the appeal, which is what we customarily do, and it should be a simple thing to look at those documents and see what was in there and what was not. I take it your office has none of them?

MR. FRIEDMAN: We have copies.

THE COURT: The originals, because copies will only confuse it.

MR. FRIEDMAN: No.

THE COURT: The original record is in the

possession of the prosecutor.

MR. MARMO: You have the transcripts. We have a box of their submissions to you. Their briefs, all in the way of appendices and that type of thing. Many of the 18 items which they complain about were sent to you by one of their attorneys on the various appendices. Most of them were. We indicate that in our affidavit to your Honor. One by one we've gone over that indicating what the name of the document was and what appendix or brief was included.

MR. FRIEDMAN: I object to that. All exhibits about Bello and the movie career, we didn't submit any of that material. That is not true. We did not submit the contested items to this Court.

THE COURT: Is it the prosecution's position that these things came in from the petitioner?

MR. MARMO: Many of them did, yes. All the statements were statements sent to you sometimes two or three times in the various appendices. In fact, they've already conceded in their reply when they complained those things weren't in the record, and they were wrong. There were three or four statements sent to you sometimes two or three times --

MR. FRIEDMAN: That we agree on. That was something that got lost in the shuffle --

THE COURT: If you can't agree, and frankly it's inconceivable to me that counsel cannot agree as to what was in the record before the trial court, particularly on a petition for habeas corpus, bearing in mind the parameters I have set. We are only talking about something that was actually submitted to me. If you can't agree, we will have to set it down for a hearing. Somebody will have to show me how they came to the Court and --

MR. FRIEDMAN: We'll sit down any time to see what was in there and what wasn't. We're not objecting --

THE COURT: I thought that was already done at the direction of Judge Gibbons, that you should try to work it out, and only if you couldn't work it out you should come here.

MR. MARMO: They filed a motion and for two months we didn't hear a word. Then we got an order -- actually if it wasn't a problem with the automobile, the appendix would have been there before the order arrived at the office. We got an order on the 27th, and the appendix was due on the 28th, and the Third Circuit said to us there will be no further postponement. They had given us 60 days of which was occupied with our motion to revoke enlargement, so we

really had about 30 days to put that together.

THE COURT: I understand, but as to this, do you think a meeting could resolve these disputes?

MR. MARMO: I doubt a meeting could. Many of the items they're complaining about were items marked into evidence. We had the marking on the exhibit when we looked at it --

MR. FRIEDMAN: I don't know how to resolve it. The ten items they admit were not --

THE COURT: I have already ruled. If they are clearly conceded to be not part of the record, they are not part of the record.

MR. FRIEDMAN: The five we're talking about, the photos will take five minutes. If they can show one of those photos were put in --

THE COURT: Bear with me a minute.

Off the record.

(A discussion was held off the record.)

THE COURT: Counsel, what I am going to do is: I am going to direct counsel to meet and see if you can arrive at an agreement. Remember my direction, that only those matters that were before this Court should be part of the appendix. If you cannot agree, notify the Clerk, and we will set the matter down for a hearing on August 20th, which is Wednesday. But

again, it is just inconceivable to me that counsel should be unable to determine what was part of the record.

MR. FRIEDMAN: Brings me to the second -- let me respond to one thing. We don't think we're being petty, because there's a lot of material. We have answers to everything. We have a lot of non-record stuff to submit to the Third Circuit. We have a lot of other photographs, but every time they say something off the record to explain, and instead of 20,000 documents, we'll have a hundred-thousand. When they say we're being petty--

THE COURT: I've already indicated that I do not think that the Court of Appeals would be interested in factual material that was not presented to the trial court, but I do not want to foreclose Mr. Marmo's argument, but I do not have the authority to expand the record, and I do not think it would be appropriate to expand the record to include things that I did not consider when I arrived at the decision.

Mr. Marmo can argue to the Court of Appeals that I was wrong, that the record does not support my conclusions. But I don't think he can point to things that show I am wrong.

That is my ruling as to the things that were

in the record. I will direct you to meet together in person and review the documents. If you have a dispute and cannot resolve it by a meeting, then I will set the matter down for August 20th. Please advise my clerk by August 7th whether or not you have resolved it.

MR. MARMO: I have a problem with August 20th. I anticipated being away the last two weeks of August. It's my vacation in August.

THE COURT: Well, we can put it off until September.

MR. MARMO: We don't want to put it off. That's the problem. But at the same time I can see we're going to have to go to the Third Circuit on at least some of the items. We can't go to the Third Circuit and say things that were wrong, unless we can show the Third Circuit what was wrong. The boxing record, there's no way to back up what he said to your Honor about that. You have to look at those two pages from his book, and you can see the man fought six times from the last year and once or twice --

THE COURT: You may be right, but the direction to this Court was to determine what was in the record before me. That was not in the record before

me, and it should not be part of the appendix unless the Third Circuit says so. That is not the mandate. that I have received from the Third Circuit. I understand your argument, but I think that it is appropriate for me to exclude from the record things I did not consider when I arrived at my decision.

MR. FRIEDMAN: We've cross designated 16 items they didn't put in. I'm going to read two sentences from Rule 30B. If the Appellee deems it necessary to direct the particular attention to the Court to parts of the record not designated by the appellant, he shall within ten days after receipt serve upon appellant designation of those parts. We did that within ten days.

THE COURT: Any problem --

MR. MARMO: We replied to them about it, and as I understand there was an agreement reached as to certain items included and were not included, and we did include no items --

MR. FRIEDMAN: I don't know what to say.

THE COURT: Let me handle this very quickly. To the extent to which the petitioner, and you are the appellee now, wishes the record submitted with matters that were before this Court, the appellant should include those portions in the record.

MR. FRIEDMAN: That's what the rule says, shall be included in the appendix.

THE COURT: So we have resolved everything.

I think, Mr. Friedman, I would like an order on what I have done today, and fixing the date of the hearing.

Mr. Marmo, I don't know what to say about your vacation plans. Can somebody else be here?

MR. MARMO: Yes. But I really have to be here.

THE COURT: I am hopeful that if you are both reasonable and sit down together, you should have no difficulty deciding what is before this Court.

MR. MARMO: We have already item by item indicated what our position is as to each one of the 18 items. There's nothing to do than say what our position is. That is our position. A number of these items were exhibits at trial offered into evidence. We don't see how they can be --

THE COURT: Were they submitted to this Court?

MR. MARMO: They were attached to various appendices that were sent.

THE COURT: Again, if it was something that was submitted to me, and I considered it, it was part of the record, then it should be before the Court

of Appeals, and that should be something that counsel should be able to resolve. If you cannot, then we will have to have a hearing. And if August 20th is not convenient for you, the next time would have to be in September.

MR. FRIEDMAN: We have the same problem about the items in the brief where they refer to things that were not in the record.

THE COURT: You mean the brief before the Court of Appeals?

MR. FRIEDMAN: Right.

THE COURT: I think that is something that you have to take up with the Court of Appeals. I have no right to strike anything from the brief.

MR. FRIEDMAN: Indicate whether it was part of the record or not.

THE COURT: That is what I mean. If you cannot agree, I will resolve it August 20th. I am confident that you can agree. I hope that you do.

MR. FRIEDMAN: Thank you, your Honor.

MR. MARMO: Thank you, Judge.

(The matter was concluded for the day.)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

Circuit Court No. 85-5735

District Court No. 85-745

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

REPLY AFFIDAVIT IN SUPPORT OF MOTION TO SETTLE THE RECORD

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I am one of the attorneys for petitioner-appellee Rubin Carter.

2. I make this reply affidavit in support of appellee's motion to settle the appellate record in this case pursuant to the order of the Third Circuit Court of Appeals and Rules 10 and 30 of the Federal Rules of Appellate Procedure.

3. Appellants, in their answering affidavit, attempt to reargue not only appellee's two previous Third Circuit Motions to Strike Matters Not of Record, but also now attempt to reargue the merits of the habeas corpus proceeding. Although appellants' contentions in this regard are irrelevant for the purposes and scope of this motion, which is limited to settling what matters were of record before this Court, appellee will, in responses below, place appellants' unfounded claims in perspective.

4. As a major thrust of their criticism of the District Court opinion, Carter v. Rafferty, 621 F. Supp. 533 (D.C.N.J. 1985), appellants assail the District Court for not considering documents and arguments which appellants failed to submit to this Court. Appellants were urged and entitled to dispute whatever they wished in regard to appellee's presentation of the facts to this Court. Indeed, appellants were given ample opportunity and even prodding by the District Court and by appellee's counsel to supply this Court with whatever of the state record they deemed material to the resolution of the issues

raised in the petitions and in the Motion for Summary Judgment. There was nothing in the District Court opinion that was not presented by either party; at no point in its opinion did the District Court go beyond the record that was presented to it. Particularly in light of the following facts, appellants' allegations that compliance with proper appellate procedure would be unfair are hollow indeed:

(a) The February 20, 1985 order of this court (see Exhibit 1 to moving papers) requested that appellants file by March 31, 1985:

> ... all briefs, appendices, opinions, process, pleadings, transcripts and orders filed in the state proceedings or such of them as may be material to the questions raised in the petition [of Rubin Carter].

(b) Appellants failed to file such materials. In an effort to expedite the proceedings, appellee, on April 10, 1985, accepted the responsibility of filing the portions of the state record "which counsel considered material to the questions raised in the petition" and stated that "counsel anticipates filing of transcript by the State in accordance with U.S.D.J. Sarokin's order." (Exhibit D, attached to appellants' Answering Affidavit).

(c) This Court's order to appellants was repeated on March 7, 1985 with regard to the petition of John Artis, with a directed filing date of April 30, 1985.

(d) In Petitioners' Joint Memorandum In Support of Motion for Summary Judgment (p. 2, n. 1), appellees once again urged that appellants file the record of the state proceedings:

> Petitioners have not filed the transcripts of the trial and various pre- and post-trial proceedings and hearings. The burden of submitting the briefs and appendices, which was actually the respondents' obligation in accordance with the Court's order, has been at great cost to petitioners and their counsel. Petitioners, by prior court determinations, are indigent and should not be required to go to the additional cost and effort necessary for them to provide the transcripts of the proceedings.

(e) At oral argument of the Motion for Summary Judgment on July 26, 1985, the Court urged appellants:

> ... if -- in preparing your brief you would go through that [petitioners' "presentation of the facts"] and just indicate to me those areas in which you disagree, and then refer me to the record where the disagreement is. And then I'll see if there really is a difference and/or whether it is just a matter of interpretation. That would be helpful.
>
> MR. GOCELJAK: We'd be happy to.
>
> THE COURT: There's no reason to restate the facts if you agree. But I'd like to know those areas where you disagree and I'll deal with that by reference to the record.
>
> MR. GOCELJAK: All right, Judge.
>
> Another thing that would be helpful, because the petitioners have raised in their petition certain facts which go back to -- go back even to the first trial, go back to various proceedings that have taken place since the retrial, that perhaps the purpose of this motion today might be to narrow some of these issues down so that we don't have to file the transcript of -- the entire tran-

> script of the second trial, the transcript of the first trial, many transcripts have to do with these ancillary proceedings, because this would be a terrible burden and I don't think it would help the court. [Emphasis supplied.]
>
> * * *
>
> THE COURT: ... When it comes to filing the underlying transcripts, again, I think that's only necessary to the extent that there's a dispute. I assume that counsel has gleaned from all of the transcripts what they view to be essential for the disposition of this matter. It is only if there's some difference of opinion or difference of contention as to what the transcripts reveal I have go to to any particular portions of the transcript.

(Transcript, pp. 9-11)

(f) Again, at the end of argument, the Court reminded Mr. Goceljak:

> But I would appreciate you do as I suggest, and that is go through their [petitioners'] factual statements, indicate to me any disagreement. And then, of course, supplement it. [p. 83]

(g) During the same hearing, defense counsel Beldock also requested that appellants submit to the District Court whatever portions of the state record they wished:

> We have asked Mr. Goceljak to file all of the transcripts, and trust that he will. We're talking about 1981 remand hearing and at least the transcripts of the trial. I don't think it requires it, but on a most selected basis anything from the 1967 trial. [p. 85]

(h) Ultimately, on August 30, 1985, along with their Brief in Opposition to Petitioners' Motion, appellants saw

fit to file what they called "the pertinent transcript," which included no transcripts from the 1967 trial and no 1976 trial exhibits whatsoever. (See appellants' 8/30/85 Letter to Clerk of the District Court regarding filing of trial and remand transcripts.)

5. As detailed more fully in the exhibits to the moving papers, in the course of preparing the appendix, appellants consistently refused to cooperate with appellee. The difficulties arising from appellants' choice to bullheadedly go forward with the filing of improper non-record materials are unfortunate. But appellants can hardly complain of such inconvenience when their own disregard of the Federal Rules and basic appellate procedure is the sole cause of their distress.

6. Moreover, appellants' conduct was obviously contrived in an improper attempt to gain advantages and prejudice the appellee. Appellants' conduct has been marked by their studied refusal to cooperate with appellee; their arbitrary rejection of appellee's appendix designations; their total disregard of the Circuit Court orders, related federal rules and orderly procedure; and their numerous misstatements, as outlined herein as well as in the exhibits to the moving papers, of significant facts in their submissions to both the Circuit and District Courts. Appellants' contention that they somehow were required to file improper materials because of the briefing schedule is absurd. Indeed, appellants' assertion in their

answering affidavit (pp. 4-5) that they believed "any dispute as to what was before the District Court could probably be rectified without further extending the filing dates" is contradicted by the reality of the continuing dispute. Finally, appellants could have resolved the conflict between the so-called filing deadline and the requirements of the Circuit Court order to settle the record by conferring with the appropriate personnel in the office of the Clerk of the Third Circuit. Their choice to make no attempts to do so suggests that they were seeking some tactical or other advantage by going ahead with the improper filing.

7. Appellants have no basis (by any standard) to argue that it is only "fair" and "proper" and "appropriate" for materials dehors the District Court record -- the content and parameters of which appellants were given over six months to establish as they deemed necessary -- to now be included for review in the Court of Appeals. The Rules of Appellate Procedure and the Third Circuit Court order of March 25, 1986 specifically prohibit this.

8. The legal standards for determining what is of record from the District Court proceedings are crystal clear. 9 Moore's Federal Practice, para. 210.04, at 10-14, to 10-20; F.R.A.P. Rule 10(a), "The original papers and exhibits filed in the District Court, the transcript of the proceedings, if any, and a certified copy of the docket entries prepared by the Clerk of the District Court shall constitute the record on appeal in

all cases." Furthermore, the appellate court may consider only those matters which were before the District Court. "It is, of course, black letter law that a United States Court of Appeals may not consider material or purported evidence which was not brought upon the record in the trial court." United States v. Alldredge, 432 F.2d 1248, 1250 (3d Cir. 1970); see also, Jaconski v. Avisun Corporation, 359 F.2d 931, 936 (3d Cir. 1966); Coplin v. United States, 761 F.2d 688, 691 (Fed. Cir. 1985).

9. Appellants contend that there is no reason for this Court to review those non-record materials which appellants chose to include in their proposed brief to the Circuit Court. They disingenuously contend that the matter on remand before this Court is limited to the contents of the appendix. Appellants apparently misunderstand the nature of a motion to settle the record. It is appropriate for appellee to include in this motion a request that the District Court settle the record as to matters put forth in appellants' brief. Such a review is clearly implied and anticipated in the Circuit Court order of April 29, 1986, which followed appellee's motion "to strike appellants' brief and appendix" (emphasis added).

10. Appellants can hardly argue that appellees have been delaying these proceedings through insisting that only material of record go before the appellate court. In fact, the appellants are inviting further extensive delays by attempting to postpone full resolution of the contents of the record in this

proceeding. F.R.A.P. Rule 10(e) clearly authorizes the District Court to resolve these issues fully: "If any difference arises as to whether the record truly disclosed what occurred in the District Court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." See also, 9 Moore's Federal Practice, para. 210.08, at 10-47: "Thus, all disputes as to what actually happened in the District Court must be submitted to that court for resolution. A party may not impeach the record by assertions in his brief or argument; he must secure its formal correction by proceeding under Rule 10(e)."

11. Contrary to appellants' assertions, appellee is certainly not asking the District Court to "censor" appellants' brief. It is difficult to conceive how complying with the Rules of Appellate Procedure and court orders can be construed as censorship. Appellee is merely seeking to settle the record in an expeditious fashion with due regard to judicial economy. Obviously, the District Court cannot prevent the appellants from including matters in their brief which the District Court has found to be not of record. The appropriate sanctions for such behavior would have to come from the Circuit Court. The District Court can, however, make clear at this point what matters contained in the proposed brief are not of record so that appellants will not have reason to vex the Circuit Court with non-record inclusions in their brief.

12. It is most unfair, improper and inappropriate for appellants to manipulate their inability and/or failure to adequately address appellee's arguments to the District Court into an opportunity to (once again) try to create a whole new set of "facts." Appellants' attempts to that end represent an effort to prejudice appellee and to turn the Circuit Court into a trial court.

13. Although unnecessary for this motion, appellee offers this Court three illustrations of the meritlessness and absurdity of appellants' contentions.*

(a) Appellants insist on submitting to the Third Circuit the 1967 testimony of Patricia Valentine in an effort to show that her 1976 trial testimony positively identifying appellee Carter's car as the getaway car was the same as her first trial testimony in that regard. Not only are appellants' contentions not supported by that testimony, but their attempted inclusion of that material is improper since it was not submitted to the District Court. Furthermore, appellants had the opportunity at the 1976 trial to attempt to introduce it but did not. It would also have been <u>inadmissible during the 1976 trial</u> since

---

* All of appellants' arguments concerning the merits of the appeal can and will be rebutted in the appropriate appellate forum. Appellee vigorously disputes the representations and characterizations of the non-record material by appellants but believes it is not only unnecessary but also inappropriate to engage in a contest of citing non-record material to this Court. Appellee certainly could offer voluminous non-record material disproving appellants' contentions based on non-record material.

Valentine was available to testify; it would have constituted hearsay evidence available only for purposes of impeachment or refreshment of recollection. Thus appellants' "search for the truth" contradicts both New Jersey and Federal Rules of Evidence.

(b) Appellants argue that items 6(K) and (L), which relate to allegations of prosecutorial misconduct based on the notes of former Prosecutor's Investigator Richard Caruso are irrelevant to the appeal. In reality, these items are highly relevant since they demonstrate that the supposedly full and fair investigation conducted in response to publicity following the reversal of the 1967 convictions was actually a farce designed to prosecute appellees regardless of the truth. Prosecutorial misconduct is an essential issue in the appeal. To try to exclude these matters as irrelevant is an astounding further attempt to bury the truth.

(c) Appellants also assert that it is necessary to submit to the Court of Appeals an excerpt from appellee Carter's book, The Sixteenth Round, even though that book was specifically ruled inadmissible at trial, even though it was never presented to this Court and even though the excerpt does not support appellants' contentions. Appellants speciously attempt to use this excerpt as a basis from which to assail the correctness of the District Court decision concerning the State's improper creation of a racial revenge motive. This argument has already unsuccessfully been presented to the Court of Appeals in

Respondents-Appellants' Motion Revoking Enlargement, etc. To rebut that argument, which was based on non-record materials, appellee was compelled to use extensive materials which were also not of record before the District Court. See Petitioners-Appellee's Memorandum, especially pp. 42-45, and the corresponding Appendix materials (copy enclosed; previously served on respondents). An examination of those materials clearly shows that appellants' factual contentions are wrong not only according to the District Court record, but according to the facts of any record. Nonetheless, we reiterate: non-record materials should not have been submitted in the first place.

14. Appellants have conceded that the following ten items contained in appellee's motion to settle the record were not submitted to the District Court:

(a) Item 4.(e) (testimony of Patricia Valentine from first trial on May 10, 1967);

(b) Item 4.(f) (1967 trial testimony of Rubin Carter) (The 1967 Rubin Carter trial testimony was not included in appellants' Appendix to the Court of Appeals, but it is cited to in Respondents' Brief, p. 33, and referred to again on p. 54. This testimony was ruled inadmissible at the 1976 trial, 35T24-25.);

(c) Item 4.(g) (typewritten notes of oral interrogation of Rubin Carter);

(d) Item 4.(h) (typewritten notes of oral interrogation of John Artis)

(Regarding both Items 4.(g) and 4.(h), the Typed DeSimone Notes of Oral Interrogation of Petitioners were not read to the jury, as appellants claim (p. 12, Answering Affidavit); the "original" handwritten notes were the ones read to the jury (see 32T54); the typewritten notes were not given to the jury as part of their deliberations, as appellants also erroneously state (p. 13); they were deemed not admissible (see 32T5,51).)

(e) Item 4.(i) (grand jury testimony of John Artis on June 29, 1966);

(f) Item 4.(j) (excerpt from "The Sixteenth Round");

(g) Item 4.(l) (agreement dated September 17, 1975 among Alfred Bello, Melvin Ziem and Joseph Miller regarding "The Lafayette Bar Massacre");

(h) Item 4.(o) (agreement dated December 8, 1985 among Jerry Leopaldi, Alfred Bello, Joseph Miller and Melvin Ziem, regarding motion picture production);

(i) Item 4.(p) (letter of Joseph Miller to Sherry Lansing, MGM Studios, dated September 2, 1975; letter of Joseph Miller to Sohcha Metzler, The Viking Press, dated September 2, 1975);

(j) Item 4.(q) (outline of script for "The Lafayette Bar Massacre") (not admitted into evidence in state proceedings).

15. Appellants erroneously contend that items 4.(a), (b), (c), (n) and (r) were submitted to the District Court:

(a) Items 4.(a) and (b): Appellants (p. 5) cite to the "approximately 50 pages of docket sheets" included in the Defendants' Joint Appendix ... to Dismiss or to grant an Evidentiary Hearing on the Related Issues." Significantly, appellants do not cite specific pages in that Appendix because the "Court Clerk's Records of Jury Deliberations" from either trial are not to be found therein, and were unquestionably not submitted to this Court. Moreover, the docket sheets from the 1967 trial cannot logically be related to the record of the 1976 trial.

(b) Item 4.(c): Appellants do not claim the photo of the side view of appellee's car was given to the District Court (S-33), and concede, therefore, that it is not of record before this Court. But appellants erroneously contend (p. 8) that the photo of the car's rear view was submitted by appellee to the District Court in "Petitioners' Joint Reply Memorandum in Support of Motion for Summary Judgment." The photo reproduced in Appendix A, p. A1 of that brief to this Court, is, however, not the photo submitted by appellants to the Court of Appeals.

(c) Item 4.(n): Appellants disingenuously suggest (pp. 20-1) that Bello's Essex County Grand Jury Testimony was submitted to this Court in various defense briefs. However, while "components of" his testimony may have been "detailed" in those briefs, all the citations therein were from the 1976 trial and 1981 remand hearing transcripts. Bello's complete grand jury testimony was most definitely not before this Court. If appellants wish to cite portions which are of record, they may do so by referring to those transcripts which were before the District Court.

(d) Item 4.(r): Appellants mistakenly claim that this defense affidavit to the state Appellate Division was submitted to this Court in "Defendants-Appellants' Appendix After Evidentiary Hearing on Remand, Vol. 1" (DaRH). While it is listed as Remand Hearing Exhibit S-1035, it was not submitted to this Court. Page (ii) of the Index to that Appendix shows an asterisk beside "S-1035*" which states: "Previously filed with appeal courts. Not reproduced in Appendix by agreement." Thus, that affidavit was not part of this court's record.

16. Appellee concedes that the following three items were submitted to the District Court and, therefore, may properly be included and referred to in appellants' submissions to the Court of Appeals: Statements of Alfred Bello; Items 4.(d), (k) and (m).

17. Appellants concede (p. 23) that the 15 items designated (a) through (o) in paragraph 6 of appellee's counsel's moving affidavit were submitted to this Court. It is not up to appellants to impose their views of relevancy on appellee's designated appendix exhibits.

18. Appellants refuse to address the extensive body of non-record matters contained in their brief to the Court of Appeals, as listed in point 5 of appellee's moving affidavit. Appellants contend the matter on remand before this Court is limited to the contents of the appendix. However, it is clear (see ¶¶ 8 to 11 above) that this court is both empowered and required to make a full determination of disputes as to the record. Appellants' failure to address any of the items listed in point 5 and to cite them in the record must be construed as a concession that they are not reflected therein. Accordingly, appellees include in the attached proposed order a listing of pages and lines thereon which contain non-record matter.

19. Appellants' contentions that appellees are being "petty" or "unfair" in objecting to appellants' attempts to include literally hundreds of pages of non-record materials in their appendix and literally dozens of references to non-record materials in their proposed brief are unacceptable. Appellees, in bringing this motion, have sought to expeditiously settle the record. For that reason, the appellees are attaching a complete and detailed proposed order which lists each page of non-record

material in the appendix and each page and lines thereon of non-record material in the brief.

20. For the foregoing reasons, appellees move for an order settling the record and for such other and further relief as the Court may deem appropriate.

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Sworn to before me this
23rd day of July, 1986.

Notary Public
EDWARD S. GRAVES
Notary Public, State of New York
No. 31-4849102
Qualified in New York County
Commission Expires March 30, 19[illegible]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 42 Riverside Drive, New York, New York 10024. On the 23rd day of July, 1986, he served true copies of the attached Reply Affidavit in Support of Motion to Settle the Record and Proposed Order upon appellants in this action at the address indicated below by Express Mail by presenting same securely enclosed in a postpaid, properly addressed wrapper, to a post office maintained and exclusively controlled by the United States Postal Service.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07050

Sworn to before me this
23rd day of July, 1986.

Notary Public

KAREN L. DIPPOLD
Notary Public, State of New York
No. 4658347
Qualified in Delaware County
Certificate Filed in New York County
Commission Expires March 30, 1987

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DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER, Petitioner-Appellee, V. JOHN J. RAFFERTY, ET AL., Respondents-Appellants. JOHN ARTIS, Petitioner-Appellee, V. CHRISTOPHER DIETZ, ET AL., Respondents-Appellants.	Circuit Court No. 85-5735 District Court No. 85-745 AFFIDAVIT IN OPPOSITION TO MOTION OF PETITIONERS - APPELLEES TO STRIKE PORTIONS OF APPENDIX SUBMITTED TO COURT OF APPEALS

STATE OF NEW JERSEY:
COUNTY OF PASSAIC : S.S.

JOHN P. GOCELJAK and RONALD G. MARMO, of full age, being duly sworn according to law, upon their respective oaths, depose and say that:

1. Deponents are the Acting Prosecutor and Acting Chief Assistant Prosecutor, respectively, in the Office of the Passaic County Prosecutor, attorney for respondents-appellants in the herein-captioned matters pending appeal before the United States Court of Appeals for the Third Circuit, and are familiar with the matters concerned with said appeal and in this affidavit.

2. Following this Court's decision to set aside the multiple first degree murder convictions returned in the Superior Court of the State of New Jersey in 1976, the respondents-appellants filed an appeal of this Court's decision with the United States Court of Appeals. In pursuit of that appeal the respondents-appellants compiled and submitted an extensive brief (copy enclosed) and voluminous appendix to the Court of Appeals to support the position that this Court misjudged this matter. The brief contains 193 pages. The appendix contains 89 volumes. The brief and appendix are the product of the expenditure of substantial time, effort and expense. They contain nothing which is not a fair and proper subject of review by the Court of Appeals. They make the case for the respondents-appellants' position that the District Court wrongly judged this matter. The petitioners-appellees should not be permitted to further delay this appeal and gain an extended time period to respond to the aforesaid brief and appendix, while they seek to have the same Court whose judgment is the subject of attack on appeal dismantle the respondents-appellants' presentation to the Court of Appeals.

3. The sequence of events relating to the composition of the appendix submitted to the Court of Appeals is as follows:

> (a) As directed by the letter of the Clerk of the Court of Appeals dated January 17, 1986 and, in accordance with Rule 30(b) F.R.A.P., the respondents-appellants by papers dated January 24, 1986 (Exhibit A), furnished to the respective attorneys for the petitioners-appellees the statement of content of appendix and statement of issues presented on appeal (Exhibit A), a copy of which was filed with the Court of Appeals.
>
> (b) By notice dated February 5, 1986, counsel for petitioner-appellee Carter submitted to the respondents-appellants their designation of additional parts of the record to be included in

the appendix, and objections to material designated by the respondents-appellants.

(c) The same date, counsel for petitioner-appellee Carter filed with the Court of Appeals a notice of motion to strike material not of record from the appendix.

(d) On February 14, 1986, respondents-appellants submitted to petitioners-appellees a supplemental statement of contents of the appendix (Exhibit B), a copy of which was filed with the Court of Appeals. In said supplemental statement, respondents-appellants detailed explicit modifications to the statement of contents previously filed relating to the proposed appendix on appeal, which took into consideration the objections and additions contained in the previous petitioners-appellees' designation and notice of motion, aforesaid.

(e) Petitioners-appellees did not subsequently reply to the specific modifications submitted by respondents-appellants, and instead, counsel for petitioner-appellee Carter, on February 19, 1986, filed a supplemental affidavit in general terms alleging failure to comply with F.R.A.P. 30(b), without mentioning any particular item or items in the proposed appendix to which petitioners-appellees objected.

(f) Thereafter, respondents engaged in the considerable effort to compile and reproduce the massive appendix required in this matter, approaching some 20,000 pages of transcript and other materials. Because of the magnitude of the project, respondents-appellants sought and obtained an Order from the Court of Appeals extending the time for filing the brief and appendix an additional 30 days to March 28, 1986 (Exhibit C). Said Order, dated March 4, 1986, also provided that no further extension would be granted to respondents-appellants.

(g) During the extended period, from February 19, 1986 when counsel for petitioner-appellee Carter filed the supplemental affidavit on his motion, until on or about March 26, 1986, counsel for petitioners-appellees did not further

correspond or contact respondents-appellants to offer any specific objections, suggestions or modifications to the proposed appendix as suggested in the respondents-appellants' supplemental statement of contents submitted on February 14, 1986.

(h) On March 26, 1986, two days before the brief of respondents-appellants and the voluminous appendix prepared by respondents-appellants were due to be filed as per the extended deadline of the Court of Appeals, Edward Graves, an attorney associated with counsel for petitioner-appellee Carter, telephoned Acting Prosecutor John P. Goceljak to state that he understood an Order would be forthcoming from the Court of Appeals relative to the appendix materials. Mr. Graves was advised that respondents-appellants were under a deadline to file within two days, and that respondents-appellants believed that the areas of dispute as to materials to be included in the appendix were probably minimal and could be rectified after a detailed review of the included materials.

(i) An Order was received from the Court of Appeals by the respondents-appellants on March 27, 1986, one day before the extended due date for the submission of the brief and appendix of the respondents-appellants. At that point, the materials included in the appendix had been assembled, reproduced to form seven sets, collated and bound into 89 volumes per set amounting to a total of 623 volumes. The Order received on March 27, 1986 provided in part that the appendix was to be limited to matters of record before the District Court, and that if the parties were unable to agree on that within ten days, the matter would be referred to the District Court for determination.

(j) The undersigned, upon receipt of the aforesaid Order, telephoned the office of the Clerk of the Court of Appeals to notify that the Order had been received and that the respondents-appellants' brief and appendix were being transported for filing the next day, Friday, March 28, 1986. The undersigned further advised that it was the respondents-appellants' belief

that any dispute as to what was before the District Court could probably be rectified without further extending the filing dates. Respondents-appellants did file and serve the brief and appendix on March 28, 1986.

(k) Beyond the transcripts of court proceedings and the exhibits referenced in those proceedings, the record before the District Court included extensive additional documentation. This documentation was incorporated in numerous briefs and appendices thereto, filed with various Courts over many years in the course of the petitioners-appellees' efforts to overturn these convictions. This voluminous supplemental material was submitted to the District Court with a cover letter of April 10, 1985, by petitioners-appellees' attorney, Ronald J. Busch (Exhibit D).

4. The petitioners-appellees now have identified 18 documents included in an appendix of approximately 20,000 pages which they contend should not be a part of the appeal. These 18 items, designated (a) through (r) are listed in the affidavit of Myron Beldock, Esq., dated May 21, 1986. See paragraph four of that affidavit at pp. 2 to 4.

(a) Court Clerk's Records of Jury Deliberations, December 21, 1976;

(b) Court Clerk's Records of Jury Deliberations, May 26, 1967;

These first two items objected to by the petitioners-appellees consist of three pages each. They are the official docket sheets of the Clerk of the trial court regarding the jury deliberations and rendition of the verdicts at the two trials. The docket sheets from the first and second trials were included in the submission of documents to the District Court by petitioner-appellee's attorney, Ronald Busch. See his cover letter to this Court (Exhibit D). There are approximately 50 pages of docket sheets included in the document entitled, "Joint Appendix in Support of Defendants' Appeal From Denial of Motion to Vacate and Set Aside the Judgments of Conviction and to Dismiss or to Grant an Evidentiary Hearing on the Related Issues."

Throughout the appellate process after the second trial, the respondents-appellants have maintained that, at the point when the case was given the jury, the state of the evidence was such that it was not a close case. The evidence of the defendants' guilt was clear. This is demonstrated by a study of the jury deliberations. These deliberations were not protracted and did not involve any requests for read back or reinstruction. The docket sheets record these non-disputable aspects of the jury deliberations.

The District Court's opinion presents two bases for vacating these murder convictions. Each of the two positions stated by the District Court is premised on the finding that the jury was presented with a close case. In reaching this conclusion, the District Court did not consider the nature and length of the jury deliberations. The jury returned six first degree murder convictions following relatively brief deliberations which were carried on in a way to suggest that the jury did not struggle with the law as defined by the Trial Court or the facts as shown by the evidence.

The respondents-appellants strongly disagree with the view of the District Court that this was a close case. The docket sheets support this position on appeal and are necessary to show, along with the other aspects of our argument, that the District Court's premise for its holding is not valid.

The District Court's failure to examine the nature of the jury deliberations is particularly significant on appeal since the District Court cites United States ex. rel. Haynes v. McKendrick, 481 F.2d 152 (2 Cir. 1973), in recognition of the fact that the finding of a sufficiently close case is a necessary premise to the District Court's ruling. This is significant because in Haynes, the Court of Appeals for the Second Circuit conducted a detailed study of the jury deliberations in reaching its conclusion that the case was close. As opposed to the instant case, the Haynes jury deliberations were protracted and eventful.

Furthermore, the District Court decided that the submission of the motive evidence to the jury made the difference in the verdicts at the second trial. The respondents-appellants maintain that it is a fair response to the District Court's position to show that, the deliberations leading to the same convictions at the first trial, were comparable to those at the second trial, while there was no evidence of motive presented at the first trial.

(c) Photographs of Rubin Carter's Car;

These two photographs of Rubin Carter's car constitute two pages in an appendix of approximately 20,000 pages. These two photographs were marked S-32 and S-33 in evidence at the trial. The jurors who decided that Rubin Carter and John Artis committed these murders saw these photographs. Why shouldn't they be seen by the Court which will review the decision to set aside the finding of those jurors.

The transcript of trial is replete with references and descriptions of these photographs by numerous witnesses. The taped statement of State's witness Alfred Bello and the transcript of that statement contained a discussion of the details of these same photographs.

Rubin Carter and John Artis were arrested in Rubin Carter's car within minutes of the shootings not far from the scene of the murders. Ammunition like that used in the murders was found in this car and the car was identified as the car driven from the scene by the murderers.

The District Court's opinion maintains that the evidence as to the identification of the car is weak. On appeal the respondents-appellants contend that the record shows just the opposite to be true. The rear view of the car (S-32) is distinctive. The witnesses described the same before they were shown the car and made their identification. The photographs are a necessary portion of the argument on

appeal that the District Court's view of the evidence regarding the identification of Rubin Carter's car is not supported by the record.

This photograph showing the distinctive rear view of the Carter car was submitted to this Court by the petitioners-appellees (Exhibit D). It is contained in the document entitled "Petitioners' Joint Reply Memorandum in Support of Motion for Summary Judgment."

(d) Statement of Alfred Bello dated June 17, 1966;

This statement was read, substantially in its entirety, at the trial during the redirect examination of Alfred Bello. See the appendix submitted to the Court of Appeals, 4774aA to 4785aA.

This statement in its entirety was submitted to this Court by petitioner-appellee's attorney, Ronald Busch (Exhibit D). It is contained verbatim twice in a document entitled, "Defendants-Appellants' Appendix After Evidentiary Hearing on Remand" pp. 31a-32a, 45a-46a.

This statement is also reproduced in its entirety in a document entitled, "Appendix in Support of Defendant Rubin Carter's Motion Seeking Order Compelling Withdrawal of Passaic County Prosecutor, and Compelling Supplementation of the Record." This appendix was submitted to this Court by petitioner-appellee's attorney Busch (Exhibit D).

The joint affidavit of petitioners-appellees' attorneys Beldock and Steel submitted to this Court contains a detailed outline of Alfred Bello's statement of June 17, 1966.

(e) Testimony of Patricia Valentine from First Trial on May 10, 1967;

Patricia Valentine lived above the Lafayette Bar, the scene of the murders. She identified Rubin Carter's car as the automobile driven from the scene by the

murderers. The District Court in its opinion takes the position that the evidence of her identification of the Carter car is weak. The respondents-appellants maintain on appeal that this view is mistaken. In support of its position, the District Court's opinion recites the defense claim that in her testimony at the first trial, Mrs. Valentine referred to the rear of the Carter car as "similar" to the car she saw leave the scene, while at the second trial she testified it was "identical." Carter v. Rafferty, 621 F. Supp. 533, 555 (D.C.N.J. 1985).

The fact of the matter is that this reference by the District Court to Mrs. Valentine's testimony is mistaken. Mrs. Valentine never used the term "similar" as stated by the District Court in its opinion.

The District Court in its opinion says that Mrs. Valentine's testimony that the taillights were "identical" was new to the second trial. This is not so. A reference to the sequence of questions on cross-examination in which the term "similar" was used shows that Mrs. Valentine did not upgrade her testimony for the second trial as the District Court suggests:

> Q. Referring gentlemen to P. 2.148, do you remember, Mrs. Valentine, being asked these questions and giving these answers [at the first trial]?
>
> "Question: And you told Officer Greenough you looked at the car that was brought back and you told him that this was the car?
>
> Answer: That this was the taillights that I seen.
>
> Question; So what you meant, what you did say to him was it was a similar type of car; is that right?
>
> Answer: The same kind of taillights."

It was the defense attorney at the first trial in his question who used the term "similar." It was not Mrs. Valentine. She testified that the taillights on the

Carter car were the same taillights she had seen. At both trials, Mrs. Valentine testified that the taillights were identical.

A reading of Mrs. Valentine's entire testimony at the first trial shows her well documented position that the Carter car looked "exactly like" the car she saw the murderers leave in. The appellants-respondents submitted with the appendix on appeal the portions of the testimony of Mrs. Valentine at the first trial regarding her description and identification of the murderers' car in order to show that her testimony was essentially the same at both trials. The District Court's opinion suggests that some adjustment was made by her in her testimony at the second trial. The Court's implication is most unfair to this witness based on this record. In light of the District Court's inaccurate and unfair presentation of Patricia Valentine's testimony and the Court's implication that she adjusted her testimony for the second trial, the respondents-appellants maintain that it is most fair and proper to include in the appendix to the Court of Appeals, the testimony Mrs. Valentine gave at the first trial regarding her identification of Rubin Carter's car.

(f) 1967 trial testimony of Rubin Carter;

The testimony of Rubin Carter at the first trial in 1967 is not included in the appendix which respondents-appellants submitted to the Court of Appeals. The affidavit of petitioner-appellee's attorney, Myron Beldock, is factually incorrect when it states that this testimony was included in the appendix. This matter was remanded to the District Court to settle the contents of the appendix, not the brief. If the petitioners-appellees take issue with the contents of the brief of the respondents-appellants, the proper and customary way for them to deal with that is to argue their position in the responding brief. The judgment of the District Court is the subject of attack on appeal. It is unfair, in appearance as well as reality, to permit the

petitioners-appellees to return to the District Court seeking excisions and censorship of the argument challenging the District Court's disposition of this matter.

The reference to Rubin Carter's testimony at the 1967 trial appears in a footnote in the respondents-appellants' brief. This reference was made by the respondents-appellants in the course of arguing against the District Court's position that the evidence of the shotgun shell and bullet is weak. This ammunition is the same kind as that used in the murders and was found in Rubin Carter's car at the time of the arrest of Rubin Carter and John Artis just some minutes after the killings.

The District Court determined that the evidence of the bullet and shell was weak (disputable). As with the Court's analysis of other areas of the State's evidence at the trial, the District Court did not state why the Court found the evidence to be disputable but rather the Court presented the petitioners-appellees' argument against the evidence. In the face of what the respondents-appellants contend is an enormous record to support the validity of the evidence of the bullet and shell, the District Court's opinion presents only one basis for suggesting that there is a "considerable dispute" about this evidence. Carter v. Rafferty, supra at 556-557. The Court restates the petitioners-appellees' argument that since Detective DiRobbio, who found the ammunition in the car did not voucher it with the property clerk until five days later, petitioners-appellees theorized that Detective DiRobbio intentionally or unintentionally produced in this case evidence found earlier in the killing of Roy Holloway. Mr. Holloway was the black man murdered by a white man with a shotgun several hours earlier at a bar down the street from the Lafayette Bar. Detective DiRobbio investigated the Holloway murder. This theory was rejected by the jury, the respondents-appellants contend because it was disproven by a substantial body of evidence.

While Detective DiRobbio retained the bullet and shell from the Carter car during his investigation and turned them in to the property clerk on June 23, 1966, he logged them in the Detective Bureau Evidence Book at the time he recovered them on June 17, 1966, the day of the murders. Numerous witnesses testified to seeing the bullet and shell in the possession of Detective DiRobbio on June 17, 1966. Consequently, the delay in vouchering referred to by the District Court does not weaken the probative value of the bullet and shell.

It is disingenuous for the petitioners-appellees to offer the vouchering attack on this evidence in light of the fact that Rubin Carter admitted seeing the ammunition on the day of the murder while he was under arrest at police headquarters. The fact that the ammunition was not vouchered with the property clerk until five days later is meaningless in the face of Carter's admission. Since the District Court reiterated the petitioners-appellees' vouchering argument, the footnote in the respondents-appellants' brief advising the Court of Appeals of the Carter admission is appropriate in the interest of justice to show the true state of affairs regarding the vouchering argument.

(g) Typewritten notes of oral interrogation of Rubin Carter;

(h) Typewritten notes of oral interrogation of John Artis;

The typewritten notes of the oral statement of Rubin Carter consist of one page in the appendix. The typewritten notes of the oral statement of John Artis constitute two pages of the appendix.

At the trial, Lieutenant Vincent J. DeSimone testified to the oral statements made to him by Rubin Carter and John Artis. During his testimony the contents of the typewritten notes of both Rubin Carter and John Artis were recited by him to the jury in their entirety.

The typewritten notes of Rubin Carter were marked S-68 in evidence. The jury had the opportunity to see this one page statement of Rubin Carter. Why

shouldn't the Court of Appeals have the opportunity to see what the jury saw?

Likewise, the typewritten notes of the statement of John Artis were marked S-69 in evidence and as such constituted a piece of the documentary evidence taken into the jury deliberations.

With regard to this area of the evidence also, the District Court's opinion reaches the same factual conclusion, that the evidence was "frayed." The District Court's opinion presents the following paragraph as a total basis for this conclusion:

> Petitioners also dispute the accuracy of the interrogation of Carter in which he purportedly denied lending his car or knowing about the ammunition; two points upon which the State relies heavily. Petitioners note the statement was never seen or acknowledged by them (32aA7089, 7140) and that the detective who interrogated them conceded destroying his original notes after reducing them to typewritten form (32aA7095-96). The notes do not include any reference to Carter's whereabouts between 2:00 a.m. and 3:00 a.m., a topic one would expect to be the primary reason for the interrogation in the first place. The New Jersey Supreme Court criticized the admissibility of the notes, but concluded that the affirmative probative value of these oral statements was virtually nil. Carter I at 442-446 (Carter v. Rafferty, supra p. 557).

The respondents-appellants contend in their brief on appeal that the District Court's implication that this evidence is weak because the detective who conducted the interrogation conceded destroying his notes, is not a fair statement of the record. The handwritten notes were available at the time of the second trial and were provided to the defense in discovery. The District Court's account of the record seems misleading. What actually occurred was that the original notes could not be located at the time of the detective's testimony at the first trial in 1967. They were located thereafter and made available at the second trial in 1976. The typewritten notes have

always been available and they are an accurate reproduction of the handwritten notes as can readily be seen from a comparison of the documents.

The District Court's factual conclusion that this evidence is frayed appears, from its opinion, to be founded on the District Court's belief that the notes do not include any reference to Rubin Carter's whereabouts during the crucial time between 2:00 a.m. and 3:00 a.m. The record does not support the District Court's statement in this regard. The respondents-appellants contend on appeal that there is such a reference in the notes of the verbal statement of John Artis and there is such a reference in the notes of the verbal statement of Rubin Carter. The notes of the oral statement of John Artis read as follows:

> Then Rubin Carter came around the corner from Governor Street an I called him and asked him where he was going. He said he was going to the Club LaPetit (about 10:00 p.m.). Carter spoke with a man at the other end of the bar. I believe the other man was his manager. They talked for an hour or an hour and a half and we went to the Nite Spot (Ruben and I -- about 11:30 p.m.). We stayed at the Nite Spot til the bar closed. Bar closed at 3:00 a.m.

It couldn't be clearer but that the notes state that John Artis said that Rubin Carter was at the Nite Spot between 2:00 a.m. and 3:00 a.m. Yet the District Court's opinion states that "the notes do not include any reference to Carter's whereabouts between 2:00 a.m. and 3:00 a.m., a topic one would expect to be the primary reason for the interrogation in the first place."

The notes of the oral statement of Rubin Carter read as follows;

> At Richie's Hideaway with two guys in my car. I don't think it was Artis. I left with my car alone about 1:30-1:45 a.m., went to Nite Spot and parked. Stayed at Nite Spot until bar closed. Artis left with me at 3:00 a.m.

As with the notes of the oral statement of John Artis, the notes regarding the oral statement of Rubin Carter specifically record the whereabouts of Carter between 2:00 a.m. and 3:00 a.m. Rubin Carter said he was at the Nite Spot. The District Court's definitive statement that no such reference is included in the notes is contradicted by an examination of the notes themselves.

Lastly, the District Court's opinion refers to the New Jersey Supreme Court's criticism of the admissibility of these notes in Carter I, 54 N.J. 436, 446 (1969). However, the Supreme Court's concern had nothing to do with matters related to this trial. The New Jersey Supreme Court's concern had to do with a Bruton question (Bruton v. United States, 39 U.S. 123, 88 S. Ct. 1620, 20 L. Ed.2d 476 (1968)). The New Jersey Supreme Court criticized the fact that the Bruton question was not explored at the trial level during the first trial. This issue was not involved in the second trial because the defendant Artis personally, and through his attorney, declined the trial court's invitation for a severance.

Furthermore, at a pre-trial conference, the prosecution itself had raised the severance issue. Prosecutor Burrell Ives Humphreys made a detailed presentation at that time to alert the defense about their option to seek a severance in light of the statements given by both defendants and in light of the fact that some evidence related only to Rubin Carter. The defense did not seek a severance. In the context in which it is presented, the District Court's statement in its opinion that, the New Jersey Supreme Court criticized the admissibility of the oral statement, conveys the idea that the criticism obviously relates to the admissibility of the statements at the trial under review, namely, the second trial. The fact is that the criticism related to the first trial and does not pertain to the second trial. Furthermore, since the criticism concerned a Bruton issue which was not involved in the second trial, the

upshot of the District Court's mention of this criticism is that on its face, but not in fact, it seems to support the District Court's contention that this evidence is frayed.

Aside from the fact that the oral statements of Rubin Carter and John Artis were part of the record at the trial and were marked as exhibits in evidence at the trial, they are a proper subject of the appendix because of the statements made in the District Court's opinion regarding these items.

(i) Grand jury testimony of John Artis on June 29, 1966;

The Grand Jury testimony of John Artis was read at the trial by the State during the State's case. Certain portions of John Artis's Grand Jury testimony were deleted by the State in the process of reading the Grand Jury transcript to the trial jury. The appendix submitted to the Court of Appeals contains the Grand Jury testimony including the deletions in order that it may be compared with what was read at the trial. What the State deleted from its reading of John Artis's Grand Jury testimony was the statements he made about his hearing talk at certain places around town that white people should be killed in retaliation for the murder of a black man by a white.

At the trial, the State maintained that indeed the people in the Lafayette Grill were killed in the course of retaliation for the murder of a black man, named Leroy Holloway, several hours earlier. The respondents-appellants maintain on appeal that there is a wealth of evidence to support the prosecution's position as to this motive and that the record further shows that the prosecution handled this sensitive issue in a fair and responsible way. The District Court in its opinion maintains that the prosecution of this matter involved an insidious and repugnant appeal to racism. This is a strong and sensational statement. It is sharply contested by the respondents-appellants on appeal. We maintain that the Court's statement is without support in the record and that it was unfair and wrong for the District Court to make it.

The reading of the Grand Jury testimony of both John Artis and Rubin Carter occurred at the end of the State's case just prior to the State resting. The respondents-appellants contend on appeal that a fair, common-sense assessment of the totality of the record at that point, clearly established that the Lafayette Grill shootings occurred as retaliation for the murder of Leroy Holloway. The excerpts from the Grand Jury testimony of John Artis regarding the talk of retaliation by killing white people could have had the potential to be inflammatory. The prosecution did not attempt to offer these statements and deleted them on its own initiative. The respondents-appellants contend that it is most appropriate to refer this matter to the attention of the Court of Appeals in light of the District Court's claim that this prosecution involved an appeal to racism.

(j) Excerpt from "The Sixteenth Round";

This item refers to the compilation of Rubin Carter's professional boxing record as it is listed by him in his book entitled, "The Sixteenth Round." It is well-known that this case has drawn wide attention from the media and from celebrities because of Mr. Carter's status as a professional boxer. In its formal opinion the District Court stated that, at the time of the murders, Rubin Carter was

> [a] well-known professional boxer who lived in Paterson, and who was at 30 years old, reaching the peak of his career, a contender for the middleweight crown. Carter v. Rafferty, supra 525.

The respondents-appellants cannot understand where in the record the District Court found the basis for its belief that at the time of the murders, the career of this 30 year old boxer was peaking and that he was a contender for the championship. In reality, Rubin Carter's boxing career was in sharp decline and he certainly was not a contender for the middleweight crown.

This is clear from an examination of Rubin Carter's boxing record as he summarized it in his book. From 1961 to 1964, Rubin Carter fought 25 fights. He won 21 and lost four. This is an impressive record and it obviously earned him a chance to fight for the championship on December 14, 1964. He lost that fight. In the year 1965 and the year 1966, which was the year of the murders, his record was markedly different than it had been before 1964. In those latter two years he fought 15 matches and won only seven. In 1966, the year of the murders, he fought six fights and won only two. The District Court stated that Rubin Carter was at his peak at the time of the murders in June 1966 when in fact he obviously had peaked in 1964 and was in a steady decline in 1965 and 1966.

This profile of Rubin Carter stated by the District Court in its opinion is wrong. (The District Court is also wrong in its stated profile of John Artis. He did not have a scholarship and he was not entered into college at the time of the murders as the District Court wrote in its opinion.)

The respondents-appellants argue on appeal that after presenting these mistaken profiles of Carter and Artis, the District Court's opinion thereafter repeatedly argues from these erroneous profiles by suggesting the implication that it is not likely that these particular defendants would commit these crimes for these reasons. The District Court's opinion queries: Why should this professional boxer at the peak of his career and about to fight for the championship, and this scholarship student on his way to college, commit these crimes?

The District Court chose to present these erroneous profiles and to draw argument from them to support its findings. Since the District Court chose to write about Rubin Carter's boxing record, it is fair and appropriate that the respondents-appellants demonstrate to the Court of Appeals that what the District Court said is incorrect.

(k) Statement of Alfred Bello dated October 14, 1966;

The substance of this statement was read at the trial during the cross-examination of Alfred Bello. See the appendix submitted by the respondents-appellants to the Court of Appeals, 4815aA to 4825aA.

This statement in its entirety was submitted to this Court by petitioner-appellee's attorney, Ronald Busch (Exhibit D). It was contained in a document entitled, "Defendants-Appellants' Appendix After Evidentiary Hearing on Remand," Vol. I, pp. 33a-36a.

This statement in its entirety, also was submitted to this Court by petitioner-appellee's attorney, Ronald Busch, in a document entitled, "Appendix in Support of Defendant Rubin Carter's Motion Seeking Order Compelling Withdrawal of Passaic County Prosecutor, and Compelling Supplementation of Record" (Exhibit D).

Furthermore, the joint affidavit of petitioners-appellees' attorneys Beldock and Steel submitted to this Court contains a recital of the so-called Alfred Bello version of October 1966, referring to the statement in question.

(l) Agreement dated September 17, 1975 between Alfred Bello, Melvin Ziem and Joseph Miller, Re: "The Lafayette Bar Massacre";

This document and its contents was testified to at the trial by all the above-named individuals. Together, their testimony developed all the essential language of this document. The record of the testimony and argument at trial is replete with references to this document. This agreement was marked S-44 in evidence at the trial. If it was available for the jury to look at and read, why should the eyes of a reviewing court be shielded from the document?

(m) Affidavit of Alfred Bello to Eldridge Hawkins dated November 1, 1975;

The essential portions of this document were read to the jury during the testimony of Alfred Bello.

The document in its entirety was submitted to this Court by petitioner-appellee's attorney, Ronald Busch, (Exhibit D). The affidavit is contained in a document entitled "Joint Appendix in Support of Defendants' Appeal from Denial of Motion to Vacate and Set Aside the Judgments of Conviction and to Dismiss or to Remand for a New Trial or Alternatively to Grant an Evidentiary Hearing on the Related Issues." See pp. 227a and 228a of that document.

The essential contents of this affidavit were summarized in the joint affidavit of the petitioners-appellees' attorneys Beldock and Steel which was submitted to this Court.

(n) Testimony of Alfred Bello to Essex County Grand Jury on December 19, 1975;

Alfred Bello's testimony before the Essex County Grand Jury has been the basis for the petitioners-appellees' argument regarding the non-disclosure of the oral report of Professor Harrelson regarding his polygraph examination of Alfred Bello. In the course of framing this argument, the petitioners-appellees have dubbed the Alfred Bello Grand Jury testimony in Essex County as "the in-the-bar story" or "the Essex County in-the-bar story." They coined these terms and have presented their argument framed around the Essex County Grand Jury testimony to many courts over the many years of the appeals following the murder convictions. They presented that argument to this Court and this Court adopted it. They now object to an Appellate Court seeing the transcript of the testimony that is the basis for the argument they have formulated and which the Court, whose judgment is being challenged, accepted.

A detailing of the components of the "Essex County in-the-bar story" was submitted to this Court in a document entitled "Petitioners' Joint Memorandum in Support of Motion for Summary Judgment." This Grand Jury testimony essentially was submitted to this Court again by the petitioners-appellees in a document entitled, "Petitioners' Joint Reply Memorandum in Support of Motion for Summary Judgment."

The details of Alfred Bello's testimony before the Essex County Grand Jury are recited in a document entitled, "Joint Brief for Defendants-Appellants." This document was included in the voluminous submission of the various briefs, appendices and affidavits sent to this Court by petitioner-appellee's attorney, Ronald Busch. (Exhibit D). This testimony of Alfred Bello is also detailed in a document entitled, "Joint Brief for Defendants-Appellants After Evidentiary Hearing on Remand." This brief was sent to this Court by petitioner-appellee's attorney, Ronald Busch (Exhibit D).

At the trial Alfred Bello was cross-examined for days and during that time many pages of the transcript of his Grand Jury testimony were read in question and answer form by defense counsel.

(o) Agreement dated December 8, 1975, among Jerry Leopoldi,

Alfred Bello, Joseph Miller and Melvin Ziem, Re: Motion Picture Production;

This document, its contents and the circumstances which led up to the formulation of this agreement were testified to in detail at the trial by Jerry Leopoldi. It was also the subject of considerable testimony by the other witnesses named above.

This agreement was marked S-45 in evidence at the trial. The petitioners-appellees should not be permitted to keep the Court of Appeals from seeing the evidence which the jury saw and which was the basis for their guilty verdicts.

(p) Letter of Joseph Miller to Sherry Lansing,

MGM Studios, dated September 2, 1975.

Letter of Joseph Miller to Socha Metzler,

The Viking Press, dated September 2, 1975;

(q) Outline of script for "The Lafayette Bar Massacre";

These items were the subject of considerable testimony from several witnesses at the trial. In the course of the questioning of Joseph Miller and Melvin

Ziem, the contents of these letters were read in the presence of the jury.

The letter to MGM Studios was marked S-47 in evidence and the letter to The Viking Press was marked S-46 in evidence at the trial.

The outline of the script for the so-called "Lafayette Bar Massacre" was an enclosure referred to by Joseph Miller in each of the above letters.

(r) Portion of defense affidavit filed with the Appellate Division;

Petitioner-appellee's attorney, Lewis Steel, testified during the remand hearings regarding the polygraph examination of Alfred Bello by Professor Leonard Harrelson. The transcripts of the remand hearing were submitted to this Court. During the questioning of attorney Steel the relevant portions of this affidavit were read into the record. The affidavit was marked into evidence at the hearing as S-1035.

This affidavit, in its entirety, was submitted to this Court by petitioner-appellee's attorney, Ronald Busch (Exhibit D). It is contained in a document entitled, "Defendants-Appellants' Appendix After Evidentiary Hearing on Remand," Vol. I.

5. The respondents-appellants maintain that the petitioners-appellees' complaint over these 18 items is without merit and petty. Through their application contesting the appendix they have stalled the appeal and obtained months of additional time to respond to the brief submitted to the Court of Appeals by the respondents-appellants on March 28, 1986.

The respondents-appellants contend that there is no reason to respond to the complaints of the petitioners-appellees regarding the brief of the respondents-appellants to the Court of Appeals. The matter on remand before this Court is limited to the contents of the appendix. Whatever argument the petitioners-appellees have with regard to the contents of the brief should be dealt with in the customary way, through the vehicle of a responding brief.

6. In the affidavit of petitioner-appellee's attorney, Myron Beldock, to this Court dated May 21, 1986, the petitioners-appellees list 15 items designated (a) through (o) in paragraph six (pp. 5 through 8) which they request be confirmed as having been submitted to this Court. We acknowledge that these items were submitted to this Court in one form or another. Aside from the fact that these items seem to bear no reasonable relationship to the issues on appeal, it should be noted that some items were not requested by petitioners-appellees to be included in the appendix, or are listed here for confirmation as having been in the record before this Court, while earlier in the affidavit of Myron Beldock, he seeks deletions from the appendix of the respondents-appellants on the grounds that the item was not before this Court.

Specifically with regard to the aforementioned items designated (a) through (o) by the petitioners-appellees, the following observations should be noted:

> (a) This item was not requested for inclusion in the appendix by the petitioners-appellees. Certain portions of this affidavit were requested for inclusion in the appendix and that portion of this affidavit was included in the appendix submitted by the respondents-appellants. The pages listed here (pp. 42 to 46) were not requested by the petitioners-appellees to be included in the appendix.
>
> (b) This item refers to a Notice of Motion for a New Trial returnable at the time of sentencing (February 4, 1977) on the grounds that Lieutenant Vincent DeSimone who investigated the matter for the Prosecutor's Office in 1966 had been elevated to Chief of County Detectives prior to the second trial. The motion was totally without merit and has nothing whatsoever to do with this Court's opinion or the issues on appeal.
>
> (c) and (d) These items relate to the trial judge's exclusion of an out-of-state attorney from courtroom participation with the team of defense attorneys. The exclusion was based on the out-of-state attorney's repeated unprofessional

behavior in court. The excluded attorney's participation in the courtroom to that point, aside from his mere presence, was very slight.

(e), (f), (g) and (h) These items deal with the petitioners-appellees' allegations of jury misconduct. This was not an issue dealt with in this Court's opinion and is not an issue on appeal.

(i) The respondents-appellants have been unable to identify the contents of this item.

(j) This item deals with an application for a change of venue and the petitioners-appellees' application to disqualify the trial judge. These are not matters dealt with in this Court's opinion and are not issues on appeal.

(k) and (l) These items dealt with the allegations of misconduct made by the petitioners-appellees based on the notes of a former Prosecutor's investigator named Richard Caruso. This issue was specifically excluded from consideration by this Court and is not an issue on appeal.

(m) This item consists of the petitioners-appellees' reply to the issue of non-exhaustion of State remedies which was raised by the respondents-appellants. The respondents-appellants raised this argument because the petitioners-appellees were actively pursuing appeals in the Appellate Courts of the State of New Jersey at the same time they were seeking a writ of habeas corpus before this Court. This Court did not rule on the non-exhaustion of State remedies issue raised by the respondents-appellants. This Court heard and decided the habeas application.

(n) It should be noted, the "Exhibits" listed here by petitioner-appellee's attorney, Myron Beldock, for confirmation as part of the record, include the Carter car photo which in paragraph four (c) of this same affidavit, attorney Beldock contends was not part of the record and for that reason should be deleted from the appendix of the respondents-appellants.

(o) This item has no relevance to the opinion of this Court or the appeal contesting that ruling.

The respondents-appellants maintain that there is no reason to delete any item from the appendix submitted to the Court of Appeals. The respondents-appellants request the opportunity to be heard regarding any deletions sought by the petitioners-appellees. The respondents-appellants contend, as stated above, that the affidavit of attorney Myron Beldock submitted by the petitioners-appellees as the basis for their application contains incorrect information. The respondents-appellants request that this matter be resolved expeditiously so that there will be no further delay of the appeal to the United States Court of Appeals.

By: _____
John P. Goceljak
Special Deputy Attorney General-In-Charge
Acting Passaic County Prosecutor

By: _____
Ronald G. Marmo
Special Deputy Attorney General
Acting Chief Assistant Prosecutor

Sworn and subscribed to before me on this
11th day of July, 1986.

_____
John R. Cosmi
Attorney-At-Law
State of New Jersey

Office of
The Passaic County Prosecutor
Courthouse
Paterson, New Jersey 07505-2095
(201) 881-4800

JOSEPH A. FALCONE
PROSECUTOR

JOHN P. GOCELJAK
FIRST ASSISTANT PROSECUTOR
ANTHONY P. TIRINATO
DEPUTY FIRST ASSISTANT PROSECUTOR
THOMAS R. EDMOND
CHIEF OF COUNTY DETECTIVES

January 27, 1986

Sally Mrvos, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: Rubin Carter, Petitioner-Appellee vs.
John J. Rafferty, et al., Respondents-Appellants

John Artis, Petitioner-Appellee vs.
Christopher Dietz, et al., Respondents-Appellants.

No. 85-5735

Dear Ms. Mrvos:

Please find enclosed for filing in the above matter, Statement of Contents of Appendix and Statement of Issues Presented.

Also enclosed is Affidavit of Proof of Service of copy of the above upon respective counsel for petitioners-appellees.

Very truly yours,

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
Attorney for Respondents-Appellants

By: John P. Goceljak
First Assistant Prosecutor

JPG:le
Enclosure(s)

cc: Myron Beldock, Esq.
Lewis M. Steel, Esq.

EXHIBIT A M150

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,	:	
Petitioner-Appellee,	:	
vs.	:	
JOHN J. RAFFERTY, ET AL.	:	
Respondents-Appellants.	:	AFFIDAVIT OF PROOF OF SERVICE
JOHN ARTIS,	:	
Petitioner-Appellee,	:	
vs.	:	
CHRISTOPHER DIETZ, ET ALS.	:	
Respondents-Appellants.	:	

State of New Jersey : SS
County of Passaic :

John P. Goceljak, of full age, being duly sworn according to law upon his oath deposes and says that:

1. I am First Assistant Prosecutor in the Office of the Passaic County Prosecutor, Attorney for Respondents-Appellants in the above captioned appeal, and am familiar with the matters made the subject thereof.

2. On Friday, January 24, 1986, I mailed a true copy of

EXHIBIT A

Statement of Contents of Appendix and Statement of Issues Presented, respectively, to Myron Beldock,Esq., attorney for Petitioner-Appellee Rubin Carter, at his office, 565 Fifth Avenue, New York, New York, 10017, and to Lewis M. Steel, Esq., attorney for Petitioner-Appellee John Artis, at his office, 351 Broadway, New York, New York 10013, by placing same in duly addressed and stamped envelopes and depositing said envelopes in the main Post Office facility in Paterson, New Jersey.

John P. Goceljak

Sworn to and subscribed before
me this 27th day of January, 1986

Ronald G. Marmo
An Attorney-at-Law of New Jersey

EXHIBIT A M152

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

STATEMENT OF CONTENTS OF APPENDIX AND STATEMENT OF ISSUES PRESENTED

TO:

Myron Beldock, Esq.
Attorney for Petitioner-Appellee Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee for John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

EXHIBIT A

SIRS:

PLEASE TAKE NOTICE that in accordance with Rule 30 (b), F.R.A.P. the following statement of the Contents of the Appendix in the above captioned appeal is furnished:

1. Notice of appeal.

2. Relevant docket entries.

3. Petitions for Writ of Habeas Corpus, Rubin Carter and John Artis, respectively.

4. Answer to Petitions for Writ of Habeas Corpus.

5. Motion for Summary Judgment.

6. Petitioners' Statement of Facts, Rule 12 G.

7. Respondents' Reply to Statement of Facts.

8. Transcript of Hearing on Summary Judgment Motion.

9. Opinion and Orders of U.S. District Court granting Petitions for Writ of Habeas Corpus.

10. Transcript of 1976 trial proceedings of petitioners Rubin Carter and John Artis in the Law Division, Superior Court of New Jersey. 46 trial volumes including jury voir dire, and 20 volumes of related pre-trial and post-trial proceedings.

11. Transcript of 1981 Polygraph Remand Hearing, 14 volumes.

12. Unpublished opinion of Appellate Division, Superior Court of New Jersey, affirming convictions, dated October 22, 1979.

13. Unpublished opinion of Trial Court, Honorable Bruno Leopizzi, dated August 28, 1981, following Polygraph Remand Hearing.

14. Excerpts from transcript of Recantation Hearing, October-November 1974.

15. Excerpts of transcript of alibi testimony from 1967 trial of petitioners.

16. Following numbered exhibits from Defendants' Appendix on

EXHIBIT 9

appeal from 1976 trial convictions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 24, 26, 27, 28, 29, 31, 32, 33, 34, 36, 47, 54, 55, 56, 73.

17. Following numbered exhibits at 1981 Remand Hearing: S-1000 thru S-1007, S-1009 thru 1032, S-1035, DA-1101 thru DA-1112, DA-1117 DA-1119, DA-1120, DA-1121, DA-1216, DA-1222, DA-1223, DA-1231, DA-1123, DA-1125, DC-1202, DC-1202, DC-1203, DC-1205, DC-1206, DC-1207.

18. Police reports, 1966 Murders investigation.

19. Statements, Alfred Bello, Arthur Bradley given during 1966 investigation.

20. Caruso file notes.

21. Affidavits: Myron Beldock, November 29, 1983, Lewis Steel, December 1, 1983, Jeffrey Fogel, December 8, 1983, Harold Cassidy, December 9, 1983.

22. Unpublished opinion, Honorable Bruno Leopizzi, dated January 20, 1984.

23. Unpublished opinion of Appellate Division of Superior Court of New Jersey, dated July 2, 1985.

24. Order of New Jersey Supreme Court, dated November 1, 1985.

PLEASE BE FURTHER ADVISED, the Statement of Issues Presented in the above captioned appeal will include the following:

1. Failure of the United States District Court to sufficiently credit the trial record, evidence and jurys' fact findings at the State court trial of petitioners.

2. Failure of the United States District Court to properly credit the record, evidence and trial court's findings of fact and conclusions of law derived therefrom, developed at the polygraph remand hearing relative to an alleged Brady violation.

3. Failure of the United States District Court to give due deference to the record, evidence, and trial court's findings and rulings relative to admissibility of motive evidence at the state trial, as well as to the State appellate courts' review thereof.

EXHIBIT A

4. Failure of the United States District Court to properly apply the guidelines set forth in the applicable case law, including United States v. Bagley, 473, U.S. _____, 105 S. Ct. 3375, 87 L. Ed. 2nd 481 (1985) relative to the alleged Brady violation involving non-disclosure of an oral polygraph test report.

5. Erroneous application of the standard of review upon Habeas Corpus proceeding, to the record, the fact-findings and rulings in the State court proceedings.

DATED: January 24, 1986

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
Attorney for Respondents-Appellants

By: _____
John P. Goceljak
First Assistant Prosecutor

_____
Ronald G. Marmo
Chief Assistant Prosecutor

F44-R-T 9

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

RESPONDENTS-APPELLANTS' SUPPLEMENTAL STATEMENT OF CONTENTS OF APPENDIX

TO:

Myron Beldock, Esq.
Attorney for Petitioner-Appellee Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

Exhibit B

SIRS:

PLEASE TAKE NOTICE that upon review of Appellees' designation of additional contents and objections to certain contents to be included in the Appendix on appeal in the herein matter Respondents-Appellants submit the following modifications to their Statement of Contents previously filed:

1. The exhibits noted in paragraph 1 of Appellees' designation to be included with the exception of the following:

   a) Exhibit 42 to be excluded. This is a motion to dismiss for prejudicial pre-trial publicity, which is irrelevant to the issues in the United States District Court's Opinion and on appeal.

   b) Exhibit 70, to include only pp. 153a-160a.

   c) Exhibit 71. To include only pp. 174a-200a, if those exhibits are not elsewhere included. Pages 161a-173a not to be included, since it involves an affidavit in support of a motion for remand, and is subsumed by the 1981 remand hearing which is part of the record.

   d) Exhibit 79. Pages 47a to 72a to be included.

   e) Exhibit 84. Motion for new trial not to be included, since irrelevant to issues on appeal.

   f) Exhibits 22, 23 from Volume 5 not to be included. Disqualification of James Meyerson, Esq. irrelevant to issues on appeal.

   g) Exhibits 6, 8, 12 and 13 from Volume 6 not to be included. Issue of alleged jury misconduct irrelevant on appeal.

   h) Following exhibits to be included: 75, 76, 77; 16, 17, 18, 19, 20 and 21 from Volume 5.

2. Exhibits noted in paragraph 2 of Appellees' designation to be included.

3. Trial exhibits noted in paragraph 3 of Appellees designation to be included, together with any other 1976 trial exhibits relating to Petitioner Rubin Carter's 1966 Dodge automobile.

4. Exhibits noted in paragraph 5 of Appellees' designation not to be included unless already included under other designation. Change of venue motion is irrelevant to issues on appeal.

5. Affidavits and letter of Myron Beldock noted in paragraph 6 of Appellee' designation to be included. Proposed Caruso Affidavit not to be included, since it was never signed by him and is irrelevant. Transcript of Hearings on Caruso matter not to be included, since these were filed as to the exhaustion issue, which is not on appeal.

6. Appellees' brief on the exhaustion issue not to be included.

7. Paragraph 14 of Appellants' Statement of Contents of Appendix, excerpts from transcript of Recantation Hearing, to include testimony of Alfred Bello.

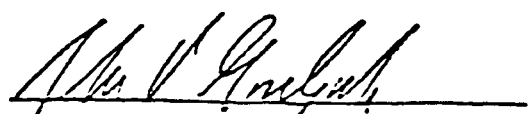
8. Paragraph 15 of Appellants' Statement of Contents of Appendix, excerpts of testimony of alibi testimony to include testimony of Anna Mapes, Catherine McGuire and Welton Deary.

9. Paragraph 18 of Appellants' Statement of Contents of Appendix to include any in evidence at 1976 trial, referred to in testimony at 1976 trial, or in briefs or appendices submitted to United States District Court.

10. Paragraph 19 of Appellants' Statement of Contents of Appendix to include only statements of Alfred Bello, typed or handwritten.

DATED: February 14, 1986

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
Attorney for Respondents-Appellants

By: 
John P. Goceljak
First Assistant Prosecutor

By: 
Ronald G. Marmo
Chief Assistant Prosecutor

Exhibit 2 M159

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER,

Petitioner-Appellee

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

85-5735

RESPONDENTS-APPELLANTS' APPLICATION FOR EXTENSION OF TIME FOR FILING BRIEF AND APPENDIX

ORDER

THE MOTION IS GRANTED. NO FURTHER EXTENSIONS WILL BE GRANTED. THE APPELLANTS SHALL FILE & SERVE THEIR BRIEF AND THE JOINT APPENDIX ON OR BEFORE MARCH 28, 1986.

For the Court.

Clerk

MAR - 5 1986

TO:

a/cc: LF
MB
JPG
RGN

Myron Beldock, Esq.
Attorney for Petitioner-Appellee
Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

M160

EXHIBIT A

BUSCH AND BUSCH
COUNSELLORS AT LAW
99 BAYARD STREET
P.O. BOX 33
NEW BRUNSWICK, N.J. 08903

AREA CODE 201
247-1017

LEWIS D BUSCH
HENRY BUSCH
MALCOLM R. BUSCH
RONALD J. BUSCH
BERTRAM E. BUSCH
MARK N. BUSCH
LEONARD R. BUSCH
C. EDWARD SPEIDEL

April 10, 1985

BY HAND

Allyn Z. Lite, Clerk
United States District Court
U.S. Courthouse and Post Office Bldg.
Newark, New Jersey 07102

RE: Rubin Carter, Petitioner vs. John J. Rafferty, Superintendent, Rahway State Prison, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, Respondents.
Docket No. 85-745

John Artis, Petitioner vs. Christopher Dietz, Chairman, Parole Board of New Jersey, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, Respondents.
Docket No. 85-1007

Dear Sir:

On April 8, 1985, Professor Leon Friedman, one of the attorneys representing petitioners, spoke to Ms. Margaret Turner, Law Clerk to U.S.D.J. Sarokin, and requested permission to file copies of briefs, appendices and opinions which counsel considered material to the questions raised in the petition. Professor Friedman made this request since respondents had failed to file such materials by March 31, 1985, as directed in U.S.D.J. Sarokin's order of February 21, 1985.

Therefore, in accordance with Ms. Turner's instructions, and for the purpose of assisting the Court in its consideration of the petition, the following materials are provided:

1. (a) Brief and one-volume appendix in support of defendant's motion seeking order compelling withdrawal of Passaic County Prosecutor and other relief.

EXHIBIT D

(b) Letter from Passaic County Prosecutor's office, dated November 9, 1978, in opposition.

2. (a) Joint brief for defendants on appeal of convictions with six-volume appendix.

(b) Brief on behalf of respondent State of New Jersey.

(c) Joint supplemental brief for defendants.

(d) Supplementary brief for defendant Artis.

(e) Letter dated June 6, 1979 in lieu of defendants' formal reply brief.

(f) Letter dated June 29, 1979 in lieu of formal response brief from respondents.

(g) Opinion of J.S.C. Bruno Leopizzi, Superior Court of New Jersey Law Division: Passaic County, dated May 29, 1979.

(h) Opinion of Judges Matthews, Kole and Milmed, Superior Court of New Jersey, Appellate Division, dated October 22, 1979.

3. (a) Joint brief and two-volume appendix for defendants after evidentiary hearing on remand. Submitted to the Supreme Court of New Jersey on review of trial court's findings and conclusions after remand for hearing pursuant to decision of March 3, 1981.

(b) Brief and appendix on behalf of respondent State of New Jersey.

(c) Defendants' joint reply brief after evidentiary hearing on remand.

(d) Letter dated December 4, 1981 supplementing defendants' joint brief.

4. Memorandum and two-volume appendix submitted by defendants in support of application for leave to appeal from Law Division orders denying motion for a change of venue and for disqualification of Judge Leopizzi (in regard to eviden-

EXHIBIT A

tiary hearing directed by March 3, 1981 Supreme Court decision).

5. (a) Joint brief for defendants-appellants submitted to Superior Court of New Jersey, Law Division, on remand by order of the New Jersey Supreme Court.

(b) Brief on behalf of State of New Jersey.

(c) Opinion of J.S.C. Bruno Leopizzi, dated August 28, 1981.

6. (a) Notice of motion and affidavit in support of motion to permit inspection and copying of Caruso files, dated October 20, 1982.

(b) Defendants' joint brief and appendix vol. 1 and 2 on appeal from denial by Superior Court of New Jersey Law Division of motion to vacate and set aside the judgments of conviction and to dismiss or to remand for a new trial or, alternatively, to grant an evidentiary hearing on the related issues.

(c) Brief in opposition on behalf of the State.

(d) Defendants' joint reply brief.

7. Defendants' notice of motion and joint brief in support of motion for certification of appeal pending unheard in the Appellate Division.

(a) Letter dated August 22, 1984 on behalf of State of New Jersey in opposition to certification.

(b) Order filed September 6, 1984 denying motion for direct certification to the Supreme Court of the State of New Jersey.

8. (a) Notice of motion on behalf of defendants to suppress respondents' brief for failure to file and serve a reply, dated August 4, 1984, submitted to the Appellate Division of the Superior Court of the State of New Jersey.

EXHIBIT A

(b) Notice of motion for leave to file brief on behalf of State of New Jersey nunc pro tunc dated August 17, 1984.

(c) Order of P.J.A.D. Charles S. Joelson granting respondents' motion to file brief nunc pro tunc.

(d) Order of P.J.A.D. Charles S. Joelson, dated August 24, 1984, denying defendants' motion to suppress.

I hereby certify that these are true copies of the originals on record. Please note that transcripts are not included with this submission and counsel anticipates filing of transcripts by the State, in accordance with U.S.D.J. Sarokin's order of February 21, 1985. A copy of this letter, without enclosures, will be forwarded to respondents.

Respectfully yours,

Ronald J. Busch

RJB:slj

Enclosures

cc: John P. Goceljak
Passaic County Prosecutor's Office

Ms. Margaret Turner

All defense counsel

Messrs. Carter and Artis

Exhibit D

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, New York 11550
(212) 737-0400

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER, Petitioner-Appellee, -against- JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey, Respondents-Appellants.	Circuit Court No. 85-5735 District Court No. 85-745
JOHN ARTIS, Petitioner-Appellee, -against- CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey, Respondents-Appellants.	**MOTION TO SETTLE THE RECORD**

PLEASE TAKE NOTICE that petitioner-appellee, upon the annexed affidavit of Myron Beldock, will move before the United

States District Court for the District of New Jersey, on June 23, 1986 or as soon thereafter as counsel can be heard, for an order settling the appellate record in this case pursuant to the Order of Hon. John J. Gibbons, United States Court of Appeals dated April 29, 1986 and Rule 10(e) of the Rules of Appellate Procedure for the Third Circuit.

Dated: New York, New York
May 21, 1986

Myron Beldock
BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Leon Friedman
HOFSTRA UNIVERSITY LAW SCHOOL
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(212) 737-0400

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903
(201) CH7-1017

TO: John Goceljak
PASSAIC COUNTY PROSECUTOR'S OFFICE
Passaic County Courthouse
77 Hamilton Street
Paterson, New Jersey 07505
(201) 881-4800

Lewis M. Steel
STEEL & BELLMAN
351 Broadway
New York, New York 10013

Patricia Rousseau
RUTGERS SCHOOL OF LAW
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Newark, New Jersey 17102

Myron Beldock, Esq.
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Leon Friedman
Hofstra University Law School
Hempstead, New York 11550
(212) 737-0400

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
ON REMAND FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

Circuit Court No. 85-5735

District Court No. 85-745

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I am one of the attorneys for petitioner-appellee Rubin Carter.

2. I make this affidavit in support of petitioner-appellee's motion for an order to settle the appellate record in this case pursuant to the Order of the Third Circuit Court of Appeals and Rule 10(e) of the Federal Rules of Appellate Procedure.

3. By Order dated April 29, 1986, the Court of Appeals for the Third Circuit (Gibbons, J.) ordered that "since the parties are unable to agree on what matters were of record before the District Court, pursuant to the Circuit Court's Order of March 25, 1986, the matter be referred to the District Court for determination." (The Circuit Court orders of April 29, 1986 and March 25, 1986, together with the submissions of the parties, are attached as Exhibits 1 and 2, respectively.)

4. Petitioner-appellee contends that references to matters not of record are contained in the proposed brief and appendix submitted by appellants to the Circuit Court. (Pages of the brief in which those non-record matters are referred to, with brackets around improper inclusions, are attached as Exhibit 3.) The non-record matters contained in the appendix and related references in the appellants' brief are as follows:

(a) Court Clerk's records of jury deliberations, December 21, 1976 -- (AB9, 89; 1aF1-3)[1];

(b) Court Clerk's records of jury deliberations, May 26, 1967 -- (AB9, 89; 1aF4-6);

(c) Photos of Rubin Carter's car -- (AB13; 1aF7-8);

(d) Statement of Alfred Bello dated June 17, 1966 (AB17, 20, 21, 25, 26, 91, 174; 2aF199-200);

(e) Testimony of Patricia Valentine from first trial on May 10, 1967 -- (AB22-24; 1aF99-178);

(f) 1967 trial testimony of Rubin Carter -- (AB33, 54);

(g) Typewritten notes of oral interrogation of Rubin Carter (AB-31, 51-52; 1aF12);

(h) Typewritten notes of oral interrogation of John Artis (AB-31, 51-52; 1aF18-19);

(i) Grand jury testimony of John Artis on June 29, 1966 (AB76-77; 1aF24-98);

(j) Excerpt from "The Sixteenth Round" (AB-81, 130; 1aF10-11);

---

[1] AB followed by a number refers to pages in the brief submitted to the Circuit Court by appellants; a number, followed by a lower case "a," followed by an upper case letter, followed by a number, refer to appellants' appendix locations. For example, 1aF1-3 refers to volume one "F," pages 1 through 3 of appellants' appendix.

(k) Statement of Alfred Bello dated October 14, 1966 (AB-93, 94, 174; 2aF240-244);

(l) Agreement dated September 17, 1975 between Alfred Bello, Melvin Ziem and Joseph Miller Re: "The Lafayette Bar Massacre" (AB107; 2aF188-191);

(m) Affidavit of Alfred Bello to Eldridge Hawkins dated November 1, 1975 (AB106, 108; 2aF197-198);

(n) Testimony of Alfred Bello to Essex County grand jury on December 19, 1975 (AB106; 2aF245-288);

(o) Agreement dated December 8, 1975 among Jerry Leopaldi, Alfred Bello, Joseph Miller and Melvin Ziem, re. motion picture production (AB109; 2aF192-196);

(p) Letter of Joseph Miller to Sherry Lansing, MGM Studios, dated September 2, 1975. Letter of Joseph Miller to Sohcha Metzler, The Viking Press, dated September 2, 1975 (AB110, 111; 2aF179-182);

(q) Outline of script for "The Lafayette Bar Massacre" (AB110; 2aF183-187);

(r) Portion of defense affidavit filed with Appellate Division, ¶ 29 (AB163, 179; 3aE543-546).

5. There are additional references to matters not of record which are contained in appellants' brief. That brief does not include citations relating to these non-record matters. As far as we can determine by a diligent review of the record, they have no source in the record, which is presumably why no cita-

tions are given. Appellee is submitting for the Court's consideration the pages in question, with brackets around the improper inclusions (attached as Exhibit 4).[2] The pages are AB7, 11, 18, 35, 37, 39, 63, 96, 104, 105, 106, 107, 108, 114, 128, 136 and 139.

6. Appellants have refused to include certain materials of record -- (a) through (o) below -- which were designated by appellee for inclusion in the appendix. All of these materials, except (m), (n) and (o) below, were submitted to the District Court on April 10, 1985 by petitioner's counsel, as indicated in Appendix A to Petitioners' Joint Memorandum In Support of Motion for Summary Judgment. Item (m) was submitted to the District Court on or about June 25, 1985. Item (n) was submitted to the District Court on September 9, 1985. Appellee requests that the Court's order settling the record confirm that the following items are of record:

(a) 4DaT42-46 -- pages 42-46, Volume IV, Defendants' Joint Appendix on Appeal of Convictions (excerpt from Ex. "79" - Steel Affidavit 1/25/79 and Exhibits Submitted in Federal Habeas Corpus Proceeding Seeking Hearing Re: 1976 Jury);

---

[2] Furthermore, appellee disputes the accuracy and truth of these improperly included references.

(b) 4DaT104-112 -- Ex. "84" from Vol. IV, as above (Defendants' Notice of Motion For A New Trial dated 2/4/77);

(c) 5DaT114-115 -- Exhibit "22" from Vol. V, as above (Judge Leopizzi's 4/23/79 Letter to NAACP Re Admission of Meyerson Before the Court);

(d) 5DaT116-122 -- Ex. "23" from Vol. V, as above (Meyerson's 4/27/79 Letter to Judge Leopizzi Re 4/23/79 Letter);

(e) 6DaT64-77 -- Ex. "6" from Vol. VI, as above (Transcript of 10/5/78 In Camera Conference Between Judge Leopizzi and Juror Adamo);

(f) 6DaT82 -- Ex. "8," Vol. VI, as above (Excerpt from Transcript of Adamo's Allegations Concerning Fischer);

(g) 6DaT90-92 -- Ex. "12," Vol. VI, as above (Adamo's 3/14/79 Letter to Judge Leopizzi);

(h) 6DaT93-94 -- Ex. "13," Vol. VI, as above (Adamo's 3/15/79 Letter to Judge Leopizzi);

[Items (a) through (h) listed in Appendix A to Summary Judgment Memorandum as item 2a];

(i) Letter and exhibits, dated December 4, 1981, Supplementing Defendants' Joint Brief After Evidentiary Hearing on Remand, Submitted to Supreme Court of New Jersey;

[Item 3(d) from Appendix A to Summary Judgment Memorandum];

(j) Exhibits 1, 2, 3 (pp. 5a to 11a), 5 (pp. 45a to 80a, 104a to 200a) from Defendants' Appendix in Support of Application for Leave to Appeal from Law Division Orders Denying Motion for Change of Venue and for Disqualification of Judge Leopizzi (in regard to evidentiary hearing directed by March 3, 1981 Supreme Court decision);

[Item 4 from Appendix A to Summary Judgment Memorandum];

(k) Defendants' Joint Brief On Appeal From Denial by Superior Court of New Jersey Law Division of Motion To Vacate and Set Aside The Judgments of Conviction and To Dismiss etc. (re: the Caruso file);

[Item 6(b) from Appendix A to Summary Judgment Memorandum];

(l) From Volume I, Joint Appendix In Support of Above Motion (re Caruso):

(i) pp. 70a-81a (Affidavit of Myron Beldock sworn to October 31, 1983 In Support of Motion To Vacate Judgment of Conviction and Grant a New Trial (with attached exhibits);

(ii) pp. 83a-86a (Proposed Caruso Affidavit dated November 29, 1983);

[Item 6(b) from Appendix A to Summary Judgment Memorandum];

(m) Petitioners' Reply to Respondents' "Answer" to Petitions (Petitioners' Joint Memorandum Regarding Exhaustion of State Remedies);

(n) Exhibits A, C and E from Appendix A to Petitioners Joint Reply Brief in Support of Motion for Summary Judgment, submitted to the District Court on September 9, 1985;

(o) Order of the District Court, directing respondents to answer to the Petition of Rubin Carter, dated February 20, 1985.

7. For the foregoing reasons, petitioner-appellee moves for an order settling the record and for such other and further relief as the Court may deem appropriate.

MYRON BELDOCK
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LEON FRIEDMAN
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903
(201) CH7-1017

Attorneys for Petitioner-
Appellee Carter

Sworn to before me this
21st day of May, 1986.

Notary Public

EDWARD S. GRAVES
Notary Public, State of New York
No. 31-4849102
Qualified in New York County
Commission Expires March 30, 1987

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says:

That he is over 18 years of age and is not a party to this action; that he resides at 42 RiversideDrive, New York, New York 10024; that on the 21st day of May, 1986, he served true copies of the attached Notice of Motion to Settle the Record and ~~Supporting~~ Affidavit and Exhibits upon appellants ~~in this action~~ at the address indicated below by Express Mail by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States Government.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
~~Attorney for Respondents-Appellants~~
~~New Court House~~
~~Paterson~~, New Jersey 07050
(201) 881-4800

Sworn to before me this
21st day May, 1986.

Notary Public

SANDRA J. GONSKI
Notary Public, State of New York
No. 31-4851865
Qualified in New York County
Commission Expires Feb. 10, 1988

Exhibit I

B-109

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5735 April 15, 1986

CARTER and ARTIS vs. RAFFERTY, et al.

ARTIS vs. DIETZ, et al.

Rafferty, et al, Appellants
(NJ D.C. Civil 85-0745 & 85-1007)

✓

Present: GIBBONS, HIGGINBOTHAM, and BECKER, Circuit Judges.

1. Appellants' motion for permission to file brief exceeding length limitation of F.R.A.P. 28(g), namely 193 pages exclusive of indexing, and table of contents, nunc pro tunc,
2. Motion by appellee, Rubin Carter, to strike appellants' brief and appendix and for such other and further relief as is appropriate, including, without limitation, dismissal, and if appropriate, that appellee's brief be filed 30 days after appellants file and serve a corrected and proper brief and appendix,
3. Appellants' response to appellee's motion to strike brief and for further relief,
4. Appellee's reply affidavit in support of motion to strike appellants' brief and appendix and for such other and further relief, etc., (not filed unless Court directs)
5. Copy of Court's order dated March 25, 1986, sent by the undersigned for the Court's information, (#B-109)

in the above-entitled case.

Respectfully,

Gigi Geratyonian

enc. Deputy Clerk 7-5019

cd

P.S. Appellants' brief and appendix were received in the Clerk's office on 3-28-86 (P.D. 3-27)

The foregoing Motion ~~is here~~, from which it appears that the parties are unable to agree on what matters were of record before the district court, pursuant to this Courts order of March 25, 19 that matter is referred to the district court for determination. The motion for leave to file a brief in excess of that permitted by the rules is deferred until the district Court determines what matters may be included in the appendix

By the Court,

John J. Gibbons
Judge

Dated: April 29, 1986
ad/cc: JPG LMS
LF RGM
MB

M178

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, NY 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER, Petitioner-Appellee, -against- JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey, Respondents-Appellants. JOHN ARTIS, Petitioner-Appellee, -against- CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey, Respondents-Appellants.	**NOTICE OF MOTION TO STRIKE APPELLANTS' BRIEF AND APPENDIX AND FOR SUCH OTHER AND FURTHER RELIEF AS IS APPROPRIATE, INCLUDING, WITHOUT LIMITATION, DISMISSAL**

PLEASE TAKE NOTICE that petitioner-appellee Rubin Carter, upon the annexed affidavit of Myron Beldock, hereby moves before the United States Court of Appeals for the Third Circuit

for an order striking Appellants' Brief and Appendix and for such other and further relief as is appropriate, including, without limitation, dismissal.

Dated: New York, New York
April 1, 1986

MYRON BELDOCK
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New York, NY 10017
(212) 490-0400

LEON FRIEDMAN
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Hempstead, NY 11550
(212) 737-0400

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
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(201) CH7-1017

Attorneys for Petitioner-
Appellee Carter

TO: JOSEPH A. FALCONE
Passaic County Prosecutor
New Courthouse
Patterson, NJ 07505
(201) 881-4800

Attorneys for Respondents-
Appellants

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
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(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I am one of the attorneys for appellee Rubin Carter.

2. I make this affidavit in support of Mr. Carter's motion for an order to strike appellants' brief and appendix and for such other and further relief as is appropriate, including, without limitation, dismissal.

3. By order dated March 25, 1986, this Court granted appellee's motion to limit the appendix to matters of record before the District Court. The order further specified that if the parties were unable to agree on what was of record within ten days of the date of the order, the matter was to be referred to the District Court for determination. Upon information and belief, appellants received this order before filing their brief and appendix. Indeed, on March 26, 1986, my associate Edward Graves spoke by telephone to John P. Goceljak, one of the attorneys for appellants, and reiterated appellee's objections to appellants' inclusion of non-record material. Mr. Graves noted to Mr. Goceljak that filing the disputed appendix and any brief relying on such material would violate this Court's order of March 25, 1986. Mr. Goceljak stated that he nonetheless intended to file these materials on March 28, 1986.

4. The materials filed by appellant include the following:

(a) An appendix consisting of approximately 20,000 pages which contains material not of record before the District Court.

(b) A brief of 193 pages of text which contains argument and references based upon material not of record before the District Court.

(c) In addition, the appendix submitted by appellants not only summarily omits certain materials designated by appellee, but also contains additional materials which appellants never previously designated.

5. For the foregoing reasons, appellee moves for an order to strike appellants' brief and appendix and for such other and further relief as is appropriate, including, without limitation, dismissal. Appellee further requests that, if appropriate, the Court direct that appellee's brief be filed 30 days after appellants file and serve a corrected and proper brief and appendix.

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RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903
(201) CH7-1017

Attorneys for Petitioner-
Appellee Carter

Sworn to before me this
1st day of April, 1986.

Notary Public

EDWARD S. GRAVES
Notary Public, State of New York
No. 31-4849102
Qualified in New York County
Commission Expires March 30, 1987

EDWARD S. GRAVES, being duly sworn, deposes and says: that he is over 18 years of age and not a party to this action; that he resides at 42 Riverside Drive, New York, New York 10024; that on the 1st day of April, 1986, he served true copies of the attached notice of motion and affidavit upon appellants in this action at the address indicated below by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States government.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Appellants
New Courthouse
Patterson, New Jersey 07050
(201) 881-4800

Sworn to before me this
1st day of April, 1986.

Notary Public

ELLEN M. DOAK
Notary Public, State of New York
No. 41-4851896
Qualified in Queens County
Commission Expires Feb. 3. 19[illegible]

JOHN P. GOCELJAK
SPECIAL DEPUTY ATTORNEY GENERAL IN-CHARGE
ACTING PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

REPLY OF RESPONDENTS-APPELLANTS TO MOTION OF PETITIONERS-APPELLEES TO STRIKE BRIEF AND FOR FURTHER RELIEF

TO:

Myron Beldock, Esq.
Attorney for Petitioner-Appellee
Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

SIRS:

PLEASE TAKE NOTICE that Respondents-Appellants hereby oppose the motion of Petitioners-Appellees to strike Appellants' brief and appendix and for such other and further relief as is appropriate, etc. The Respondents-Appellants submit the annexed affidavit of John P. Goceljak and Ronald G. Marmo in support of such opposition.

John P. Goceljak
Special Deputy Attorney General In-Charge
Acting Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07505

Dated: April 4, 1986

JOHN P. GOCELJAK
SPECIAL DEPUTY ATTORNEY GENERAL IN-CHARGE
ACTING PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURTHOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

v.

JOHN J. RAFFERTY, ET AL.

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

v.

CHRISTOPHER DIETZ, ET AL.

Respondents-Appellants.

AFFIDAVIT IN OPPOSITION TO MOTION OF PETITIONERS - APPELLEES TO STRIKE BRIEF AND FOR FURTHER RELIEF

STATE OF NEW JERSEY :
COUNTY OF PASSAIC : S.S.

JOHN P. GOCELJAK and RONALD G. MARMO, of full age, being duly sworn according to law, upon their respective oaths, depose and say that:

1. Deponents are the Acting Prosecutor and Chief Assistant Prosecutor, respectively, in the Office of the Passaic

County Prosecutor, attorney for respondents-appellants in the herein captioned matters pending appeal before this Court, and are familiar with the matters concerned with said appeal and in this affidavit.

2. As directed by the letter of the Clerk of this Court dated January 17, 1986 and Rule 30(b) F.R.A.P., respondents, by papers dated January 24, 1986, furnished to the respective attorneys for petitioners the statement of contents of appendix and statement of issues presented on appeal, a copy of which was filed with this Court.

3. By notice dated February 5, 1986, counsel for Petitioner Carter submitted to respondents the appellees' designation of additional parts of the record to be included in the Appendix, and objections to material designated by appellants, stated by petitioners to have not been before the District Court.

4. The same date, counsel for Petitioner Carter filed with this Court a notice of motion to strike material not of record from the Appendix.

5. On February 14, 1986, respondents submitted to petitioners a supplemental statement of contents of appendix, a copy of which was filed with this Court. In said supplemental statement, respondents detailed explicit modifications to the statement of contents previously filed relating to the proposed appendix on appeal, which took into consideration the objections and additions contained in the previous appellees' designation and notice of motion, aforesaid.

6. Petitioners did not subsequently reply to the specific modifications submitted by respondents, and instead, counsel for Petitioner Carter, on February 19, 1986,filed a supplemental affidavit in general terms alleging failure to comply with F.R.A.P. 30(b), without mentioning the particular items in the proposed Appendix to which petitioners objected.

7. Thereafter, respondents engaged in the considerable effort to compile and reproduce the massive Appendix required in this matter, approaching some 20,000 pages of transcript and other materials. Because of the magnitude of the project, respondents sought and obtained an Order from this Court extending the time for filing the brief and appendix an additional 30 days, to March 28, 1986. Said order, dated March 4, 1986, also provided that no further extension would be granted to respondents.

8. During the extended period, from February 19, 1986 when counsel for Petitioner Carter filed the supplemental affidavit on his motion, until on or about March 26, 1986, counsel for petitioners did not further correspond or contact respondents to offer any specific objections, suggestions or modifications to the proposed Appendix as suggested in the respondents' supplemental statement of contents submitted on February 14, 1986.

9. On March 26, 1986, two days before the brief of respondents and the voluminous appendix prepared by respondents was due to be filed as per the extended deadline of this Court, Edward Graves, an attorney associated with counsel for petitioner Carter, telephoned John P. Goceljak to state that he understood an

Order would be forthcoming from this Court relative to the appendix materials. Mr. Graves was advised that respondents were under a deadline to file within two days, that respondents believed that the areas of dispute as to materials to be included in the appendix were probably minimal and could be rectified after a detailed review of the included materials made by petitioners.

10. The Order of this Court, referenced by Mr. Graves, was dated March 25, 1986 and received by respondents on March 27, 1986, the day prior to the extended due date. At that point, the materials included in the appendix had been assembled, reproduced to form 7 sets, collated and bound into 89 volumes per set amounting to a total of 623 volumes. The Order received on March 27th provided in part that the appendix was to be limited to matters of record before the District Court, and that if the parties were unable to agree on that within ten days, the matter would be referred to the district court for determination.

11. The undersigned, upon receipt of the aforesaid Order, telephoned the Office of the Clerk of this Court to notify that the Order had been received and that the respondents' brief and appendix were being transported for filing the next day, Friday, March 28, 1986. Further, that it was respondents' belief that any dispute as to what was before the District Court could probably be rectified without further extending the filing dates. Respondents did file and serve the brief and appendix on March 28, 1986.

12. The petitioners' motion does not identify what portion of the appendix they contend is objectional. The respondents will reply specifically should the petitioners submit particular designation of items of the appendix which they contend should not be reviewed by this Court. The respondents contend that the full content of the appendix is appropriate, necessary and helpful to a review of the district court's ruling. While the appendix is voluminous, most of it consists of transcripts of court proceedings which indisputably constitute a proper record concerning the petitioners' convictions.

13. Beyond the transcripts of court proceedings and the exhibits referenced in those proceedings, the record before the district court included extensive additional documentation. This documentation was incorporated in numerous briefs and appendices thereto, filed with various courts over many years in the course of the petitioners' efforts to overturn these convictions. This voluminous supplemental material was submitted to the district court with a cover letter of April 10, 1985, by petitioners' attorney, Ronald J. Busch. A copy of that letter inventorying the supplemental material is attached hereto.

The respondents submit that the application of the petitioners is, on its face and in fact, without merit. The respondents contend that the petitioners should not be permitted to use this application as a basis hereafter, to claim a need for an extension of their time limitation.

Respondents respectfully submit that for the reasons above stated, the motion of petitioners-appellees to strike brief and for further relief should be denied.

John P. Goceljak

Ronald G. Marmo

Sworn to and subscribed
before me this 7th day
of April, 1986.

Daniel A. Di Lella
An Attorney-at-Law of New Jersey

BUSCH AND BUSCH
COUNSELLORS AT LAW
99 BAYARD STREET
P.O. BOX 33
NEW BRUNSWICK, N.J. 08903

AREA CODE 201
247-1017

LEWIS D. BUSCH
HENRY BUSCH
MALCOLM R. BUSCH
RONALD J. BUSCH
BERTRAM E. BUSCH
MARK N. BUSCH
LEONARD R. BUSCH
C. EDWARD SPEIDEL

April 10, 1985

BY HAND

Allyn Z. Lite, Clerk
United States District Court
U.S. Courthouse and Post Office Bldg.
Newark, New Jersey 07102

RE: Rubin Carter, Petitioner vs. John J. Rafferty, Superintendent, Rahway State Prison, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, Respondents.
Docket No. 85-745

John Artis, Petitioner vs. Christopher Dietz, Chairman, Parole Board of New Jersey, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, Respondents.
Docket No. 85-1007

Dear Sir:

On April 8, 1985, Professor Leon Friedman, one of the attorneys representing petitioners, spoke to Ms. Margaret Turner, Law Clerk to U.S.D.J. Sarokin, and requested permission to file copies of briefs, appendices and opinions which counsel considered material to the questions raised in the petition. Professor Friedman made this request since respondents had failed to file such materials by March 31, 1985, as directed in U.S.D.J. Sarokin's order of February 21, 1985.

Therefore, in accordance with Ms. Turner's instructions, and for the purpose of assisting the Court in its consideration of the petition, the following materials are provided:

1. (a) Brief and one-volume appendix in support of defendant's motion seeking order compelling withdrawal of Passaic County Prosecutor and other relief.

(b) Letter from Passaic County Prosecutor's office, dated November 9, 1978, in opposition.

2. (a) Joint brief for defendants on appeal of convictions with six-volume appendix.

(b) Brief on behalf of respondent State of New Jersey.

(c) Joint supplemental brief for defendants.

(d) Supplementary brief for defendant Artis.

(e) Letter dated June 6, 1979 in lieu of defendants' formal reply brief.

(f) Letter dated June 29, 1979 in lieu of formal response brief from respondents.

(g) Opinion of J.S.C. Bruno Leopizzi, Superior Court of New Jersey Law Division: Passaic County, dated May 29, 1979.

(h) Opinion of Judges Matthews, Kole and Milmed, Superior Court of New Jersey, Appellate Division, dated October 22, 1979.

3. (a) Joint brief and two-volume appendix for defendants after evidentiary hearing on remand. Submitted to the Supreme Court of New Jersey on review of trial court's findings and conclusions after remand for hearing pursuant to decision of March 3, 1981.

(b) Brief and appendix on behalf of respondent State of New Jersey.

(c) Defendants' joint reply brief after evidentiary hearing on remand.

(d) Letter dated December 4, 1981 supplementing defendants' joint brief.

4. Memorandum and two-volume appendix submitted by defendants in support of application for leave to appeal from Law Division orders denying motion for a change of venue and for disqualification of Judge Leopizzi (in regard to eviden-

tiary hearing directed by March 3, 1981 Supreme Court decision).

5. (a) Joint brief for defendants-appellants submitted to Superior Court of New Jersey, Law Division, on remand by order of the New Jersey Supreme Court.

(b) Brief on behalf of State of New Jersey.

(c) Opinion of J.S.C. Bruno Leopizzi, dated August 28, 1981.

6. (a) Notice of motion and affidavit in support of motion to permit inspection and copying of Caruso files, dated October 20, 1982.

(b) Defendants' joint brief and appendix vol. 1 and 2 on appeal from denial by Superior Court of New Jersey Law Division of motion to vacate and set aside the judgments of conviction and to dismiss or to remand for a new trial or, alternatively, to grant an evidentiary hearing on the related issues.

(c) Brief in opposition on behalf of the State.

(d) Defendants' joint reply brief.

7. Defendants' notice of motion and joint brief in support of motion for certification of appeal pending unheard in the Appellate Division.

(a) Letter dated August 22, 1984 on behalf of State of New Jersey in opposition to certification.

(b) Order filed September 6, 1984 denying motion for direct certification to the Supreme Court of the State of New Jersey.

8. (a) Notice of motion on behalf of defendants to suppress respondents' brief for failure to file and serve a reply, dated August 4, 1984, submitted to the Appellate Division of the Superior Court of the State of New Jersey.

(b) Notice of motion for leave to file brief on behalf of State of New Jersey nunc pro tunc dated August 17, 1984.

(c) Order of P.J.A.D. Charles S. Joelson granting respondents' motion to file brief nunc pro tunc.

(d) Order of P.J.A.D. Charles S. Joelson, dated August 24, 1984, denying defendants' motion to suppress.

I hereby certify that these are true copies of the originals on record. Please note that transcripts are not included with this submission and counsel anticipates filing of transcripts by the State, in accordance with U.S.D.J. Sarokin's order of February 21, 1985. A copy of this letter, without enclosures, will be forwarded to respondents.

Respectfully yours,

Ronald J. Busch

RJB:slj

Enclosures

cc: John P. Goceljak
Passaic County Prosecutor's Office

Ms. Margaret Turner

All defense counsel

Messrs. Carter and Artis

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, NY 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

REPLY AFFIDAVIT IN SUPPORT OF MOTION TO STRIKE APPELLANTS' BRIEF AND APPENDIX AND FOR SUCH OTHER AND FURTHER RELIEF AS IS APPROPRIATE, INCLUDING WITHOUT LIMITATION, DISMISSAL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I make this reply affidavit, as counsel for Rubin Carter, in response to the opposing affidavit of Assistant Prosecutors Goceljak and Marmo sworn to April 7, 1986. The latter affidavit obfuscates the issues in an apparent attempt to mask the prosecution's complete failure to comply with the applicable rules and with the specific directions stated in this Court's order dated March 25, 1986 (copy attached). It also attempts to avoid the serious problems caused by the prosecution's insistence on including in its appendix and brief substantial materials dehors the record below and on excluding from its appendix materials within the record which were appropriately and promptly requested by appellee.

2. The prosecutors' affidavit inaccurately tries to shift the responsibility for their improper conduct to the appellee. In doing so, the prosecution desregards and distorts the relevant events. Appellants omit any reference to numerous phone calls from my associate, Edward Graves, to appellants' counsel in which objections were made to all appendix items not of record before the District Court and greater specificity of certain designated items was requested so that it could be determined if they were of record. (All references to Mr. Graves' conversations in this affidavit are made on information and belief, as supported by his attached affidavit.) Appellants were uncooperative and refused to comply with appellee's requests. It was at

that point that appellee made the original February 5, 1986 motion to strike, which was granted on March 25, 1986. Appellants' February 14, 1986 supplemental statement of contents of appendix was not responsive to appellee's February 5 motion to strike. In that regard, paragraph 5 of the appellants' opposing affidavit is inaccurate and misleading. As detailed in ¶ 4 of appellee's February 19, 1986 Supplemental Affidavit in support of the earlier motion, appellants' supplementary designation did not take "into consideration" the bulk of appellees' objections; and appellants had designated additional items not of record and summarily dismissed matters of record that had been designated by appellees.

3. Appellants suggest (¶¶ 6, 7, Opposing Affidavit) that appellee somehow failed to make clear objections to appellants' designations. In fact, appellee had already specified in detail his objections to the proposed appendix, both orally and in writing, as well as in the papers submitted in support of appellee's motion dated February 5, 1986. Those objections were arbitrarily and summarily ignored by appellants. Furthermore, where appellants were general and vague in their designations, appellee had asked for specificity and these requests were likewise ignored.

4. Appellants were aware of the necessity for agreement between the parties as to the contents of the appendix. Indeed, one of the reasons cited in support of their February 21,

1986 request for extension of time in filing their brief and appendix was the resolution of appellees' motion to strike matters not of record. Clearly, the need to resolve what was or was not to be included in the appendix was a prerequisite for filing and appellants had to be aware of that circumstance. (See ¶ 6, Appellants' Affidavit In Support of Extension of Time, sworn to February 21, 1986.)

5. By February 19, 1986, appellee had already diligently and repeatedly made their objections known to appellants. Appellants claim (¶¶ 6, 8, opposing affidavit) that appellee is somehow blameworthy for not continuing to repeat objections which appellants were ignoring is meritless.

6. Appellants attempt to characterize the matters in dispute as minimal (¶ 9, opposing affidavit). Appellee does not concur with this judgment. However, regardless of the appellants' attempt to minimize the importance of the issues at hand, disputed matters should have been resolved before filing the appendices and appellants' brief and the Court's March 25, 1986 order should have been followed. During a telephone conversation between Mr. Goceljak and Mr. Graves of March 26, 1986, Mr. Graves noted the impropriety of filing the disputed materials. Mr. Goceljak dismissed appellee's objections once again and said that his office would not alter its intended submission. When told that grounds would then exist for rejection of appellants' brief

and appendix, Mr. Goceljak stated "Let them reject it, we're not going to take this apart now."

7. This Court's March 25, 1986 order granted appellee's motion to limit the appendix to matters before the District Court and allowed ten days to settle the dispute. By implication some further time, if necessary, would be involved for a resolution of the matter in the District Court. It was clear that (a) this matter was to have been resolved before the filing of appellants' brief and appendix and (b) the March 28, 1986 deadline for filing appellants' brief and appendix had been superseded. The fact that the appellants had made the unusual choice to include an extraordinary number of complete transcript volumes (80) in their approximately 20,000-page "appendix" is hardly an excuse to ignore the directive of the Court (¶ 10, opposing affidavit).

8. The Office of the Clerk, on information and belief (and as reported to me by Mr. Graves) informed the appellants on March 27 that under the Court's March 25, 1986 order it would be inappropriate to file their brief and appendix with the dispute unresolved. It is difficult to fathom how this dispute "could probably be rectified without extending the filing date" (¶ 11, opposing affidavit) when appellants refused to cooperate with appellee in the first place and then disregard the remedy delineated by this Court's order.

9. Appellants are now attempting to reargue the previous motion to strike matters not of record, which has already been granted by this Court. How can matters which were not submitted to and considered by the District Court be deemed "appropriate, necessary and helpful to a review of the District Court's ruling?" (¶ 12, opposing affidavit) Appellants are even attempting to expand the record to include materials which appellants know were not part of the trial record, let alone the District Court record. Appellants rely on these non-record appendix items in their brief as a basis to attack the District Court's opinion. For example, appellants wrongly and inappropriately cite (1AF 10-11) Mr. Carter's boxing record -- taken from Mr. Carter's book, which was specifically ruled inadmissible at trial -- not only to attack the Court's soundness of reasoning, but also to somehow ascribe to Mr. Carter a racial revenge motive.

10. In another instance relating to a key element of their racial revenge theory, appellants openly acknowledge their use of material dehors the record in quoting "an inflammatory" passage from grand jury transcripts which was "not read to the jury" and specifically excluded at trial. (Appellants' Brief, pp. 76-77).

11. These are only two examples of the many instances in which appellants have included and referred to material dehors the record. Indeed, at least several hundreds of pages of the

appendix submitted are materials which were never before the District Court.

12. Appellee's rebuttal of these non-record materials would in part impel the introduction of more material dehors the record. Appellee scrupulously avoided introducing non-record materials to the District Court in the proceeding below, although he possessed significant and substantial exculpatory materials dehors the record. It is the District Court's decision, based on the record before it, which is under appeal and appellants' attempts to transmute the Court of Appeals into a trial court are totally improper.

13. The prosecutors attach to their affidavit an April 10, 1985 letter from appellee's New Jersey counsel to the District Court as if it somehow supports appellants on this motion. The effect is in fact just the opposite. Appellants were ordered by the District Court on February 20, 1985 to provide that court by March 31, 1985 with "all material briefs, appendices, opinions, transcripts, etc. filed in the State, as is required for the review of a habeas corpus petition." Appellants did not comply with that order. Petitioners, seeking to expedite federal review, therefore provided those materials as noted in their letter to the District Court (exhibit attached to Appellants' Affidavit in Opposition). On August 31, 1985, appellants finally submitted to the District Court all the transcripts of the state proceedings they deemed relevant to the issues. In

light of the more than six months accorded to respondents by the District Court to furnish a complete record, it is unacceptable for respondents to now claim that (a) they do not know what was on record or (b) the record should be expanded for appellate review.

14. Appellants' conduct in this matter has been marked by their studied refusal to cooperate with appellee; their arbitrary rejection of appellee's appendix designations; their total disregard of this Court's order, related federal rules and orderly procedure; and their numerous misstatements, as outlined above, of significant facts in their submissions to this Court.

15. Appellee is now placed in the position where the content of the appendix is not settled and the brief to which he must respond, which often refers to matters dehors the record, is correspondingly unsettled. Yet appellants (who have had five months from the inception of their appeal to complete their papers) have the temerity to claim that there is no need for an alteration of the briefing schedule.

16. It is particularly unfair for a state-funded prosecutor's office to attempt to impede pro bono defense counsel's ability to act in the most efficient manner and in the best interests of our client.

17. For the foregoing reasons, appellee should be granted the previously requested relief, i.e., dismissal of the appeal; or the striking of appellants' brief and appendix, with

the requirement that the procedures directed by this Court's March 25, 1986 order be followed and a revision of the briefing schedule. Given the current circumstances, since these matters will not likely be resolved sufficiently in advance of the scheduled date for filing appellee's brief (April 28, 1986), we request that the briefing schedule be suspended.

MYRON BELDOCK

Sworn to before me this
11th day of April, 1986.

Notary Public

SANDRA J. GONSKI
Notary Public, State of New York
No. 31-4851865
Qualified in New York County
Commission Expires Feb. 10, 1988

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, NY 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-against-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

AFFIDAVIT

JOHN ARTIS,

Petitioner-Appellee,

-against-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says:

1. I make this affidavit as associate to Myron Beldock, counsel for appellee, in support of appellee's motion and in response to the opposing affidavit of Assistant Prosecutors Goceljak and Marmo, sworn to April 7, 1986.

2. I have read the affidavit of Myron Beldock, sworn to April 11, 1986.

3. All information stated in that affidavit relating to matters in which I have been involved, including without limitation communications I have had with the prosecutor's office concerning the subject matters of this motion, are true and accurately described.

EDWARD S. GRAVES

Sworn to before me this
11th day of April, 1986.

Notary Public

SANDRA J. GONSKI
Notary Public, State of New York
No. 31-4851865
Qualified in New York County
Commission Expires Feb. 10, 198 8

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106 1790

SALLY MRVOS
CLERK

TELEPHONE
215 597-2995

John P. Gocel jak, Esquire
Ronald G. Marmo, Esquire
Passaic County Prosecutor's Office
New Courthouse
Paterson, NJ 07505

Re: Rubin Carter, et al, vs. John J. Rafferty, et al.
No. 85-5735

Leon Friedman, Esquire
148 East 78th Street
New York, NY 10021

Myron Beldock, Esquire
Beldock, Levine & Hoffman
565 Fifth Avenue
New York, NY 10017

Dear Counsel:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case which reads as follows:

"The foregoing motion by Artis to dismiss appeal is referred to the merits panel. Carter's motion to limit the appendix to matters of record before the district court is granted. If the parties are unable to agree on what was before the district court within ten days the matter will be referred to that court for a determination."

Very truly yours,
Sally Mrvos, Clerk

By: Frances R. Matysik
Frances R. Matysik, Deputy Clerk

ad
enc.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT #B-109

No. 85-5735 February 27, 1986

RUBIN CARTER and JOHN ARTIS vs. RAFFERTY, et al.
(NJ D.C. Civil No. 85-0745)

JOHN ARTIS vs. DIETZ, et al.
(NJ D.C. Civil No. 85-1007)
Rafferty, et al, Appellants

Present: GIBBONS, HIGGINBOTHAM and BECKER, Circuit Judges.

1. Letter-motion from Lewis M. Steel, Esquire, counsel for John Artis, stating that the notice of appeal does not refer to petitioner Artis in the body of the appeal nor does it refer to the order granting Artis' petition for writ of habeas corpus, with request that this Court inform the parties that John Artis is not a party to the proceedings in this Court, and that, therefore, the order of the district court granting his petition is final, which the Court may wish to treat as a motion to dismiss appeal against John Artis, as shown in the caption as:
   JOHN ARTIS vs. DIETZ, et al. (NJ D.C. Civil No. 85-1007)
2. Appellants' reply (in opposition) to motion to dismiss appeal as to John Artis,
3. Letter dated February 10, 1986, from appellee, John Artis, in response to appellants' Reply to Motion to Dismiss Appeal as to John Artis,
4. Motion by appellee, Rubin Carter, for an Order directing appellants to strike material not of record from appendix and to otherwise comply with F.R.A.P. 10 and 30, with Designation of Additional Parts of Record to be included in appendix and objections to material not before the district court designated by appellants,
5. Supplemental Affidavit of Myron Beldock, counsel for appellee, Rubin Carter, in support of Motion for an Order Directing Appellants to Strike Material, etc.,

in the above-entitled case.

Respectfully,

Deputy Clerk 7-3080

enc.
FM:ad/hb

The foregoing Motion ~~is/are~~ by Artis to dismiss appeal is referred to the merits panel. Carter's motion to limit the appendix to matters of record before the district court is granted. If the parties are unable to agree on what is to be before the district court within ten days the matter will be referred to that court for a determination.

By the Court,

Judge

Dated: March 25, 1986
ad/cc: John P. Goceljak, Esq.
Leon Friedman, Esq.
Myron Beldock, Esq.
Ronald G. Marmo, Esq.

M210

FILED

FEB 21 1985

At 8:30 9:32 A.M.
ALLYN Z. LITE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUBIN CARTER

v

JOHN J. RAFFERTY, ET. AL.

Civil 85-745

O R D E R

A petition for a Writ of Habeas Corpus having been filed in the above matter,

It is on this 20 day of Feb, 1985

O R D E R E D that the respondent

file an answer to said petition on or before March 31, 1985 accompanied by a certified copy of all briefs, appendices, opinions, process, pleadings, transcripts and orders filed in the state proceedings or such of them as may be material to the questions raised in the petition.

U. S. D. J.

ENTERED
ON
THE DOCKET
19
ALLYN Z. LITE, CLERK
(Deputy Clerk)

M211

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says: that he is over 18 years of age and is not a party to this action; that he resides at 42 Riverside Drive, New York, New York 10024; that on the 11th day of April, 1986, he served true copies of the attached Reply Affidavit of Myron Beldock upon appellants in this action at the address indicated below by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States government for that purpose.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07050
(201) 881-4800

Sworn to before me this
11th day of April, 1986.

Notary Public

SANDRA J. GONSKI
Notary Public, State of New York
No. 31-4851865
Qualified in New York County
Commission Expires Feb. 10, 1986

JOHN P. GOCELJAK
SPECIAL DEPUTY ATTORNEY GENERAL-IN-CHARGE
ACTING PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURTHOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 85-5735

RUBIN CARTER, :

Petitioner-Appellee, :

v. :

JOHN J. RAFFERY, ET AL. :

Respondents-Appellants. :

JOHN ARTIS, :

Petitioner-Appellee, :

v. :

CHRISTOPHER DIETZ, ET AL. :

Respondents-Appellants. :

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE APPELLANTS' BRIEF AND APPENDIX AND TO SUSPEND BRIEFING SCHEDULE

STATE OF NEW JERSEY:
COUNTY OF PASSAIC : S.S.

JOHN P. GOCELJAK AND RONALD G. MARMO, of full age, being duly sworn, according to law, upon their oaths, depose and say that:

1. Deponents are the Acting Prosecutor and Acting Chief Assistant Prosecutor, respectively, in the Office of the Passaic County Prosecutor, attorney for respondents-appellants in the herein-captioned matters pending appeal before this Court, and are familiar with the matters concerned with said appeal and in this affidavit.

2. Appellees have submitted a motion and now three affidavits (Motion to Strike Appellants' Brief and Appendix and To Suspend Briefing Schedule, affidavit of Myron Beldock, Esq. dated April 1, 1986, affidavit of Myron Beldock, Esq. dated April 11, 1986, and affidavit of Edward Graves, Esq. dated April 11, 1986) and have yet to identify specific materials which they claim should be excluded from the appendix (See paragraphs seven and eight regarding the only exception to the appellees' failure to identify items of the appendix). It is obvious to affiants that appellees are delaying determination on the merits as to whether there are any entries which properly should not be part of the appendix. They seek court action without such determination on the merits and appellants submit appellees' motion should accordingly be dismissed.

3. Affiants disagree with the representations made in the most recent affidavit of Myron Beldock dated April 11, 1986 relating to allegations of failure to cooperate with appellees' requests, and refer to the affidavit dated April 7, 1986 filed by appellants which addresses the failure of appellees to respond to specific designations of materials to be included in the appendix during the five week period from February 19, 1986 until approximately March 25, 1986, during which time, appellees knew that appellants were preparing their brief and the extensive appendix, under a Court-directed filing deadline of March 28, 1986.

4. Affiants further disagree with the assertion that there were "numerous" phone calls by Mr. Graves to appellants' counsel, and refer to the period between February 19, 1986 and on or about March 25, 1986 during which period, to affiants' recollection, there were no telephone calls or other communications received from appellees.

5. Appellees dispute the contention raised in paragraph seven of Mr. Beldock's latest affidavit that the March 28, 1986 extended deadline for filing the

brief and appendix was "superseded." Appellants' counsel believed and so informed Mr. Graves on March 27, 1986, that the filing deadline at that point was considered primary, that the brief and appendix were complete and ready for filing that day or the next, that the perceived areas of disagreement in the appendix (in the absence of a specific response to the appellants' designation of the appendix materials dated February 14, 1986) were minimal, and that any such differences could probably be resolved without delaying the filing deadlines any further.

6. Appellants dispute the assertions contained in paragraph 13 of the Beldock affidavit of April 11, 1986. As more fully explained in the procedural history in appellants' brief on appeal, respondents' initial answer to the habeas corpus applications was addressed to an obvious issue of failure to exhaust state remedies. Petitioners had filed the federal applications while they had an appeal pending in the Appellate Division of the New Jersey Superior Court from the denial of a motion for new trial. Decision of this issue would not have required the voluminous materials which petitioners gratuitously chose to provide the district court at that point.

7. In paragraphs nine and ten of Mr. Beldock's affidavit of April 11, 1986, the appellees identified two items which they claim should not have been included in the appendix. These are the only two items identified by the appellees in their application to strike the appellants' brief and the appendix. Both of these items properly were included in the appendix. In a review of the district court's decision to set aside long-standing convictions for first degree murder, it clearly is appropriate that this Court know about these items.

The first item identified by the appellees (paragraph nine, Beldock affidavit April 11, 1986) consists of two pages and represents a compilation of Rubin Carter's

boxing record as recited by him in his book, The Sixteenth Round. The district court, in its opinion detailing the basis for its decision, chose to make statements about Mr. Carter's boxing record. The district court stated that at the time of the murders, Rubin Carter was a well-known professional boxer who at 30 years old was "reaching the peak of his career" and was a "contender for the middleweight crown." (1aD 3). The appellants contend that there is no support in the record for the district court's presentation of the status of Rubin Carter's boxing career at the time of the murders and that in fact the state of his professional career was the opposite of what the district court stated. His career was not peaking. It was sharply declining at the time of the murders. Rubin Carter clearly was not at that time a "contender" for the championship. (See appellants' brief, pp. 80-82).

The appellants contend that the district court then uses this mistaken profile of the defendant Rubin Carter (the district court also recites and argues from a mistaken profile of the co-defendant John Artis) to argue that such a person (whose career was peaking and who was a contender for the title) was not likely to commit these crimes. See district court opinion 1aD 17, 19-20, 22, 33. See appellants' brief pp. 80-82.

The summary of Rubin Carter's boxing record as included in the appendix is an exact copy of that presented by him in his book. Since the district court chose to make incorrect and unsupported statements and argument regarding the status of Rubin Carter's boxing career at the time of the murders, it is fair and proper for the appellants to disclose the truth in the form of these two pages of indisputable information.

8. The second item identified by the appellees' (paragraph ten, Beldock affidavit of April 11, 1986) as improperly included in the appendix, are excerpts from the Grand Jury testimony of John Artis. The appellants contend that the murders for

which the appellees were convicted were killings committed in the course of retaliation for the brutal killing of a black man by a white man several hours earlier. At the trial, the prosecution introduced the Grand Jury testimony of Rubin Carter who stated that after the killing of the black man, there was talk in certain areas of the black community that there would be a "shake" (retaliation). In its opinion, the district court adopted the appellees' argument and stated that in his Grand Jury testimony, Rubin Carter said that a "shake" did not mean murder. See district court opinion 1aD 21-22. The appellants contend that the district court's statement about Rubin Carter's Grand Jury testimony is not a fair presentation of the record. See appellants brief pp. 75-77. In his Grand Jury testimony, Rubin Carter said that shaking meant there would be trouble, but that he didn't know what it would be and that he didn't think it would include murder. This is something different than saying that a "shake" means something that excludes murder as stated by the district court.

The appellants contend that it was improper for the appellees to argue and for the district court to accept the position that a "shake" did not mean murder, since the co-defendant John Artis specifically had said in his Grand Jury testimony that the talk of a shake involved talk of killing white people. The Grand Jury testimony of the defendants Carter and Artis were read to the jury at the end of the State's case. The prosecution deleted from the introduction of John Artis's Grand Jury testimony, his references to the talk of a shake by killing white people because it was clear at that point in the trial that the murders at the Lafayette Grill were committed in retaliation for the earlier killing of a black man and because these portions of John Artis's Grand Jury testimony had the potential to be inflammatory. In light of the appellees' argument and the district court's incorrect statement of the evidence regarding what a "shake" means and particularly in light of the district court's claim that the prosecution engaged in an "insidious and repugnant" appeal to racism, it is

absolutely fair and proper to include these excerpts in the appellants' brief and the appendix.

The appellants oppose the appellees' application to suspend the briefing schedule. The appellees have not identified any items which should not be known to this court and included in the appendix. The appellees should not be permitted to structure and enlarge a dispute over the appendix as a basis to seek a suspension of the briefing schedule. The application of the appellees should be denied.

By: _____
John P. Goceljak
Special Deputy Attorney General-In-Charge
Acting Passaic County Prosecutor

By: _____
Ronald G. Marmo.
Special Deputy Attorney General
Acting Chief Assistant Prosecutor

Sworn and subscribed to before
me on this 16th day of April, 1986.

_____
Donald R. Nichols
Attorney-at-Law
State of New Jersey

Exhibit 2

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT #B-109

No. 85-5735 February 27, 1986

RUBIN CARTER and JOHN ARTIS vs. RAFFERTY, et al.
(NJ D.C. Civil No. 85-0745)

JOHN ARTIS vs. DIETZ, et al.
(NJ D.C. Civil No. 85-1007)
Rafferty, et al, Appellants

Present: GIBBONS, HIGGINBOTHAM and BECKER, Circuit Judges.

1. Letter-motion from Lewis M. Steel, Esquire, counsel for John Artis, stating that the notice of appeal does not refer to petitioner Artis in the body of the appeal nor does it refer to the order granting Artis' petition for writ of habeas corpus, with request that this Court inform the parties that John Artis is not a party to the proceedings in this Court, and that, therefore, the order of the district court granting his petition is final, which the Court may wish to treat as a motion to dismiss appeal against John Artis, as shown in the caption as:
   JOHN ARTIS vs. DIETZ, et al. (NJ D.C. Civil No. 85-1007)
2. Appellants' reply (in opposition) to motion to dismiss appeal as to John Artis,
3. Letter dated February 10, 1986, from appellee, John Artis, in response to appellants' Reply to Motion to Dismiss Appeal as to John Artis,
4. Motion by appellee, Rubin Carter, for an Order directing appellants to strike material not of record from appendix and to otherwise comply with F.R.A.P. 10 and 30, with Designation of Additional Parts of Record to be included in appendix and objections to material not before the district court designated by appellants,
5. Supplemental Affidavit of Myron Beldock, counsel for appellee, Rubin Carter, in support of Motion for an Order Directing Appellants to Strike Material, etc.,

in the above-entitled case.

Respectfully,

Deputy Clerk 7-3080

enc.
FM:ad/hb

The foregoing Motion ~~is/are~~ by Artis to dismiss appeal is referred to the merits panel. Carter's motion to limit the appendix to matters of record before the district court is granted. If the parties are unable to agree on what is before the district court within ten days the matter will be referred to that Court for a determination.

By the Court,

Judge

Dated: March 25, 1986
ad/cc: John P. Goceljak, Esq.
Leon Friedman, Esq.
Myron Beldock, Esq.

M219

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, NY 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-vs-

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN L. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

-vs-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

NOTICE OF MOTION FOR AN ORDER DIRECTING APPELLANT TO STRIKE MATERIAL NOT OF RECORD FROM APPENDIX AND TO OTHERWISE COMPLY WITH FRAP RULES 10 AND 30.

PLEASE TAKE NOTICE that petitioner-appellee Rubin Carter, upon the annexed affidavit of Myron Beldock, hereby moves before the United States Court of Appeals for the Third Circuit for an order directing appellant to strike material not of record

from the appendix to be submitted in this appeal and to otherwise comply with FRAP Rules 10 and 30.

Dated: New York, New York
February 5, 1986

MYRON BELDOCK
Beldock Levine & Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

PROF. LEON FRIEDMAN
Hofstra University Law School
Hempstead, New York 11550

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903
(201) CH7-1017

Attorneys for
Petitioner-Appellee Carter

TO: JOSEPH A. FALCONE
Passaic County Prosecutor
New Court House
Paterson, New Jersey 07505
(210) 881-4800

Attorneys for
Respondents-Appellants

Myron Beldock, Esq.
Beldock Levine & Hoffman
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Leon Friedman
Hofstra University Law School
Hempstead, NY 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

----------X

RUBIN CARTER,

Petitioner-Appellee,

-vs-

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN L. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

AFFIDAVIT OF MYRON BELDOCK

JOHN ARTIS,

Petitioner-Appellee,

-vs-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

----------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I am one of the attorneys for appellee Rubin Carter.

2. I make this affidavit in support of Mr. Carter's motion for an order directing appellants to strike material not of record from the joint appendix and to otherwise comply with FRAP Rules 10 and 30.

3. Appellants served a Statement of Contents of Appendix and Statement of Issues Presented on appellee on January 27, 1986 (Exhibit A). Counsel for Mr. Carter, having reviewed appellants' appendix designations, informed counsel for appellants, John P. Goceljak, First Assistant Prosecutor, Passaic County, by telephone on January 31, 1986 that certain of the designated appendix items were inadequately specific and could not be identified. Mr. Goceljak could not provide the necessary clarification.

4. On February 3, 1986, counsel for appellee further informed Mr. Goceljak that various materials designated by the appellants were not previously before the District Court in these proceedings. My associate, Edward Graves, in the latter telephone conversation, informed Mr. Goceljak that the Federal Rules of Appellate Procedure prohibit the submission of materials to the Court of Appeals which have not been part of the record below. Mr. Goceljak informed Mr. Graves that appellants intended to nevertheless include these materials.

5. Appellee has served a designation of additional parts of the record to be included in the appendix and objections to material not before the District Court designated by appellant on February 5, 1986 (Exhibit B).

6. The materials designated by the appellants which are not of the record are as follows:

(a) Appellants' paragraph 14. "Excerpts from transcript of recantation hearing, October-November 1974." Transcripts of these proceedings were not in evidence before the District Court.

(b) Appellants' paragraph 15. "Excerpts from transcript of alibi testimony from 1967 trial of petitioners." Transcripts of these proceedings were not in evidence before the District Court.

(c) Appellants' paragraph 18. "Police reports, 1966 murders investigation." Only certain police reports of the 1966 murder investigation were in evidence before the District Court. (Indeed, only some of those reports were in evidence at the 1976 trial.) Appellee objects to the inclusion of any such reports not in evidence in these proceedings. Further, appellee is entitled to specific designation by appellants of each report appellants propose to include in the joint appendix.

(d) Appellants paragraph 19. "Statements, Alfred Bello, Arthur Bradley, given during 1966 investigation." Only certain statements given during the 1966 investigation by Bello

and no statements of Bradley (who did not testify at the 1976 trial) were before the District Court. Appellee therefore objects to the inclusion of any such statements not in evidence in these proceedings. Further, appellee is entitled to specific designation by appellants of each statement appellants intend to include in the joint appendix.

7. In addition, appellants have designated their putative "Answer to Petitions" (Exhibit A, para. 4) for inclusion in the joint appendix. Appellants' "Answer" is actually a memorandum of law concerned with exhaustion of state remedies. Therefore, appellee has designated his reply to that "Answer" for inclusion in the joint appendix in the event that the Court accepts the appellants' designation (Exhibit B, para. 8).

8. Throughout the proceedings in the District Court, appellee carefully avoided introducing into the record any material which was not of record in the proceedings under review. Appellee objects to appellants' inclusion during the appeals process of any material not of record in the District Court. Appellants' insistence on including materials which were not before the District Court is improper and prejudicial to appellee since appellee will not be able to respond to that material without improperly introducing additional and potentially extensive materials not of record.

9. Since the issues on this motion are, in the opinion of counsel for appellee, readily determined by the clear language

of F.R.A.P. Rules 10 and 30, a separate memorandum of law is not being submitted. However, the Court is respectfully referred to the following relevant decisions and authorities: Jaconski v. Avisun Corporation, 359 F.2d 931, 936 (3d Cir. 1966); Coplin v. United States, 761 F.2d 688, 691 (Fed. Cir. 1985), 9 Moore's Federal Practice, para. 210.04, at 10-14, 10-15.

10. Appellee makes no comment concerning the appellants' designation of materials related to John Artis' Petition for Writ of Habeas Corpus. Appellee notes, however, that counsel for John Artis has asserted that the appellants failed to appeal the District Court's order granting Artis' petition and his motion to dismiss the appeal as to Artis is pending in this Court.

11. For the foregoing reasons, appellee moves this Court for an order directing the appellants to strike any materials from the appendix which are not of record before the District Court and directing appellants to promptly designate with specificity those items from the District Court record which are proposed to be included in appellants' paragraphs 18 and 19 as noted above. In addition, appellee requests that such order

provide an adequate opportunity for an additional counterdesignation, if necessary, by appellee upon receipt of a proper designation by appellants.

MYRON BELDOCK

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(212) 490-0400

LEON FRIEDMAN
Hofstra University Law School
Hempstead, New York 11550

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903

Attorneys for
Petitioner-Appellee Carter

Sworn to before me this
5th day of February, 1986.

Notary Public

EDWARD S. GRAVES
Notary Public, State of New York
No. 31-4849102
Qualified in New York County
Commission Expires March 30, 1987

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says:

That he is over 18 years of age and is not a party to this action; that he resides at 42 Riverside Drive, New York, New York 10024; that on the 5th day of February, 1986, he served true copies of the attached Notice of Motion and Affidavit upon appellants in this action at the address indicated below by Express Mail by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States Government.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07050
(201) 881-4800

Sworn to before me this
5th day of February, 1986.

Notary Public

DAVID S. KORZENIK, ESQ.
Notary Public, State of New York
No. 31-4770157
Qualified in New York County
Commission Expires March 30, 1986

Exhibit A

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

STATEMENT OF CONTENTS OF APPENDIX AND STATEMENT OF ISSUES PRESENTED

TO:

Myron Beldock, Esq.
Attorney for Petitioner- Appellee Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee for John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

SIRS:

PLEASE TAKE NOTICE that in accordance with Rule 30 (b), F.R.A.P. the following statement of the Contents of the Appendix in the above captioned appeal is furnished:

1. Notice of appeal.

2. Relevant docket entries.

3. Petitions for Writ of Habeas Corpus, Rubin Carter and John Artis, respectively.

4. Answer to Petitions for Writ of Habeas Corpus.

5. Motion for Summary Judgment.

6. Petitioners' Statement of Facts, Rule 12 G.

7. Respondents' Reply to Statement of Facts.

8. Transcript of Hearing on Summary Judgment Motion.

9. Opinion and Orders of U.S. District Court granting Petitions for Writ of Habeas Corpus.

10. Transcript of 1976 trial proceedings of petitioners Rubin Carter and John Artis in the Law Division, Superior Court of New Jersey. 46 trial volumes including jury voir dire, and 20 volumes of related pre-trial and post-trial proceedings.

11. Transcript of 1981 Polygraph Remand Hearing, 14 volumes.

12. Unpublished opinion of Appellate Division, Superior Court of New Jersey, affirming convictions, dated October 22, 1979.

13. Unpublished opinion of Trial Court, Honorable Bruno Leopizzi, dated August 28, 1981, following Polygraph Remand Hearing.

14. Excerpts from transcript of Recantation Hearing, October-November 1974.

15. Excerpts of transcript of alibi testimony from 1967 trial of petitioners.

16. Following numbered exhibits from Defendants' Appendix on

appeal from 1976 trial convictions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 24, 26, 27, 28, 29, 31, 32, 33, 34, 36, 47, 54, 55, 56, 73.

17. Following numbered exhibits at 1981 Remand Hearing: S-1000 thru S-1007, S-1009 thru 1032, S-1035, DA-1101 thru DA-1112, DA-1117 DA-1119, DA-1120, DA-1121, DA-1216, DA-1222, DA-1223, DA-1231, DA-1123, DA-1125, DC-1202, DC-1202, DC-1203, DC-1205, DC-1206, DC-1207.

18. Police reports, 1966 Murders investigation.

19. Statements, Alfred Bello, Arthur Bradley given during 1966 investigation.

20. Caruso file notes.

21. Affidavits: Myron Beldock, November 29, 1983, Lewis Steel, December 1, 1983, Jeffrey Fogel, December 8, 1983, Harold Cassidy, December 9, 1983.

22. Unpublished opinion, Honorable Bruno Leopizzi, dated January 20, 1984.

23. Unpublished opinion of Appellate Division of Superior Court of New Jersey, dated July 2, 1985.

24. Order of New Jersey Supreme Court, dated November 1, 1985.

PLEASE BE FURTHER ADVISED, the Statement of Issues Presented in the above captioned appeal will include the following:

1. Failure of the United States District Court to sufficiently credit the trial record, evidence and jurys' fact findings at the State court trial of petitioners.

2. Failure of the United States District Court to properly credit the record, evidence and trial court's findings of fact and conclusions of law derived therefrom, developed at the polygraph remand hearing relative to an alleged Brady violation.

3. Failure of the United States District Court to give due deference to the record, evidence, and trial court's findings and rulings relative to admissibility of motive evidence at the state trial, as well as to the State appellate courts' review thereof.

4. Failure of the United States District Court to properly apply the guidelines set forth in the applicable case law, including United States v. Bagley, 473, U.S. _____, 105 S. Ct. 3375, 87 L. Ed. 2nd 481 (1985) relative to the alleged Brady violation involving non-disclosure of an oral polygraph test report.

5. Erroneous application of the standard of review upon Habeas Corpus proceeding, to the record, the fact-findings and rulings in the State court proceedings.

DATED: January 24, 1986

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
Attorney for Respondents-Appellants

By: _____
John F. Goceljak
First Assistant Prosecutor

_____
Ronald G. Marmo
Chief Assistant Prosecutor

Exhibit B

MYRON BELDOCK, ESQ.
BELDOCK LEVINE & HOFFMAN
ATTORNEYS FOR PETITIONER-APPELLEE
RUBIN CARTER
565 FIFTH AVENUE
NEW YORK, NEW YORK 10017
(212) 490-0400

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

vs.

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE INCLUDED IN APPENDIX AND OBJECTIONS TO MATERIAL NOT BEFORE THE DISTRICT COURT DESIGNATED BY APPELLANT

TO:

Joseph A. Falcone
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07505
(201) 881-4800

SIRS:

Appellee designates the following additional portions of the record to be included in the Appendix:

1. The following numbered exhibits from Defendant's Appendix on Appeal from 1976 trial convictions: 30, 40, 42, 45, 46, 50, 51, 52, 53, 57, 58, 59, 60, 61, 63, 64 (pp.21a to 22a), 65, 66 (pp. 38a to 76a), 70, 71, 76, 79 (pp. 48a, 53a to 68a), 84, 85. From Volume 5: Exhibits 14, 21, 22, 23. From Volume 6: Exhibits 6, 8, 12, 13.

2. The following numbered exhibits from the 1981 Remand Hearing: DA-1113, DA-1113A, DA-1114, DA-1116, DA-1126, DA-1127, DC-1201, DC-1204 (p. 178a), DC-1216, DC-1220, DC-1221, DC-1222, DC-1223, DC-1231.

3. The following 1976 trial exhibits: S-32, D-258, D-508 (the preceding three exhibits are alternately designated as Exhibits A, C, E from Appendix A of Petitioner's Reply Brief in Support of Motion for Summary Judgment).

4. Letter and exhibits, dated December 4, 1981, Supplementing Defendants' Joint Brief After Evidentiary Hearing on Remand.

5. Exhibits 1, 2, 3 (pp. 5a to 11a), 5 (pp. 45a to 80a, 104a to 200a) from Defendants' Appendix in Support of Application for Leave to Appeal from Law Division Orders Denying Motion for a Change of Venue and for Disqualification of Judge

Leopizzi (in regard to evidentiary hearing directed by March 3, 1981 Supreme Court decision).

6. Affidavits of Myron Beldock, sworn to October 31, 1983 and November 29, 1983. Letter from Myron Beldock to Hon. Bruno Leopizzi, dated December 8, 1983. Proposed Caruso Affidavit of November 29, 1983. Transcripts of Hearings before Hon. Bruno Leopizzi, held November 18, 1983, January 20, 1984.

7. Appellee's Reply ("Joint Memorandum Regarding Exhaustion of Remedies") to Appellants' "Answer" to Petitions.

* * * *

Objections to Material Designated by Appellant

Appellant's "Statement of Contents of Appendix and Statement of Issues Presented" contains the following designated items which were not before the District Court:

1. Paragraph 14. "Excerpts from transcript of Recantation Hearing, October-November 1974."

Transcripts of these proceedings were not in evidence before the District Court.

2. Paragraph 15. "Excerpts of transcript of alibi testimony from 1967 trial of petitioners."

Transcripts of these proceedings were not in evidence before the District Court.

3. Paragraph 18. "Police reports, 1966 Murders Investigation."

Only certain police reports of the 1966 murder investigation were in evidence before the District Court. Appellee objects to the inclusion of any such reports not in evidence in these proceedings.

Further, appellee demands specific designation by appellant of each report appellant intends to include in the joint appendix.

4. Paragraph 19. "Statements, Alfred Bello, Arthur Bradley, given during 1966 investigation."

Only certain statements given during the 1966 investigation by Bello and none by Bradley (who did not testify in the 1976 trial) were before the District Court.

Appellee objects to the inclusion of any such statements not in evidence in these proceedings.

Further, appellee demands specific designation by appellant of each statement appellant intends to include in the joint appendix.

5. Paragraph 4. "Answer to Petitions for Writ of Habeas Corpus." Appellants' "Answer" is actually a memorandum of law concerning exhaustion of state remedies and is not properly included. Therefore, although anticipating that the Court will find appellants' inclusion of that document to be improper, appellee has designated his reply ("Joint Memorandum Regarding

Exhaustion of Remedies") to the "Answer" for inclusion, in the event the Court accepts the appellants' designation.

Appellee also reserves the right to designate additional materials to be included following receipt of Appellant's corrected and detailed designation.

Myron Beldock

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(212) 490-0400

LEON FRIEDMAN
Hofstra University Law School
Hempstein, New York 11550

RONALD J. BUSCH
Busch & Busch
99 Bayard Street
New Brunswick, NJ 08903

Attorneys for Petitioner-
Appellee Rubin Carter

Dated: February 5, 1986

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says:

That he is over 18 years of age and is not a party to this action; that he resides at 42 Riverside Drive, New York, New York 10024; that on the 5th day of February, 1986, he served true copies of the attached Appellee's Designation of Additional Parts of Record to Be Included in Appendix and Objections to Material Not of Record upon appellants in this action at the address indicated below by Express Mail by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States Government.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07050
(201) 881-4800

Sworn to before me this
5th day of February, 1986.

Notary Public

DAVID S. KORZENIK, ESQ.
Notary Public, State of New York
No. 31-4770157
Qualified in New York County
Commission Expires March 30, 1986

Myron Beldock, Esq.
Beldock Levine & Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Leon Friedman
Hofstra University Law School
Hempstead, New York 11550
(212) 737-0400

IN THE
UNITED STATES COURT OF APPEALS
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NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

-vs-

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN L. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

-vs-

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

SUPPLEMENTAL AFFIDAVIT OF MYRON BELDOCK IN SUPPORT OF MOTION FOR AN ORDER DIRECTING APPELLANTS TO STRIKE MATERIAL NOT OF RECORD FROM APPENDIX AND TO OTHERWISE COMPLY WITH F.R.A.P. RULES 10 AND 30

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MYRON BELDOCK, being duly sworn, deposes and says:

1. I am one of the attorneys for appellee Rubin Carter.

2. I make this supplemental affidavit in further support of appellee's motion for an order directing appellants to strike material not of record from the Joint Appendix and to otherwise comply with F.R.A.P. Rules 10 and 30.

3. My affidavit in support of this motion, sworn to February 5, 1986, detailed the material designated by appellants for inclusion in the Joint Appendix which are not of record before the District Court. That affidavit also detailed those items from appellants' designation which were inadequately specific to inform appellee of the materials intended for inclusion. Appellants' response to the motion was due February 18, 1986.

4. We have received no response to the motion. However, on February 18, 1986, my office received a document from counsel for appellants entitled "Respondents-Appellants' Supplemental Statement of Contents of Appendix" (copy attached). Appellants' supplemental designation indicates that appellants intend to ignore F.R.A.P. 30(b) and to summarily omit matters designated by appellee for inclusion in the Joint Appendix. Appellants also indicate that they intend to retain the materials not of record in the District Court in the Joint Appendix, in spite of appellee's proper objection. Furthermore, appellants

have now designated additional materials not of record for inclusion, including briefs and memoranda.

5. Appellants are inexcusably in default on the motion and are defying the Federal Rules of Appellate Procedure and the Local Rules of the Third Circuit. For the reasons stated herein and previously, the relief requested by appellee on the motion should be granted and appropriate sanctions under Local Rule 21 should be imposed against appellants.

MYRON BELDOCK

Sworn to before me this
19th day of February, 1986.

Notary Public

EDWARD S. GRAVES
Notary Public, State of New York
No. 31-4849102
Qualified in New York County
Commission Expires March 30, 1987

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS-APPELLANTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(201) 881-4800

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee

vs.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents-Appellants.

RESPONDENTS-APPELLANTS' SUPPLEMENTAL STATEMENT OF CONTENTS OF APPENDIX

TO:

Myron Beldock, Esq.
Attorney for Petitioner-Appellee Rubin Carter
Beldock, Levine and Hoffman
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

Lewis M. Steel, Esq.
Attorney for Petitioner-Appellee John Artis
Steel and Bellman
351 Broadway
New York, New York 10013

SIRS:

PLEASE TAKE NOTICE that upon review of Appellees' designation of additional contents and objections to certain contents to be included in the Appendix on appeal in the herein matter Respondents-Appellants submit the following modifications to their Statement of Contents previously filed:

1. The exhibits noted in paragraph 1 of Appellees' designation to be included with the exception of the following:

    a) Exhibit 42 to be excluded. This is a motion to dismiss for prejudicial pre-trial publicity, which is irrelevant to the issues in the United States District Court's Opinion and on appeal.

    b) Exhibit 70, to include only pp. 153a-160a.

    c) Exhibit 71. To include only pp. 174a-200a, if those exhibits are not elsewhere included. Pages 161a-173a not to be included, since it involves an affidavit in support of a motion for remand, and is subsumed by the 1981 remand hearing which is part of the record.

    d) Exhibit 79. Pages 47a to 72a to be included.

    e) Exhibit 84. Motion for new trial not to be included, since irrelevant to issues on appeal.

    f) Exhibits 22, 23 from Volume 5 not to be included. Disqualification of James Meyerson, Esq. irrelevant to issues on appeal.

    g) Exhibits 6, 8, 12 and 13 from Volume 6 not to be included. Issue of alleged jury misconduct irrelevant on appeal.

    h) Following exhibits to be included: 75, 76, 77; 16, 17, 18, 19, 20 and 21 from Volume 5.

2. Exhibits noted in paragraph 2 of Appellees' designation to be included.

3. Trial exhibits noted in paragraph 3 of Appellees designation to be included, together with any other 1976 trial exhibits relating to Petitioner Rubin Carter's 1966 Dodge automobile.

4. Exhibits noted in paragraph 5 of Appellees' designation not to be included unless already included under other designation. Change of venue motion is irrelevant to issues on appeal.

5. Affidavits and letter of Myron Beldock noted in paragraph 6 of Appellee' designation to be included. Proposed Caruso Affidavit not to be included, since it was never signed by him and is irrelevant. Transcript of Hearings on Caruso matter not to be included, since these were filed as to the exhaustion issue, which is not on appeal.

6. Appellees' brief on the exhaustion issue not to be included.

7. Paragraph 14 of Appellants' Statement of Contents of Appendix, excerpts from transcript of Recantation Hearing, to include testimony of Alfred Bello.

8. Paragraph 15 of Appellants' Statement of Contents of Appendix, excerpts of testimony of alibi testimony to include testimony of Anna Mapes, Catherine McGuire and Welton Deary.

9. Paragraph 18 of Appellants' Statement of Contents of Appendix to include any in evidence at 1976 trial, referred to in testimony at 1976 trial, or in briefs or appendices submitted to United States District Court.

10. Paragraph 19 of Appellants' Statement of Contents of Appendix to include only statements of Alfred Bello, typed or handwritten.

DATED: February 14, 1986

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
Attorney for Respondents-Appellants

By: 
John P. Goceljak
First Assistant Prosecutor

By: 
Ronald G. Marmo
Chief Assistant Prosecutor

JOSEPH A. FALCONE
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-5735

RUBIN CARTER,

Petitioner-Appellee,

vs.

JOHN J. RAFFERTY, ET AL.

Respondents-Appellants.

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, ET ALS.

Respondents-Appellants.

AFFIDAVIT OF PROOF
OF SERVICE

State of New Jersey :
County of Passaic : SS

John P. Goceljak, of full age, being duly sworn according to law upon his oath deposes and says that:

1. I am First Assistant Prosecutor in the Office of the Passaic County Prosecutor, Attorney for Respondents-Appellants in the above captioned appeal, and am familiar with the matters made the subject thereof and in the enclosed Supplemental Statement of Contents of Appendix.

2. On Friday, February 14, 1986, I mailed a true copy of Supplemental Statement of Contents of Appendix to Myron Beldock, Esq., attorney for Petitioner-Appellee Rubin Carter, at his office, 565 Fifth Avenue, New York, New York, 10017, and to Lewis M. Steel, Esq., attorney for Petitioner-Appellee John Artis, at his office, 351 Broadway, New York, New York 10013, by placing same in duly addressed and stamped envelopes and depositing same in the Postal Service facility located in the New Courthouse, Paterson, New Jersey.

John P. Goceljak

Sworn to and subscribed
before me this 14th
day of February, 1986.

Ronald G. Marmo
An Attorney-at-Law
of New Jersey

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD S. GRAVES, being duly sworn, deposes and says: that he is over 18 years of age and is not a party to this action; that he resides at 42 Riverside Drive, New York, New York 10024; that on the 19th day of February, 1986, he served true copies of the attached Supplemental Affidavit of Myron Beldock upon appellants in this action at the address indicated below by Express Mail, by presenting same securely enclosed in a postpaid wrapper to a post office maintained and exclusively controlled by the United States government for that purpose.

EDWARD S. GRAVES

JOSEPH A. FALCONE
Passaic County Prosecutor
Attorney for Respondents-Appellants
New Court House
Paterson, New Jersey 07050
(201) 881-4800

Sworn to before me this
19th day of February, 1986.

Janet M. Burke
Notary Public

JANET M. BURKE
Notary Public, State of New York
No. 41-8160380
Qualified in Queens County
Commission Expires March 30, 19 86

Exhibit 3

Ex 3

> and sometimes exceptionally murky.... But from thousands of pages of testimony spanning two trials and numerous hearings the parties have reconstructed two drastically different versions of the events that tragic night. The conflicting evidence is reviewed below (See Brady violation) but a brief summary of the evidence introduced at the second trial is presented here (1aD 3-4).

Respondents agree with the district court. The defense has painted a picture of the evidence very different than what the respondents contend the evidence was at the trial. The fact that the defense has contested each piece of evidence does not of itself make the evidence disputable. For two months a jury, brought to Passaic County from a foreign county, heard the live evidence in this case. They did not act as if they found the evidence "exceptionally murky" or "conflicting." The deliberations were not protracted or strained. This is particularly significant in light of the length of the trial. The jury did not return to the courtroom to have questions answered or testimony read back. The trial court clerk's docket book (1aF 1-3) shows that the deliberations lasted about 8½ hours, which included time for two meals. It is noteworthy that the jury which convicted Rubin Carter and John Artis of these murders in 1967 deliberated approximately the same amount of time (1aF 4-6). Nevertheless, the district court determined that the jury was confronted with a close case and probably would have returned a different verdict if not for the constitutional infirmities found by the court.

C. EVIDENCE OF PETITIONERS' GUILT ADDUCED AT THE 1976 RETRIAL

The prosecution at the 1976 trial presented evidence in several categories of the guilt of petitioners Rubin Carter and John Artis, respectively, in the three murders which occurred on the morning of June 17, 1966 in the City of Paterson.

the compelling evidence against the defendants was the strong circumstantial evidence presented at the trial. Mr. Bello was subject to the most extensive cross-examination. He was questioned for days by two teams of experienced defense attorneys. He was confronted "ad nauseam" with his unsavory past and volumes of contradictory statements. If Mr. Bello's testimony was the "crucial" evidence of the defendants' guilt, 24 detached and unrelated civilians could not have unanimously so readily voted to convict the defendants of these murders.

Mr. Bello's testimony was tested in a courtroom by means of confrontation and cross-examination. Each side will present its selected references from his statements in this case. Nothing can substitute for a review of his entire testimony at the trial wherein Mr. Bello responded to interrogation tracing his involvement in this matter. One thing is clear, while Mr. Bello is certainly not the pillar of the community, he was at the scene and he saw the getaway car and the murderers. As previously discussed, Mr. Bello described the car before it was returned to the scene where he identified it. Within five minutes of the murders, Mr. Bello described the kind of weapons (shotgun and pistol) seen by him in the hands of the murderers before there was any ballistics information or any other way to know the kind of weapons used. Ronald Ruggerio testified that he saw Bello running down Lafayette Street and saw a white car speeding down behind him.

The district court makes repeated references to the fact that Mr. Bello changed his testimony several times in the course of his involvement in this case (1aD 56). At the trial, Mr. Bello was confronted with each of the different accounts he had given and he explained the origin and basis of each account. Mr. Bello explained how in 1974 he came to recant his identification of the defendants. He explained how he had come to receive a Passaic County Jail sentence after his efforts to have authorities intercede for him had failed. He explained how thereafter he had become ill in jail.

depicted on a photograph of the white Dodge leased by defendant Carter to correspond to her testimony as to the portion of the taillights she had observed to light up (15aA 3403-04). This portion of the taillights conformed to the configuration of the back of the 1966 Dodge Polara leased by Carter.

In her testimony, Mrs. Valentine stated that shortly after drawing the diagram for Officer Greenough she went downstairs and saw two police cars and a white car they were escorting pull up and stop alongside the Lafayette Bar and Grill. Officer Greenough then asked her to walk to the rear of the white car to look at the taillights, which she did, and which she recognized as "the exact same taillights." She then began to cry and ran to the front of the tavern (15aA 3380-82).

Mrs. Valentine identified Exhibit S-32 in Evidence, the photograph of the car leased by the defendant Carter, as "the car I saw leave away from my window, the car that they brought back to the tavern" (15aA 3383). The car had been brought to the scene with defendants Carter and Artis in it, some 20 to 30 minutes after Mrs. Valentine had been awakened by noises and saw the identical car leaving the area. She identified the license plate of the car as being dark blue with yellow or gold lettering (15aA 3382-84). See the photographs of Rubin Carter's distinctive looking car, identified at trial (1aF 7-8).

On cross-examination, Mrs. Valentine reiterated that her identification of the Carter vehicle as the car she had seen departing with the killers was based upon the whiteness of the car, the blue license plates with yellow or gold lettering, and the shape of the taillights (16aA 3454-55). She repeated that "it was the same" car she had observed drive away (16aA 3506) and as to this "there is no doubt" (16aA 3618-19).

Officer Greenough testified at the 1976 trial and corroborated Patricia Graham Valentine's testimony.* At the time he first spoke to her, he had already obtained a

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* In his testimony, Officer Greenough referred to Mrs. Valentine as Ms. Graham, her maiden name.

When the police arrived, Alfred Bello described the car to one of the officers, telling him it was a white car, new, highly polished, with New York or Pennsylvania license plates. He also told him "about a geometric design, sort of a butterfly type design in the back of the car." (19aA 4317).

He also told the officer he saw two black males, giving a description of their clothes (19aA 4319).

About a half hour later, the police brought a car back to the scene which he described as the same white car he had seen earlier, the "identical car." The two black males who emerged "were the same people that I seen coming around the corner...." identified in court by Alfred Bello as defendants Carter and Artis (19aA 4320-22).

Two hours later, at 4:50 a.m., Bello gave a written statement to Lieutenant James Lawless at police headquarters. He had been shown the Carter car which was then at the police garage and identified it, stating, "that was the car that I seen pull away." (19aA 4336). In his statement to Lieutenant Lawless, Alfred Bello said, "That is definitely the car." (2aF 199-200).

Officer Alexander Greenough, in his testimony, referred to a handwritten report he had prepared on the morning of the shootings and stated that the initial description given him by Bello was two colored males driving a new white car with blue license plates (30aA 6470-71).

Alfred Bello's testimony regarding the identification of the Carter car was also corroborated by Sergeant Theodore Capter.*

Sergeant Capter and his partner Officer DeChellis, who were on patrol, had received the police radio alert at 2:34 a.m. on the morning of June 17, 1966, that there

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* Erroneously spelled Captor throughout the trial transcript.

Greenough, and after hearing her he had an officer call a patrol wagon, which was used to take Carter and Artis to police headquarters. At the same time, another officer was ordered by Lieutenant Lynch to drive Carter's car to police headquarters (34aA 7770-72).

In summary, there was little room for doubt left to the jury as to the positive identification of Rubin Carter's leased car as the vehicle which carried away the murderers from the scene.

The car itself was new, big, highly polished and white in color. It had New York license plates with their distinctive coloration and had unique "butterfly" taillights. These characteristics were referred to by the two witnesses who observed the car.

Patricia Graham Valentine had drawn a sketch of the taillights for Officer Greenough and, when the car was returned to the scene, she identified it as the same one which she had seen earlier. Greenough corroborated her testimony as to the sketch and as to the identification of the car. Officer Unger in turn verified that Greenough had a sketch of the taillights.

Later, Mrs. Valentine again identified the Carter car to Detective LaConte at the police garage. This was confirmed by Detective LaConte.

Alfred Bello described the getaway car to the first officers on the scene as white, new, highly polished, with New York or Pennsylvania license plates, and a "butterfly" type design in the back.

Part of this description was noted in Officer Greenough's notes from the scene.

Significantly, Bello's accurate description of the car given to Sergeant Capter and his partner, was what caused them to search for Carter's car after they had just prior to that allowed it to pass on.

Later on that morning, within two and a half hours of the murder, Alfred Bello again identified the Carter car as the getaway vehicle. This was memorialized in a

written statement taken from Alfred Bello by Lieutenant Lawless at police headquarters (2aF 199-200).

Further, testimony of Lieutenant Lynch was that the identification of the Carter car by Mrs. Valentine at the scene had led to the car being impounded and Carter and Artis being taken to police headquarters in a patrol wagon.

A third witness who briefly glimpsed the vehicle fleeing the murder scene was Ronald Ruggiero, who testified at both trials of the defendants. This witness lived down the street from the Lafayette Bar and had heard the shots on the morning of the murders. He then looked out his window at the side of his house, affording him an oblique view of the street and permitting a narrow field of vision. From this point he could observe a portion of Lafayette Street. He was able to see Bello running down the sidewalk, heard a car screech, and glimpsed a white car with two black males going down Lafayette Street (40aA 9275-82; 9300-04). He was unable to identify the car other than the color.

The district court evaluated this record and somehow determined that "there is a considerable dispute as to the identification of the car." (1aD 5). The district court's conclusion about the state of the evidence on this point is a necessary ingredient of its ruling. It is furthermore a conclusion regarding a very significant area of evidence pointing to the guilt of the defendants. However, it is a conclusion which is simply not supported by a fair and reasonable view of the state of the evidence submitted to the jury.

The district court states that this portion of the evidence (identification of the Carter car) is "frayed." (1aD 54). The court submits what purports to be a review of this area of the evidence (1aD 54-55). The district court's presentation is a very sparse recounting of the state of the record and the evidence on this point. Contrast the court's statement of this evidence with the references to the evidence outlined

above. Indeed, the court does not even state why it concludes this evidence is weak ("frayed"). The district court presents the defense arguments attacking the identification of the car, but does not say on what basis the court itself finds this evidence weak.

The district court recites the defense claim that there is nothing in the police reports to indicate that Mrs. Valentine identified the Carter car at the scene. However, the court does not refer here to the fact that when Mrs. Valentine saw the car upon its return to the scene she became hysterical and ran away. Doesn't this evidence clearly mean that when she saw the car, Mrs. Valentine believed it to be the same car she had seen only several minutes earlier and by her reaction stated as much. Her identification of the car is well documented in her statement to the police a short time later at police headquarters. It is well documented in her Grand Jury testimony of 1966 and her testimony at the first trial in 1967. Similarly, it is definitively restated in her testimony at the second trial in 1976. The district court recites the defense claim that at one point in her Grand Jury testimony of 1966 Mrs. Valentine mistakenly referred to the model of the Dodge automobile as a "Monaco" as opposed to a Dodge Polara which, in fact, it was. Mrs. Valentine explained in her testimony at the second trial that she was not knowledgeable about cars or car models and that she did not know the difference between a Monaco and a Polara. However, she had no doubt that the defendant Carter's car was the car which fled the scene (16aA 3617-19). See also (16aA 3557-58).

The district court's opinion on this point also repeats the defense claim that in her testimony at the first trial Mrs. Valentine referred to the rear of the Carter car as "similar" to the car she saw, while at the second trial she testified it was identical (1aD 54). Here again the court does not claim that this reference forms any basis for its determination that the car identification evidence is "frayed," but simply presents

this as another bit of defense contention that this evidence is weak. The fact of the matter is that this reference to Mrs. Valentine's use of the term "similar" is taken out of context.

The district court says that Mrs. Valentine's testimony that the taillights were identical was new to the second trial (1aD 54). This is not so. A reference to the sequence of questions in which the term "similar" was used shows that Mrs. Valentine did not upgrade her testimony for the second trial as the district court implies:

> Q. Referring gentlemen to Page 2.148, do you remember, Mrs. Valentine, being asked these questions and giving these answers [at the first trial]?
>
> "Question: And you told Officer Greenough you looked at the car that was brought back and you told him that this was the car?
>
> Answer: That this was the taillights that I had seen.
>
> Question: So what you meant, what you did say to him was it was a similar type of car; is that right?
>
> Answer: The same kind of taillights." (16aA 3508).

It was the defense attorney at the first trial in his question who used the term "similar." It was not Mrs. Valentine. She testified that the taillights on the Carter car were the same taillights she had seen. At both trials, Mrs. Valentine testified that the taillights were identical.

A reading of Mrs. Valentine's entire testimony at the first trial shows her well-documented position that the Carter car looked "exactly like" the car she saw the murderers leave in. The appellants have submitted with the appendix the testimony of Mrs. Valentine at the first trial with regard to her description and identification of the murderers' car in order to show that her testimony was essentially the same at both

trials (1aF 99-178). The district court opinion seems to imply that some adjustment was made in her testimony. If that is the court's implication, the appellants suggest that it is most unfair to this witness based on this record. While it is theoretically possible that there could be two big, white, highly polished, brand new cars with those distinctive taillights bearing blue and gold license plates in that area of Paterson within those crucial minutes, it presents a proposition that constitutes an extraordinary coincidence.

A study of the total picture of the evidence on this point shows that the defense arguments against Mrs. Valentine's identification as recited by the district court carry very little, if any, weight. We can't suggest anything to this court to remove any doubt of this, short of reading what Mrs. Valentine has said about this car from the start. There simply is no reasonable dispute based on a fair look at the record about the fact that Mrs. Valentine identified that car when she saw it minutes after it left the scene of the murders. There is simply no doubt about the fact that she was shown the car again in the police garage by Detective Donald LaConte just a short time thereafter. Her identification was memorialized in her statement to the police at police headquarters that morning. Her position has been as definitively recorded as it possibly could be in the totality of the record regarding her testimony.

The district court opinion states regarding Bello's identification of the car:

> While Bello also claimed at trial to have identified the getaway car to police when they arrived at the scene, the police radio merely describes the car as white with two black males inside (30aA 6535) (1aD 55).

This statement of the record by the district court simply skirts the truly relevant and probative evidence as to Alfred Bello's identification of the Carter car. What difference does it make as to whether Alfred Bello identified the car at the scene, what information may or may not have been given out on the police radio at

some particular moment? There can be no dispute from the record that Alfred Bello did identify the car at the scene. It is clear from the record that Alfred Bello described the car in detail before it was brought back for him to see again in the presence of the police. Aside from his description of the car to the first responding officers, it was what Alfred Bello said about the car to Officer Capter that caused Officer Capter and his partner to go back on the road and relocate the Carter car.

In presenting its position that the evidence of the identification of the Carter car is weak, the district court points out that it is significant that the police chased and stopped several other white cars after the shootings (1aD 55). The officers involved with these other white cars were Officer John Nativo and Sergeant Robert Tanis. Both these officers testified that they were sure that the other white cars had New Jersey plates and that none of these cars had foreign or out-of-state plates (40aA 9240; 41aA 9590). New Jersey plates were not blue with gold or yellow lettering at that time. The murderers' car had out-of-state plates. How can the district court attribute significance to the reference to these other white cars, when the undisputed evidence is that they all had New Jersey plates? Why doesn't the district court mention that these other cars had New Jersey plates?

The district court's recitation of the record as to the alleged weakness of the evidence as to the identification of the car does not address at all the important and unassailable evidence on this point. The district court does not even deal with the fact that; (1) Officer Capter testified that Alfred Bello identified the car at the scene after having described it to the officer prior to Sergeant Capter's relocation of the car; and (2) within two and half hours of the murders, Lieutenant Lawless took a written statement from Alfred Bello in which he memorialized Alfred Bello's identification of the car -- "that is definitely the car."

The identification of the car was not based simply on the testimony of Alfred Bello (although there is no dispute from the evidence that Alfred Bello was there and saw the car leave). The car was identified independently by Mrs. Valentine. She had no connection with Alfred Bello or his identification of the car. In order for the jury to believe that "there was a considerable dispute about the identification of the car," they would have to reject the testimony of Mrs. Valentine in addition to that of Alfred Bello. The jury would have to disbelieve Officer Alexander Greenough. The jury would have to disbelieve Detective LaConte. The jury would have to reject the testimony of Officer Capter and Lieutenant Lynch. They would have to disbelieve the statement taken of Alfred Bello by Lieutenant Lawless. There is no way to fairly evaluate the record and to conclude that the jury could reject the testimony of all these witnesses. There is no legitimate reason for them to do that.

There is a wealth of good, hard evidence to support the identification of the Carter car. This evidence cannot be overcome short of making totally adverse credibility assessments of the testimony of state witnesses under circumstances where there is no support for such evaluations in the record. In any event, the matter ultimately is an issue of credibility. The district court did not hear the live testimony as the jury did. The district court in its opinion has made credibility assessments to supersede those made by the jury that heard the live evidence. The district court did not have the opportunity to observe the sincerity of Patricia Graham Valentine, Alexander Greenough and Theodore Capter as the jury did. Yet the court made a factual determination contrary to the great weight of the evidence as shown by the record. The evidence before the jury regarding the identification of the Carter car was not reasonably disputable.

The district court states that "the detective [Chief DeSimone] who interrogated them [Carter and Artis] conceded destroying his original notes after reducing them to typewritten form (1aD 60). The court's reference to the destruction of the notes is phrased to suggest that the loss of the original notes somehow detracts from the testimony of Chief DeSimone. The fact of the matter is as shown by a complete reading of the record is that the original notes could not be located at the time Lieutenant DeSimone testified at the first trial. They were located thereafter, and were available at the second trial (32aA 7089-90). The typewritten and handwritten notes are included in the appendix (1aF 12-23). The typewritten notes are a thorough and accurate reproduction of the handwritten notes.

During then Lieutenant DeSimone's questioning of the defendant Rubin Carter that morning, the latter in response to a question had stated to Chief DeSimone that he had no idea of how the shell or bullet had gotten into his car since he had the keys to his car in his pocket and didn't loan the car to anyone (32aA 7080-81).

The State produced testimony at the retrial through John F. Lintott, a State Police ballistics expert, that the seven discharged bullets recovered from the bodies of the victims or at or near the scene of the shootings, were each lead, copper coated, .32 caliber S & W long bullets. All had been fired from the same gun, probably a seven shot "Arminius" revolver of German manufacture (36aA 8250-67).

The unfired bullet which Detective DiRobbio testified he found on the floor of the defendant Carter's car was identified by Lintott as a .32 caliber, S & W, long, lead bullet cartridge. It was not copper coated. Since the unfired cartridge was the same caliber as that of the spent bullets used in the shootings, it could also be fired from the same gun (36aA 8267-68).

Detective Lintott also testified that a 12-gauge discharged shotgun shell wad, termed a power piston, and which had been removed from the body of the bartender,

Likewise it is significant that these items were recovered at about 4:00 a.m. that morning. There can be no dispute that ballistics evidence as to the caliber of the ammunition used to murder the people inside the bar was not available at the time the ammunition was recovered from the defendant Carter's car.

The district court's rendition of the state of the evidence as to the shell and bullet follows the same format the court used in its presentation of the evidence as to the identification of Carter's car. The court states that the evidence is "frayed" (1aD 54) but does not say on what basis the court concluded the evidence is weak. Rather, the district court recites the arguments and claims by which the petitioners contest this evidence (1aD 59-60). In criminal cases the defendant customarily disputes every piece of incriminating evidence.

In the face of the enormous record outlined above to support the validity of the evidence of the bullet and shell, the district court's opinion presents only one basis for suggesting that there is a "considerable dispute" about this evidence. The court states the petitioners' argument that since Detective DiRobbio who found the ammunition in the car did not voucher it with the property clerk until five days later, petitioners theorize that Detective DiRobbio intentionally or unintentionally produced in this case evidence found earlier in the Holloway killing (1aD 59-60)*. Mr. Holloway was the black man murdered by a white man with a shotgun several hours earlier at a bar down the street from the Lafayette Grill. Detective DiRobbio investigated the Holloway murder. This theory was rejected by the jury because it was disproven by the substantial evidence outlined above.

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* It should be noted that the defendant Rubin Carter testified at the first trial (Transcript of May 22, 1967, p. 43) and at that time admitted that he was shown the bullet at police headquarters on the morning of the murders. This of course would make meaningless any theorizing based on the fact the shell and bullet were vouchered with the property clerk five days later. At the first trial, the court found the shotgun shell inadmissible. On appeal, the Supreme Court "disagreed" with that ruling. State v. Carter, 54 N.J. 436, 450 (1969).

> whereabouts between 2:00 a.m. and 3:00 a.m., a topic one would expect to be the primary reason for the interrogation in the first place. The New Jersey Supreme Court criticized the admissibility of the notes, but concluded that the affirmative probative value of these oral statements was virtually nil. Carter I, at 442-446 (1aD 60).

The district court's statement that the petitioners dispute the accuracy of the verbal statements of the defendant Carter, creates a credibility question. The record does not support the district court's resolution of this credibility issue in favor of the defendants, since Carter's statement was not specifically denied because the defendant Carter did not testify. The court's implication that this evidence is weak because the detective who conducted the interrogation conceded destroying his notes, is not a fair statement of the record. The handwritten notes were available at the time of the second trial and were provided to the defense in discovery. The court's account of the record seems misleading. What actually occurred was that the original notes could not be located at the time of the detective's testimony at the first trial in 1967. They were located thereafter and made available at the second trial in 1976. The typewritten and handwritten notes of the statement of the defendant Carter are included in the appendix as (1aF 12-17). The typed and handwritten notes of the interview of the defendant Artis are submitted as (1aF 18-23). The typewritten notes have always been available.

The district court's factual conclusion that this evidence is frayed is founded on the district court's belief that the notes do not include any reference to Carter's whereabouts during the crucial time between 2:00 a.m. and 3:00 a.m. The record does not support the district court's statement in this regard. There is such a reference in the notes of the verbal statement of the defendant Artis and there is such a reference in the notes of the verbal statement of the defendant Carter. The notes of the oral statement by Artis read as follows:

> then Ruben Carter came around the corner from Governor Street and I called him and asked him where he was going. He said he was going to the club LaPetit (about 10:00 P.M.). Carter spoke with a man at the other end of the bar. I believe the other man was his manager. They talked for an hour or an hour and a half and we went to the Night Spot (Ruben and I — about 11:30 P.M.). We stayed at the Night Spot till the bar closed. Bar closed at 3:00 A.M. (1aF 18).

It couldn't be clearer but that the notes state that Carter was at the Nite Spot between 2:00 a.m. and 3:00 a.m. How can the district court state that "the notes do not include any reference to Carter's whereabouts between 2:00 a.m. and 3:00 a.m., a topic one would expect to be the primary reason for the interrogation in the first place." (1aD 60).

The notes of the oral statement of the defendant Carter read as follows:

> At Richie's Hideaway with two guys in my car. I don't think it was Artis. I left with my car alone about 1:30-1:45 A.M., went to Night Spot and parked. Stayed at Night Spot until bar closed. Artis left with me at 3:00 A.M. (1aF 12).

As with the notes of the oral statement of the defendant Artis, the notes regarding the oral statement of defendant Carter specifically record the whereabouts of Carter between 2:00 a.m. and 3:00 a.m. The defendant Carter said he was at the Nite Spot. The district court's definitive statement that no such reference is included in the notes is contradicted by the record.

Lastly, the district court refers to the New Jersey Supreme Court's criticism of the admissibility of these notes in Carter I, 54 N.J. 436, 446 (1969). However, the Supreme Court's concern had nothing to do with matters related to this trial. The New Jersey Supreme Court's concern had to do with a Bruton question (Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed.2d 476 (1968)). The New Jersey Supreme Court criticized the fact that the Bruton question was not explored at the

mention of his efforts to locate his guns even though he said he was with Neil Morrison, Jerry Reeves and Merritt Wimberly, who it was later learned accompanied the defendant Carter to Annabelle Chandler's home in an effort to locate his guns.

The defendant Carter did not testify at the retrial. The trial court denied the State's application to read to the jury, Rubin Carter's testimony from the first trial, particularly the portion where he testified to the false alibi.

The defendant Artis did testify at the second trial. The evidence presented at the trial showed that John Artis testified falsely in accounting for his whereabouts in the early morning hours of June 17, 1966. Mr. Artis testified that he arrived at the Nite Spot "around midnight" (43aA 10067). Sometime thereafter, Mr. Artis testified he left the Nite Spot and walked to the home of a friend named Donald Mason. The home was on 12th Avenue. John Artis said he had the keys to Donald Mason's home which he had obtained from Mr. Mason some time before (43aA 10071-73). John Artis said that when he arrived at Donald Mason's house, Mr. Mason was there with a girl and Mr. Artis had a drink there (43aA 10074-75).

On rebuttal, Donald Mason was called as a witness by the State. He was a very credible witness and his testimony directly contradicted John Artis. Mr. Mason said that he lived on 12th Avenue at the time of the murders. He testified that during the evening and early morning hours when Mr. Holloway was killed and the people at the Lafayette Grill were killed, John Artis did not come to his apartment (44aA 10435-36). Mr. Mason testified that he did not give the keys to his apartment to John Artis on that night or at any time. Mr. Mason said: "I was living with somebody and she had kids, so I didn't give my keys to nobody." (44aA 10436). At the time of the murders this man had known John Artis ten years (44aA 10467).

From this evidence, the jury had very good reason to believe that the defendant

The district court's statement about the defendant Carter's Grand Jury testimony is not precise. The defendant Carter did not say that "shaking" did not mean murder as the district court states. Rubin Carter testified that shaking meant "trouble" but that he didn't know exactly what it would be. He said he "didn't think" it would include murder (36aA 8356-57). It certainly meant retaliation and the fact that the killing of Mr. Holloway produced talk of retaliation at the Nite Spot was significant evidence of itself. The shape which the retaliation took was clear from the totality of the evidence. There was undisputed evidence that retaliation was discussed at the Nite Spot and no evidence that murder was exempt from that response, only that the defendant Carter said that he personally did not think it would go that far.

It should be noted that John Artis did specifically define "shaking" to include murder in his Grand Jury testimony:

> Q. Was there any talk in the Night Spot about a shaking, there was going to be some trouble that night?
>
> A. Well, there was some talk going around.
>
> Q. Going around where?
>
> A. Around the town.
>
> Q. Was there any conversation at the Night Spot?
>
> A. Not to my knowledge.
>
> Q. Where was this talk around the town?
>
> A. Well, I heard two guys pass while I was sitting at the LaPetit, two guys passed and said that they ought to kill every white person in this town, something... (1aF 52).
>
> Q. What exactly were the words that these men used when they walked past the LaPetit?
>
> A. Well, I didn't catch the words until they crossed the opening of the door but they were,

you know, they should get mad in this town and kill every white person in this town (1aF 54).

The defendant Artis's testimony before the Grand Jury was read by the State at the retrial (36aA 8328-39). The areas quoted above were not read to the jury. By comparing the transcript of John Artis's testimony before the Grand Jury (1aF 24-98), with the trial transcript (36aA 8337-38), it can be seen that the State read up to the above excerpts and then skipped over them.

The reading of the Grand Jury testimony occurred at the end of the State's case just prior to the State resting. A fair common-sense assessment of the record at that point established that the Lafayette Grill shootings occurred as retaliation for the murder of Leroy Holloway. The excerpts from the Grand Jury testimony of John Artis could have the potential to be inflammatory. The prosecution did not attempt to offer them and excluded them on its own initiative. The appellants contend that it is appropriate to refer to this matter since the district court claims that this prosecution involved an insidious and repugnant appeal to racism (1aD 20).

The district court states that "there was no evidence that either petitioner knew that it was a white man who killed Holloway...." (1aD 22). This is an incredible statement for the district court to make. The murder of Mr. Holloway was a horrifying event. The news of this was well known in the black community. There was an angry crowd outside the Waltz Inn. There was talk of it all around Paterson according to the defendant Carter. The defendant Artis admitted that the first time he spoke with Rubin Carter that evening they talked about Eddie's father having his head blown off. The defendant Carter stated that he spoke with Eddie Rawls at the Nite Spot after Mr. Rawls returned from the hospital where he found his father dead. Rubin Carter offered Mr. Rawls his condolences. The defendant Carter said the murder of Mr. Holloway was being talked about at the Nite Spot. He said there was

The district court's view that at the time of the murders the defendant Carter was reaching the peak of his career and was a contender for the middleweight crown is mistaken. Rubin Carter's boxing record is summarized on pp. 338-339 of his book The Sixteenth Round which is included in the appendix (1aF 10-11). From 1961 to 1964, Rubin Carter fought 25 fights. He won 21 and lost four. This is an impressive record. He lost his fight for the middleweight title on December 14, 1964. In 1965 and 1966, he fought 15 matches and won only seven of those. In 1966, the year of the Lafayette Grill murders, he fought six fights and won only two. His record for the last two years (1965 and 1966) presents quite a contrast with his record before the title fight in 1964. Undoubtedly, at the time of the murders in June 1966, Rubin Carter was not "reaching the peak of his career" as the district court states. His boxing career was in sharp decline and, obviously, he was not "a contender for the middleweight crown" at that time. How can the district court say he was "peaking" and a "contender"?

The district court's understanding of the facts is also mistaken as to the defendant John Artis. The Lafayette Grill murders occurred in June 1966. John Artis had been out of high school for a year at that time. He did not go to college when he finished high school in June 1965. Aside from the fact that John Artis said that he intended to go to college, there was no evidence that he had taken any steps toward arranging to start college in September 1966. He was not arrested until October 1966 and he had not begun college at that point. Surely if he had truly intended to attend college it would have been easy to obtain documentation to show that. There was none submitted. There was no evidence that he ever had submitted any papers towards college enrollment. There was no evidence to show at the time of the murders, John Artis had a college scholarship. How can the district court say he was "about to enter college on a scholarship"?

register, and since he was on parole at the time, he didn't want to have anyting to do with it (19aA 4336-37).

In the written statement given to Lieutenant James Lawless at 4:50 a.m. on June 17, 1966, Bello described the two men he saw coming from the tavern as "one was about as tall as me, the other was a little taller than the first man. The short one had on a light colored jacket, and he was carrying a pump shotgun. The tall one, his clothes were dark in color and he was wearing a hat" (2aF 199-200). At the trial, Bello testified that the defendant Carter who was the shorter of the two was the man carrying the shotgun and that the defendant Artis was carrying the pistol. This testimony was consistent with his statement given the morning of the murders.

Bello testified that he had seen Carter previous to that night (19aA 4337) and that when he recognized him as one of the two armed men coming down the street, he realized that the men were not "colored detectives" and for that reason he turned and fled down the street (20aA 4451-52).

During cross-examination, Alfred Bello reiterated that "when the police brought back these two individuals, they were the same two I seen." Carter had a goatee, "a little chin beard...." (20aA 4461). When Carter and Artis were brought to the scene, he noticed that Carter had a bald head or his hair was closely shaved and he was wearing a light colored jacket, black vest and pants. Bello did not see any hat at this time (20aA 4479-80). Officer Capter testified there was a hat in the Carter car at the time he stopped it, supra.

Alfred Bello testified that he had previously seen the defendant Carter, a well-known pugilist at the time, on two occasions, once when Mr. Bello had been an inmate at Bordentown and the defendant Carter was there for a boxing exhibition, and another time at the Kit Kat Klub, a bar in Paterson (20aA 4587-89; 4595-96).

During that interview, Bello identified both defendants as the armed men he had seen that morning, as well as Carter's car as the getaway vehicle. He also described his own participation in an attempted break and entry at the nearby Ace Sheet Metal Company and his theft of money from the open register at the Lafayette Grill. Bello also noted the compelling reasons why he finally came forward (2aF 201-239).

Chief DeSimone further testified that three days after the taped interview, Bello gave a formal, sworn statement which detailed the information as earlier stated at the taped interview. The typewritten statement (2aF 240-244) was taken in the presence of Lieutenant DeSimone and several detectives (29aA 6293-94; 22aA 4814-16; 4820-24).

Detective Donald LaConte in his testimony at the 1976 trial stated that Bello had spoken to him, some six weeks after the Lafayette Grill incident to indicate at first he had more information concerning what he had seen that morning, and then later in early October of that year, to give him the essence of the information set forth a week later in the taped interview of October 11, 1966 (23aA 5013-23; 22aA 4801-11).

Having received that information, Detective LaConte arranged for a meeting attended by himself, Bello and Sergeant Robert Mohl on the evening of October 3, 1966, at which, Bello repeated the information, which included his identification of Rubin Carter and John Artis as the two armed men he had seen (23aA 5023-29).

Captain Robert Mohl also testified with regard to the meeting of October 3, 1966, at which, Mr. Bello detailed the information he had given Detective LaConte earlier that day concerning his knowledge of the events of the early morning of June 17, 1966 and to repeat the identification of the defendants as the two perpetrators (24aA 5283-91).

The testimony of Chief Vincent DeSimone of the Passaic County Prosecutor's Office, Captain Robert Mohl and Detective Donald LaConte of the Paterson Police Department thus placed before the jury the fact that Alfred Bello in October 1966 had on several occasions positively identified the two defendants, Rubin Carter and John Artis, as the men he had seen leaving the scene of the crime.

Mr. Bello testified at the first trial of the defendants in 1967 in conformity with the oral and written statements he gave to the police in October 1966. See State v. Carter, 54 N.J. 436, 439-440, 441 (1969).

However, in September 1974, the defense obtained an affidavit from Mr. Bello in which he stated that his identification of the defendants Carter and Artis was a mistake, that he had identified the wrong persons, and that he had been pressured and confused into his trial testimony by the prosecution and the police (22aA 4866-74).

That affidavit, dated September 19, 1974, was taken by Fred Hogan, an investigator for the Monmouth County Office of the Public Defender, who had been making overtures to Bello as early as November 21, 1973 in an attempt to obtain a recantation. The defense filed a motion for a new trial based on the alleged recantation of Alfred Bello as recorded in this affidavit. Mr. Bello subsequently testified at a hearing on this defense motion for a new trial on October 29, 1974.

His direct testimony there was brief, in essence being that he was not sure of the identity of the men he had seen departing the Lafayette Grill and that he had testified it was the defendants because he had been "molded or fashioned" into that position by "Passaic County" (22aA 4877). On cross-examination, Mr. Bello displayed a remarkable loss of memory regarding questions on critical points. His recantation, as well as that of Arthur Bradley, was found to be utterly worthless by the trial court which considered both in the context of detailed testimony given by numerous witnesses over a period of five days. The motion for a new trial was denied. The

argument to a body of neutral citizens and not through a process of imagery conjured by Madison Avenue public relations and the collection of uninformed celebrities.

During this period of time, efforts were made on behalf of the defense to obtain executive clemency from Governor Brendan Byrne for Rubin Carter and John Artis. Certain black community leaders sought out a black assemblyman named Eldridge Hawkins. Assemblyman Hawkins along with these people met with Governor Brendan Byrne in September of 1975 regarding a pardon for these defendants. The Governor asked Assemblyman Hawkins to investigate the matter and report back to him. A black investigator named Prentis Thompson was assigned to work with Assemblyman Hawkins. (It was Investigator Thompson who later obtained from the Carter alibi witnesses the admission that they had lied at the first trial).

Assemblyman Hawkins submitted his report to Governor Byrne on December 10, 1975. Eldridge Hawkins did not recommend that Governor Byrne grant a pardon to Rubin Carter and John Artis. This was a courageous act on his part and he thereafter was criticized by the defense.

It was during the investigation conducted by Assemblyman Hawkins and Investigator Thompson that Alfred Bello changed his story again. Mr. Bello gave statements and testified before a Grand Jury impaneled in Essex County to memorialize testimony. It was at that time that Alfred Bello gave an account that involved his being in the Lafayette Grill at the time of the murders. This scenario included a rather sensational story of Alfred Bello escaping harm by using the body of Hazel Tanis as a shield. Alfred Bello's affidavit to Assemblyman Hawkins and his Grand Jury testimony in Essex County are included in the appendix (2aF 197-198, 245-288).

After the polygraph examination of Alfred Bello by Professor Harrelson, Mr. Bello disclosed how the information he supplied during the Hawkins investigation came about. During the period of the recantation in 1974 and the Hawkins investigation in

1975, the Carter-Artis case had become a celebrated matter regularly attracting widespread media coverage. After Mr. Bello gave his so-called recantation, he became associated with Joseph Miller and Melvin Ziem. They were local businessmen who attempted to exploit Mr. Bello's situation as a witness in this case to secure large profits for themselves. It was as a result of Mr. Bello's association with Messrs. Miller and Ziem that the story of Alfred Bello being in the bar came about. This was an effort by these three men to produce a more sensational account. They hoped to capitalize on the high publicity and exposure which had been generated at that time to secure large profits from the promotion of this new version. A review of the record will show that the evidence presented at the trial left no dispute about this.

The district court opinion does not deal at all with this entire area of the record of the evidence regarding the circumstances under which Mr. Bello's account involving his being in the bar during the murders came about.

At the time that Assemblyman Hawkins became involved in looking into this case in September of 1975, Alfred Bello had become associated with Messrs. Miller and Ziem for the purpose of promoting a work called the "Lafayette Bar Massacre." A contract, dated September 17, 1975, was executed between Alfred Bello and Joseph Miller and Melvin Ziem to promote the publication and filming of this work. After Mr. Bello's disclosures, the State investigation secured this contract. It was offered as S-44 in evidence and acknowledged by all three parties during the trial. The contract is included in the appendix (2aF 188-191).

Mr. Bello testified that in the course of his association with Messrs. Miller and Ziem, many hours of tape recordings were made just prior to the execution of the contract (22aA 4887). These tapes contained numerous different versions of Mr. Bello's involvement in the case (22aA 4891).

Joseph Miller and Melvin Ziem were called as witnesses by the defense and both of them conceded that the tapes contained numerous different accounts by Alfred Bello (41aA 9645; 41aA 9738-41).

Mr. Bello's accounts of his observations at the Lafayette Grill as contained in the tapes were so obviously rehearsed and incredible that the defense did not seek to introduce the tape recordings of those accounts at the trial, even though they contained numerous contradictory statements by Alfred Bello. The State's investigation prior to the trial had recovered the tapes from Mr. Miller. In his testimony, Mr. Bello repeatedly referred to the accounts on the tapes as "fictionalized" (22aA 4890-92).

Alfred Bello testified that these men expected to make hundreds of thousands of dollars through the promotion of Mr. Bello's new version of his observations (22T 144). Mr. Miller conceded on cross-examination that Mr. Bello had commercial value by reason of his connection with the Lafayette Grill murders (41aA 9642). Mr. Miller conceded that his interest in the case was solely to gain financial benefit through the use of Alfred Bello to promote books and movie rights (41aA 9641). Mr. Ziem stated on cross-examination that he had no experience in such publishing and filming productions. Mr. Ziem operated a furniture store (41T 328). Mr. Miller was a real estate salesman with an office above Mr. Ziem's store.

It was in this setting of promoting a new version of Alfred Bello's observations, that Alfred Bello came to recite the more sensational account (Alfred Bello in the bar during the shootings) during the investigation by Assemblyman Hawkins. This unquestionably is demonstrated by the very affidavit which Alfred Bello gave to Eldridge Hawkins in September 1975. On the second page of the affidavit, Alfred Bello inserted the handwritten reference to his agents Melvin Ziem and Joseph Miller. See affidavit contained in appendix (2aF 197-198).

During the Hawkins investigation, Alfred Bello's testimony was recorded before a Grand Jury in Essex County. On an occasion when Alfred Bello went to Essex County to appear before the Grand Jury, Joseph Miller accompanied him. Alfred Bello was interviewed at the Essex County Prosecutor's Office by Matthew Boylan, the Director of the Division of Criminal Justice of the Attorney General's Office of New Jersey and by Essex County Prosecutor Joseph Lordi. Joseph Miller sat in on the interview. Mr. Miller admitted to accompanying Alfred Bello to Essex County and meeting with Director Boylan and Prosecutor Lordi along with Mr. Bello (41aA 9676-77). Alfred Bello was a commodity in which Mr. Miller admittedly had a financial interest, supra. Mr. Bello appeared before a Grand Jury in Essex County and gave a more sensational story of his involvement in this case. Messrs. Miller and Ziem wanted to promote this sensational story and turn a substantial profit from it. The record shows that Mr. Miller accompanied Alfred Bello to Essex County to protect his (Miller's) interest in Alfred Bello's recitation of the more sensational story.

Jerry Leopaldi, a theatrical agent and film producer, testified that Joseph Miller and Melvin Ziem sought him out and met with him on several occasions in November and December 1975 to discuss producing a script and arranging financing for a book and movie (26aA 5642-45). Mr. Bello was not present at these meetings. Messrs. Miller and Ziem told Mr. Leopaldi that they were Alfred Bello's theatrical agents and that the matter had to do with the Carter-Artis case. They told Mr. Leopaldi that they had tapes of Alfred Bello which were "dynamite" and that they were going to make quite an exciting story (26aA 5646). As a result of his solicitation by Messrs. Miller and Ziem, Mr. Leopaldi prepared a draft of a contract which was marked S-45 in evidence (26aA 5647). This agreement formalized his proposed association with Joseph Miller, Melvin Ziem and Alfred Bello for the purpose of producing a motion picture. This agreement is included in the appendix (2aF 192-196).

Joseph Miller and Melvin Ziem made numerous contacts with various people and associations in their efforts to reap a profit by using Alfred Bello's involvement in this case. Some of this came to light during the State's investigation just prior to the retrial and after Mr. Bello's disclosures at the time of the Harrelson polygraph. In an effort to sell this story, Mr. Miller testified that he approached a publishing firm named Chelsea House. He testified that he met with people at Playboy Magazine and Penthouse Magazine in that same effort (41aA 9670).

The prosecution produced letters which Joseph Miller wrote to Sherry Lansing of MGM Studios and Sohcha Metzler of The Viking Press, attempting to sell publication and film rights to Alfred Bello's new story. The letters, both dated September 2, 1975, were marked S-46 and S-47 in evidence. They are included in the appendix (2aF 179-182). According to Melvin Ziem, Mr. Miller sent out many letters like this (41T 325). Mr. Miller states therein that he and Melvin Ziem have obtained from Mr. Bello "the full facts which have never before been revealed or even speculated upon." Mr. Miller says in his letters that they have "sensational" tapes of Alfred Bello. "There is information on the tapes too sensitive and spectacular to mention in this letter," says Joseph Miller. Each letter referred to a proposed script included therewith and incorporated here with the appendix (2aF 183-187).

The fact that this promotional campaign was in full swing at the very same time that the Hawkins investigation obtained the sensational account of Alfred Bello being in the bar, was not known to the State until about a year later just prior to the retrial. Alfred Bello disclosed this information after his polygraph examination by Professor Harrelson. The State's investigation then recovered the information presented at the trial.

It is more than just interesting that, while this information was not known to the State, it was known to the defense at the time it was going on. Messrs. Miller and

Ziem had extensive contact with defense counsel Myron Beldock and others associated with the defense team at the time they were involved with Mr. Bello in carrying on these promotional activities.

Alfred Bello testified that while he was involved with Joseph Miller and Melvin Zeim in the taping and promotion of a new version, Messrs. Miller and Ziem obtained the transcripts and records of the case from New York from defense counsel Myron Beldock (22aA 4895). Mr. Miller admitted on cross-examination that he obtained the transcripts, police reports and other records of the case from Mr. Beldock (41aA 9663). Mr. Ziem testified likewise (41aA 9731). In the two letters dated September 2, 1975, which the State's investigation recovered and which were referred to previously, Mr. Miller says:

> We have over 15 hours of tape recordings from Bello which are uncut. They reveal things that cannot be put in this letter. I have been in touch with Mike [Myron] Beldock and I am sure he will verify that we are on the right track (2aF 179, 181).

Mr. Beldock stated to the court at the trial that he learned of the tapes from Mr. Miller shortly after they were made (23aA 4948).

Jerry Leopaldi testified that at his meeting with Messrs. Miller and Ziem in November 1975, they told him they had been in contact with Mr. Beldock and had been back and forth to New York (26aA 5646).

Mr. Miller testified that the taping was done before the contract with Alfred Bello of September 17, 1975 (41aA 9644). Mr. Miller testified that he spoke to Mr. Beldock three or four times while the taping of Alfred Bello was going on and that he told Mr. Beldock of the taping (41aA 9674). During his involvement with this promotional work, Mr. Miller stated on cross-examination that, he went to New York to meet with George Lois, an advertising executive, who was heading the Carter-Artis Defense Committee (41aA 9665). Mr. Miller stated on cross-examination that he also

shows that the first thing the defendant Carter did after talking to Eddie Rawls about the horrible murder of his father, was to go looking for guns which had been missing for a year, Facts, supra, p. 43 et seq. The search occurred just a few hours before the Lafayette Grill murders.

Nine: The district court's opinion states that "the search [for guns] may have occurred even before petitioners knew of the shooting of James Oliver (36T 140-145)" (1aD 24). It seems clear that the district court meant to say the shooting of Leroy Holloway rather than the "shooting of James Oliver." However, the citation (36T 140-145) given by the district court refers to the reading at the trial of the defendant Rubin Carter's Grand Jury testimony where the defendant Carter clearly says that he went to look for the guns after he talked to Eddie Rawls about his father's murder and not before as stated in the court's opinion, Facts, supra, pp. 45-47.

Ten: The district court's opinion omits any reference to the significant circumstantial evidence that the murderers' car stopped at Eddie Rawls' house within five minutes of the murders. This, of course, must be considered together with the important evidence that the defendants Carter and Artis occupied that car at the time it drove down 12th Avenue to Eddie Rawls' house at the corner of 12th Avenue and 28th Street, Facts, supra, pp. 39-41.

Eleven: The district court's opinion repeatedly presents the implication that the defendants Carter and Artis would not likely have "reacted in such a vicious and violent way" against "strangers" (1aD 19-20, 22, 33). While this area is of no real importance to the disposition of the ultimate issue, it should be noted, since the district court chose to gratuitously inject these character profiles in its opinion, that the defendant Carter was not "peaking" or a "contender" for a boxing championship and that the defendant Artis was not "about to enter college" and did not have the benefit of a "scholarship" as the district court states (1aD 3), Facts, supra, pp. 80-81.

The findings of fact made by the trial judge conducting this special hearing are, of course, entitled to a presumption of correctness upon review. 28 U.S.C. §2254(d). This is more conclusively so here in light of the comprehensive nature of the hearing itself and the thorough familiarity of the court with the lengthy 1976 trial to which the remand hearing findings were to be related.

The trial court, in its opinion, initially disposed of what it termed the "false premise" upon which petitioners had based their arguments preceding the remand hearing (1aE 63-66).

In the opinion remanding the matter back to the trial court for a hearing on the polygraph issue, the New Jersey Supreme Court expressed its understanding of the so-called "in-the-bar" version as excluding petitioners Carter and Artis as the triggermen.

> A common ingredient of the "in-the-bar" narrative was that Bello was inside the tavern when two black men - not Carter and Artis - entered through the side door and began shooting; Bello was able to get out of the bar by being "shielded" by a woman who was shot; and as he ran around the corner, he saw Carter and Artis on the sidewalk. In his first statement to Hawkins, Bello insisted that Carter and Artis were unarmed when he saw them on the street. In a second statement to Hawkins and in testimony before the Essex County Grand Jury he modified this account to explain that although defendants were not the triggermen, they were in fact armed. In June 1976 Bello was interviewed by two prosecutor's detectives and repeated essentially the same set of facts he had conveyed to the Grand Jury. State v. Carter, 85 N.J. 300, 306-07.

The trial court noted that the so-called "in-the-bar" version of Alfred Bello had been equated by the petitioners as well as the New Jersey Supreme Court to a four-man theory in which petitioners Carter and Artis were not the triggermen, and at most, aiders and abbetors. See S-1032 (3aE 542); S-1035 (3aE 543-546) See also statements made by defense counsel at a motion for new trial made to the trial court (21aB 2667, 2670, 2685).

taken advantage of Bello to create numerous "fictionalized" versions of the "Lafayette Grill Massacre" while they were in contact with and using materials obtained from the defense, and which eventuated into the various "in-the-bar" versions which Bello offered to Assemblyman Hawkins and ultimately to the Essex County Grand Jury (pp. 95-112).

The statement by the district court that Bello selected the on-the-street version only because it was confirmed by the result of the Harrelson polygraph conclusion is an oversimplification which ignores several salient facts (1aD 49-51).

The testimony which Bello gave at the 1976 trial of petitioners was the same as that he had given at the first trial in 1967. It was not just another version as the defense and the district court suggest.

That testimony was consistent with the statements which Bello gave to the police in 1966 after he had decided to come forward to identify the petitioners. See transcript of the taped interview of October 11, 1966 (2aF 201-239) and the formal statement given October 14, 1966 (2aF 240-244).

In the early statements which Bello gave to the police, prior to the time he decided to identify the petitioners as the gunmen, his account was consistent that he was on the street approaching the Lafayette Grill when he saw the gunmen (2aF 199-200). For an account of the events leading up to Bello's identification of petitioners Carter and Artis at the first trial, see the opinion of Judge Samuel Larner who presided over the first trial, rendered after the recantation hearing on the motion for a new trial heard in 1974. State v. Carter, 136 N.J. Super. 271 (Cty Ct. 1974).

Secondly, it was not just the polygraph test conclusion which was a factor in having Bello return to his 1967 testimony. As found by the trial court during the remand hearing, it was the entire polygraph process, including the pretest interview,

The trial court in making this determination referred to the fact, as testified to by Harrelson, that the preliminary oral report he had given at the time he tested Alfred Bello and the subsequent, detailed written report he submitted three weeks later, were essentially consistent, in that Harrelson believed Bello to be telling the truth when he revealed to Harrelson that two men committed the murders, whom Bello positively identified as Rubin Carter and John Artis (1aE 129).

The trial court found that assuming that the preliminary oral report and the subsequent written report were consistent as to Harrelson's belief that Bello was truthful when he said he had been in the bar at the time of the shootings, the only purpose the defense could have made of that would be to impeach Bello, which would have been merely cumulative or repetitious (1aE 130).

This conclusion was supported by the trial court's exposure of the false premise upon which the defense arguments relating to the "in-the-bar" version had been based (1aE 63-66).

On May 25, 1978, the defense issued a news release, relating to an affidavit they had obtained from Harrelson, and noting Harrelson's opinion that Bello was inside the bar during the shootings, but incorrectly and blandly stated that "the new facts completely contradict the story Bello told at trial and the claim that Carter and Artis were the killers." Exhibit S-1032 (3aE 542).

Similar representations were made in the papers submitted by the defense to the Appellate Division, dated May 19, 1978. Exhibit S-1035 (3aE 543-46).

From this it was evident that the defense was anticipating a determination at the remand hearing that Harrelson's polygraph test results would indicate a Bello version inconsistent with petitioners Carter and Artis being the triggermen at the Lafayette Grill murders.

Exhibit 4

Accordingly, respondents are setting forth a review of the trial evidence at length in the belief that this will assist in placing the district court's conclusions in better perspective, toward the ultimate determination by this court as to whether these conclusions were correct.

B. PREAMBLE

At 2:30 a.m. on June 17, 1966, two black men entered the Lafayette Grill, Lafayette Avenue, in Paterson, New Jersey. One man was armed with a 12-gauge shotgun and the other carried a .32 caliber handgun. They immediately opened fire on the occupants of the tavern. At the trial in 1976, the State contended that Rubin Carter was armed with the shotgun and John Artis with the handgun.

There were four persons in the tavern at the time: James Oliver, the bartender, and three customers, Fred Nauyaks, William Marins and Hazel Tanis.

James Oliver was 51 years of age. He was standing behind the bar near the cash register preparing to close the tavern. It was his custom to count the day's receipts from the cash register at this time. He sustained a shotgun blast to his back opening a gaping wound and fell dead on the floor behind the bar.

Fred Nauyaks was 61 years of age. He had been a regular customer and was sitting on a stool at the bar. He was shot at close range with a single bullet from the handgun. He sustained a wound to the stem of the brain and died instantly.

William Marins was 43 years of age and had been at the bar a considerable time before the shooting. He was seated at the bar two stools from Mr. Nauyaks. Like Mr. Nauyaks, he was shot once with the handgun at close range. The bullet entered his head in the area of the left temple and exited from the forehead by the right eye destroying the optic nerve. Mr. Marins survived and died about a year after the shooting.

A compelling component of the overwhelming evidence of the defendants' guilt presented by the prosecution before the jury was the positive identification of Rubin Carter's 1966 Dodge Polara as the vehicle which left the scene of the Lafayette Grill killings, carrying the two murderers. Since the two petitioners were found in that car a scant ten minutes after the shootings, such identification pointed directly to their complicity.

Carter's car was identified by two witnesses who saw the perpetrators escape as the vehicle used in the flight. This identification was assisted by distinctive identifying features of the car itself and was significantly confirmed by the fact that a shotgun shell and revolver bullet, each matching the respective calibers of the weapons used in the killings, were found in the car. Several hours after the murders, Rubin Carter stated to a police officer at police headquarters that the car was in his possession at the time of the murders and that he had the keys. Carter told the officer that no one else could have used his car.

Patricia Graham Valentine unequivocally identified Carter's 1966 leased Dodge Polara as the one which sped away from beneath her bedroom window with the two murderers.

Mrs. Valentine lived directly above the Lafayette Bar and Grill and had been awakened about 2:30 a.m. on June 17, 1966 by shots which came from the tavern. Upon hearing a woman's voice cry out, she looked out her window facing on Lafayette Street. She saw two black men on the sidewalk below her run to a white car parked away from the curb and facing toward East 16th Street.

One got into the passenger's side, the other ran around the back of the car to the driver's side. She described the two men as having sports jackets, one with a hat (15aA 3345-54). Mrs. Valentine testified that the car then sped down Lafayette Street toward East 16th Street, and she lost sight of it after it passed behind a tree further

which fled the murder scene barely ten minutes after the shootings. Chief DeSimone testified that within hours of the murders he interviewed Rubin Carter and that Mr. Carter told him that no one else had access to the car and that he (Carter), exclusively, had control of the car during the critical time surrounding the murders.

The evidence of the whereabouts of the murderers' car during the aforesaid ten minute interval further confirms the culpability of the defendants. By considering numerous references in the record to various sightings of the car, its route of travel and the relationship of this evidence to certain locations on the car's travel route which connect with these defendants, it can be seen that there was only one car involved and that it was the Carter car. (Indeed good sense and logic dictate that it would require the most extraordinary coincidence for there to be two white cars like this distinctive car, in this area of Paterson on the same day at 2:30 in the morning). This is an important portion of the evidence pointing to the guilt of the defendants. However, it is not easy to explain or comprehend because it involves bringing together numerous pieces of evidence scattered throughout the record. The jury understood this part of the case because it heard the live testimony which contained repeated references to this evidence spread over many days of testimony. Further, this point was explained to the jury with the assistance of maps and diagrams making this evidence more readily understood than it is from a reading of the bare record.

While the district court's opinion makes almost no reference to this evidence except in the most superficial way (1aD 58-59), the New Jersey Supreme Court in its 1982 decision affirming the defendants' convictions, State v. Carter, 91 N.J. 86, felt it important enough to include in its printed opinion, a diagram referencing the car sightings, travel route and significant locations. The appellants have included the same diagram separately in the appendix (1aF 9). It is quite helpful in following the numerous location references in the record to refer to this diagram.

had been a shooting at the Lafayette Bar and Grill. They thereupon turned into East 24th Street and headed north in the direction of Lafayette Street. As they approached the intersection of 24th Street and 12th Avenue, they saw a white car with "foreign" plates, followed by a black car, speeding across the intersection headed east on 12th Avenue (30aA 6533-34). See street diagram included in appendix (1aF 9).

Noting the out-of-state plates (New York) and surmising that the car would be headed for New York, Capter then proceeded across 12th Avenue to 10th Avenue which runs parallel to 12th Avenue in an attempt to cut off the escape route. He knew that 12th Avenue was dead-ended several blocks east and that using 10th Avenue would allow him to reach the bridge traversing the Passaic River more rapidly. However, when the officers crossed that bridge onto Route No. 4, which leads to New York City, they were unable to see the white car ahead of them proceeding towards New York City. They turned around and came back down Broadway, which is the extension of Route No. 4 on the Paterson side of the bridge (30aA 6535-37).

As they proceeded on Broadway approaching East 28th Street, they saw a white car crossing in front of them, which they stopped at the corner of East 28th Street and 14th Avenue. This was at 2:40 a.m., some six minutes after the initial radio alert (30aA 6537-38). The car which had New York plates (orange letters on a blue background) and "butterfly taillights" was occupied by three men, John Artis who was the driver, Rubin Carter, whom Capter knew and who was in the back seat, and a third man, Bucks Royster, an acute alcoholic well known in the neighborhood, who was seated in the passenger seat. Capter checked the license of the driver as well as the registration, and let them go on (30aA 6538-40).

Sergeant Capter and his partner then proceeded to the Lafayette Grill, where Alfred Bello came up to their car and described how he had been chased by a man with a shotgun. He also described the back of the car he had seen, stating it had an out-of-

Heading toward the Lafayette Grill on East 18th Street they were able to see a white car some distance ahead of them and proceeding toward them on East 18th Street. The white car made a quick turn onto 12th Avenue as shown on the diagram (1aF 9). At that point there had not yet been a description of the car sent out, so they continued on to the crime scene (40aA 9225). They arrived at the scene soon after Officers Greenough and Unger. The sighting of the white car on East 18th Street by Officers Nativo and Tanis supports the point argued by the prosecution that the fleeing murder car did not continue down Lafayette Street.

This position becomes clearer when the evidence of the Nativo and Tanis sighting is considered together with the testimony of Officers Greenough and Unger, who were the first to arrive on the scene. Lafayette Street runs for several blocks from the bar at East 18th Street to River Street where it ends. When Officers Greenough and Unger received the first transmission of the shootings, they were on Summer Street near Montgomery Street facing Lafayette Street. Summer Street intersects Lafayette Street three blocks down Lafayette Street past East 16th Street. They proceeded to Lafayette Street and up Lafayette Street to the bar. They had been a short distance away from the intersection of Lafayette and Summer Streets at the time. They did not see the white car proceeding on Lafayette Street (17aA 3725-27, 3747; 30aA 6500).

The only way for the white car to reach East 18th Street from Lafayette Street at the point on East 18th Street where Officers Nativo and Tanis saw it turn from East 18th Street onto 12th Avenue would be by way of Governor Street. Governor Street is the only street which would permit entrance onto East 18th Street at a point after Lafayette Street and before 12th Avenue. The white car would have to have turned off Lafayette Street after East 16th Street but before reaching Summer Street and then traveled on Governor Street to East 18th Street. As shown on the diagram the

Mr. Tuck also testified that the Lafayette Grill was approximately five blocks from the Nite Spot (39aA 9089). The witness added that defense counsel for Carter prior to the first trial had indicated to him that he was "not that good of a witness" because he could not account for Carter's presence after he had closed the back room at 2:15 a.m. (39aA 9086-88).

On the night in question, Edward Rawls had come to the Nite Spot and said he wouldn't be able to work. Mr. Tuck earlier having been informed that someone had killed Eddie Rawls' father, and Mr. Rawls "was going down to the police department to see about it." Eddie Rawls later was at the Nite Spot, but as a patron rather than as a bartender (39aA 9057-58; 9094).

The fact that the murderers' car circled from Lafayette Street to Governor Street and right past the Nite Spot Tavern with which the defendants were connected in various ways, was consistent with the defendants' complicity. The time of the sighting by Officers Nativo and Tanis suggests that the white car made a brief stop somewhere in its route after it departed the murder scene and prior to coming onto East 18th Street. The prosecution argued that the reasonable inference was that the car stopped momentarily at the Nite Spot perhaps to pick up Bucks Royster, the alcoholic (see 31aA 6911-96), for alibi purposes.

After the white car was seen turning from East 18th Street onto 12th Avenue by Officers Nativo and Tanis, it was next spotted on 12th Avenue further down the street by Officers Capter and DeChellis, supra. As shown on the diagram at the time of the 2:34 a.m. radio alert, Sergeant Capter and his partner were in their patrol car on 17th Avenue. To head towards the Lafayette Grill they turned north onto 24th Street. As they approached the 12th Avenue intersection, they observed a white car with foreign plates followed by a black car speeding easterly on 12th Avenue through that intersection (30aA 6533-34).

between William Hardney and Welton Deary or William Hardney and Catherine McGuire and her mother.

William Hardney was the defendant Carter's friend and sparring partner prior to the first trial. He was still the defendant Carter's friend prior to the second trial. They had maintained contact while Rubin Carter was incarcerated. After his release, the defendant Carter traveled a great distance to visit Mr. Hardney to again solicit the false alibi testimony. William Hardney talked to defense counsel Myron Beldock prior to the trial and told Mr. Beldock that the alibi, was a lie. This occurred well before the prosecution had any contact with Mr. Hardney. Mr. Hardney's attorney in Washington, D.C., also told Mr. Beldock that the Nite Spot story was a lie.

It is clear that Mr. Hardney still considered himself a friend of Rubin Carter's at the time of the second trial. He agreed to come to New Jersey only after a material witness complaint was drawn to secure his presence in New Jersey. He was a powerful-looking man whose presence on the witness stand left no doubt that he was a person who could not be intimidated or coerced. A fair reading of the record shows this to be so. He had the benefit of consulting with an attorney before he agreed to come to New Jersey. His attorney also spoke with Myron Beldock before Mr. Hardney came to New Jersey. Mr. Hardney did not testify at the first trial and prior to the second trial had not given any sworn testimony. He was not in jeopardy of contradicting any previous testimony given under oath. There was no reason why he would have lied and given this "most damaging evidence" against his long-time friend Rubin Carter if it were not the truth. While it was clear that William Hardney would not have come to New Jersey to testify on his own, Mr. Hardney left no doubt that what he said from the stand was totally voluntary.

The district court refers to the testimony of the defense attorneys from the first trial to the effect that the original alibi witnesses testified voluntarily and

himself by using the body of Hazel Tanis as a shield. (The evidence of the circumstances surrounding this version is presented hereafter). At the time of the retrial, the prosecution had determined that, in light of these shifts in Mr. Bello's testimony, it would not produce Alfred Bello as a witness at the retrial unless he first passed a polygraph examination by an impartial examiner. Professor Leonard Harrelson was selected. He was disassociated with law enforcement in New Jersey. He had never before worked for the Passaic County Prosecutor's Office.

The other identification witness at the first trial, Arthur Bradley, was not called as a witness by either side at the second trial. He refused the State's request that he submit to a polygraph examination. The State maintains that his recantation testimony was secured in the same manner as Alfred Bello's, except that, unlike Mr. Bello, he may very well have collected the offered bribes since he was not in jail, as was Mr. Bello, at the time his recantation was secured.

After the polygraph examination of Alfred Bello by Professor Harrelson, the State learned the circumstances surrounding the Bello recantation and the circumstances of the subsequent, more sensational version. This information was unknown to the State prior to the Harrelson polygraph examination. After the examination, the State investigation uncovered substantial evidence to corroborate Mr. Bello's information regarding these changes in his testimony. At the second trial, Alfred Bello testified to the reasons for the changes in his testimony and the State presented considerable evidence that supported his testimony in this regard.

Mr. Bello explained that he was initially approached by Fred Hogan, an investigator with the Monmouth County Office of the Public Defender, who told him he had a "piece" of Rubin Carter's book and that Bello could likewise get a "piece" of the book if he recanted. Bello further stated that he was approached on several other occasions by Hogan toward the same end and that he was likewise visited by Reporters Hal Levenson and Selwyn Raab, each of whom were attempting to solicit his

significant part of the record. Why doesn't the district court deal with this startling evidence?

The recantations of Alfred Bello and Arthur Bradley were disclosed in 1974. In October 1974, extensive hearings were conducted based on these alleged recantations. The presiding judge determined that the recantations were untrue. However, it was not until August of 1976 that the State learned the detailed circumstances of how these recantations came about. After Alfred Bello submitted to the polygraph examination by Professor Leonard Harrelson, he disclosed to the prosecution the truth about the recantations. (This polygraph examination and the circumstances surrounding it are discussed hereafter). As previously shown, the State's investigation of the information supplied by Mr. Bello about the origin of the recantations, produced evidence for the trial to support the conclusion that the recantations were untrue and solicited by bribes.

The defense appealed the opinion filed by the presiding judge at the recantation hearings. This appeal was taken directly by the New Jersey Supreme Court. It was argued in January 1976. At the argument, the defense did not contend that the recantation of the eyewitnesses was the main ground for the appeal. In fact, they stated to the court that it was not their main argument. The defense contended that suppression of evidence was the main ground for a reversal. This defense argument resulted from the production of the tape recording of October 11, 1966 of the Bello interview by Lieutenant DeSimone. The State maintains this tape supports the credibility of the identifications and that was the basis for the introduction of it at the recantation hearings. The Supreme Court reversed the convictions based on the suppression of evidence argument.

The State maintains that the record of the recantation hearings clearly supports the court's finding that the recantations were not true. The State maintains that this

is why this ruling has never been disturbed and why the defense did not present the recantations at oral argument as the main ground for reversal. However, the recantations did provide the basis for a very extensive public relations campaign on behalf of the defense. This public relations campaign was directed in part by a very large public relations firm from New York City headed by a man named George Lois. Many celebrities from the theatrical world associated themselves with the campaign which became known by various names, such as, the Carter-Artis Defense Fund, Freedom for All Forever, etc. At the height of this campaign two large scale fund-raising events were conducted just prior to the argument before the New Jersey Supreme Court. An event called the Night of the Hurricane (Rubin "Hurricane" Carter) was held at Madison Square Garden on December 8, 1975. A second event was held at the Astrodome in Houston, Texas, on January 25, 1976, called the Night of the Hurricane Concert. Numerous celebrities appeared and entertained. (The proceeds of these events amounted to over $200,000 and $600,000, respectively, although the defense later claimed that all funds were exhausted and to this day a trial court order remains in effect which permits the defense to have all transcripts at public expense).

It is not difficult to understand why these people attached themselves to the defense cause at that time. The two eyewitnesses had given statements (recantations) wherein they said that their testimony identifying the defendants at the trial was not true. It is easy to understand how this situation would produce outrage and support for the defense. However, it seems to the respondents that these celebrities never read the record. The respondents did not uncover the evidence of what occurred at the recantations until just before the retrial in 1976. This was the first opportunity for the State to record this evidence. The strength and majesty of our judicial system is founded on the exposition of the truth through a process of submission of evidence and

argument to a body of neutral citizens and not through a process of imagery conjured by Madison Avenue public relations and the collection of uninformed celebrities.

During this period of time, efforts were made on behalf of the defense to obtain executive clemency from Governor Brendan Byrne for Rubin Carter and John Artis. Certain black community leaders sought out a black assemblyman named Eldridge Hawkins. Assemblyman Hawkins along with these people met with Governor Brendan Byrne in September of 1975 regarding a pardon for these defendants. The Governor asked Assemblyman Hawkins to investigate the matter and report back to him. A black investigator named Prentis Thompson was assigned to work with Assemblyman Hawkins. (It was Investigator Thompson who later obtained from the Carter alibi witnesses the admission that they had lied at the first trial).

Assemblyman Hawkins submitted his report to Governor Byrne on December 10, 1975. Eldridge Hawkins did not recommend that Governor Byrne grant a pardon to Rubin Carter and John Artis. This was a courageous act on his part and he thereafter was criticized by the defense.

It was during the investigation conducted by Assemblyman Hawkins and Investigator Thompson that Alfred Bello changed his story again. Mr. Bello gave statements and testified before a Grand Jury impaneled in Essex County to memorialize testimony. It was at that time that Alfred Bello gave an account that involved his being in the Lafayette Grill at the time of the murders. This scenario included a rather sensational story of Alfred Bello escaping harm by using the body of Hazel Tanis as a shield. Alfred Bello's affidavit to Assemblyman Hawkins and his Grand Jury testimony in Essex County are included in the appendix (2aF 197-198, 245-288).

After the polygraph examination of Alfred Bello by Professor Harrelson, Mr. Bello disclosed how the information he supplied during the Hawkins investigation came about. During the period of the recantation in 1974 and the Hawkins investigation in

1975, the Carter-Artis case had become a celebrated matter regularly attracting widespread media coverage. After Mr. Bello gave his so-called recantation, he became associated with Joseph Miller and Melvin Ziem. They were local businessmen who attempted to exploit Mr. Bello's situation as a witness in this case to secure large profits for themselves. It was as a result of Mr. Bello's association with Messrs. Miller and Ziem that the story of Alfred Bello being in the bar came about. This was an effort by these three men to produce a more sensational account. They hoped to capitalize on the high publicity and exposure which had been generated at that time to secure large profits from the promotion of this new version. A review of the record will show that the evidence presented at the trial left no dispute about this.

The district court opinion does not deal at all with this entire area of the record of the evidence regarding the circumstances under which Mr. Bello's account involving his being in the bar during the murders came about.

At the time that Assemblyman Hawkins became involved in looking into this case in September of 1975, Alfred Bello had become associated with Messrs. Miller and Ziem for the purpose of promoting a work called the "Lafayette Bar Massacre." A contract, dated September 17, 1975, was executed between Alfred Bello and Joseph Miller and Melvin Ziem to promote the publication and filming of this work. After Mr. Bello's disclosures, the State investigation secured this contract. It was offered as S-44 in evidence and acknowledged by all three parties during the trial. The contract is included in the appendix (2aF 188-191).

Mr. Bello testified that in the course of his association with Messrs. Miller and Ziem, many hours of tape recordings were made just prior to the execution of the contract (22aA 4887). These tapes contained numerous different versions of Mr. Bello's involvement in the case (22aA 4891).

Joseph Miller and Melvin Ziem were called as witnesses by the defense and both of them conceded that the tapes contained numerous different accounts by Alfred Bello (41aA 9645; 41aA 9738-41).

Mr. Bello's accounts of his observations at the Lafayette Grill as contained in the tapes were so obviously rehearsed and incredible that the defense did not seek to introduce the tape recordings of those accounts at the trial, even though they contained numerous contradictory statements by Alfred Bello. The State's investigation prior to the trial had recovered the tapes from Mr. Miller. In his testimony, Mr. Bello repeatedly referred to the accounts on the tapes as "fictionalized" (22aA 4890-92).

Alfred Bello testified that these men expected to make hundreds of thousands of dollars through the promotion of Mr. Bello's new version of his observations (22T 144). Mr. Miller conceded on cross-examination that Mr. Bello had commercial value by reason of his connection with the Lafayette Grill murders (41aA 9642). Mr. Miller conceded that his interest in the case was solely to gain financial benefit through the use of Alfred Bello to promote books and movie rights (41aA 9641). Mr. Ziem stated on cross-examination that he had no experience in such publishing and filming productions. Mr. Ziem operated a furniture store (41T 328). Mr. Miller was a real estate salesman with an office above Mr. Ziem's store.

It was in this setting of promoting a new version of Alfred Bello's observations, that Alfred Bello came to recite the more sensational account (Alfred Bello in the bar during the shootings) during the investigation by Assemblyman Hawkins. This unquestionably is demonstrated by the very affidavit which Alfred Bello gave to Eldridge Hawkins in September 1975. On the second page of the affidavit, Alfred Bello inserted the handwritten reference to his agents Melvin Ziem and Joseph Miller. See affidavit contained in appendix (2aF 197-198).

murderers' car several minutes after the murders. The defendant Carter said that no one else had the use of that car. The defendants gave inconsistent statements of their whereabouts and activities in the time period of the murders and just prior to the murders. The defendant Carter constructed a false alibi and the defendant Artis lied in his trial testimony regarding his whereabouts just prior to the killings. After learning of the murder of Mr. Holloway and just several hours before these murders, the defendant Carter, for the first time, was searching for long-missing guns. The motive for the murders connects with the defendants.

It is unfortunate that the record of the evidence against these defendants is so voluminous. However difficult the task, a study of the totality of the record of the evidence and an examination of each piece of evidence, not in isolation, but in relation to every other piece of evidence, explains why twelve detached citizens so readily saw the guilt of the defendants and so confidently made the momentous decision to convict them.

Three: The district court's opinion exaggerates the position of the State on the motive evidence. The State did not concede that the introduction of the racial revenge motive was critical to its case and that a conviction could not be obtained without it (1aD 33). Convictions were obtained at the first trial without motive evidence and without other powerful evidence which the State presented at the second trial (there was no evidence of a false alibi by the defendant Carter at the first trial, Facts, supra, p. 56 et seq., and there was no evidence directly contradicting the defendant Artis about the nature of his relationship with Rubin Carter and directly contradicting the defendant Artis's claim that shortly before the murders he was with Donald Mason in Mr. Mason's home, Facts, supra, pp. 54-55). The district court's exaggeration of the State's position on the motive issue is presented in the opinion as fortification for the court's position that the motive evidence made a critical difference in the outcome, Facts, supra, pp. 68-69.

Four: The evidence at the trial clearly established that the killings at the Lafayette Grill did not occur in the course of a robbery or attempted robbery, Facts, supra, pp. 69-70. James Oliver was assassinated. The appellants contend that these are significant factors in the evaluation of the motive for the murders, particularly, when considered in relation to all the other evidence in the case. The district court's study and analysis of the evidence of motive contains no discussion of these rather significant factors.

Five: The district court states that the testimony of Clarence Carr "contradicted" the testimony of Detective Callahan and Officer DeFranco regarding events at the Waltz Inn (1aD 20-21). Essentially, Mr. Carr's testimony was confirmatory rather than contradictory, Facts, supra, pp. 71-72. The district court's presentation of the contradiction is apparently offered to suggest some detraction from the evidence of the neighborhood reaction to Mr. Holloway's brutal murder as

at the request of the defense, about their knowledge and experience with the racial riots in cities like Newark and Paterson in the mid-1960's.

Several hours after a white man walked into a black bar and murdered the bartender with a single blast from a shotgun fired at close range, two black men walked into a white bar and murdered the white bartender with a single blast from a shotgun fired at close range. There was considerable evidence before the jury to support the natural projection that, in a time of racial tension, the second killing occurred as retaliation for the first.

The Lafayette Grill was a natural target for retaliation. It was a white bar :wn the street from the Waltz Inn. It was on the opposite side of the boundary between the predominantly white and black neighborhoods. As the Waltz Inn was on the edge of the predominantly black community, the Lafayette Grill was on the edge of the predominantly white community. The bartender at the Lafayette Grill had a history of prior incidents involving his exclusions of black patrons from the bar, Facts, supra, p. 80.

A study of the evidence in the record covering the interval between the murder and the assassination of James Oliver supports the proposition that the Lafayette Grill murders were carried out as retaliation for the murder of Mr. Holloway and that the defendants Carter and Artis in connection with that retaliation perpetrated the killings.

Leroy Holloway was a highly regarded member of the community. In front of numerous witnesses he was shot in the head with a shotgun fired at close range. This was a horrible and premeditated killing. Under ordinary circumstances community outrage would be natural. The jury had good reason to conclude that at this time in Paterson, stronger emotions were involved.

A crowd gathered outside the scene of Mr. Holloway's murder. It was necessary for numerous police cars to respond to the scene. The police could not simply usher the murderer from the tavern to the police vehicle. It was necessary to form a cordon

The district court maintains that the articulated assumption which is unacceptable and insupportable is that "shaking" meant murder (1aD 25). The appellants contend that from the totality of the circumstantial evidence there was very good reason for the jury to believe that the shake did take the form of murder. It is clear from the record that "shaking" meant retaliation. There is no evidence that murder was somehow a specifically excluded form of retaliation. Indeed, there is a wealth of evidence to support the position that the Lafayette Grill murders constituted the retaliation.

The person upon whom it (retaliation) was inflicted and the place where it occurred suggests revenge. Murder was the event being retaliated against. The murder committed in retaliation was strikingly similar in its dimensions to the murder being avenged.

There was good reason to expect that the form of the retaliation would involve strong action. A well-liked,black man was brutally slain before the eyes of friends and customers. This outrageous killing of a black man by a white man occurred at a time of racial tension in the City of Paterson. There was good reason to believe that strong emotions became involved. No other form of retaliation occurred at the time.

While there was no particular evidence as to what the discussions of retaliation specifically involved, that does not detract from the fact that retaliation was discussed and that there was a good basis for the jury to conclude that the retaliation took the shape of the Lafayette Grill murders.

According to the district court, the prosecution's position on motive involves the unarticulated assumption that it is reasonable to expect that blacks in general commit murder when one of their own is attacked (1aD 25-26). The appellants suggest that the record shows that this is a ridiculous statement. In all of this lengthy prosecution, there was never a moment when the prosecution made this argument.