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Gag Orders

Carter v Rafferty 631 F Supp 533

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9-15-1976

## Supplemental Appendix to Brief for Plaintiff-Movant

Passaic County Prosecutor's Office



PASSAIC COUNTY PROSECUTOR

REC'D SEP 16 1976

COURT HOUSE  
PATERSON, NEW JERSEY 07505  
(201) 525-5000

September 15, 1976

BURRELL IVES HUMPHREYS  
PROSECUTOR

JOSEPH A. FALCONE  
FIRST ASSISTANT PROSECUTOR

ANTHONY P. TIRINATO  
DEPUTY FIRST ASSISTANT PROSECUTOR

JOHN GOCELJAK  
CHIEF, APPELLATE SECTION

RONALD G. MARMO  
CHIEF, TRIAL SECTION A

GEORGE TOSI  
CHIEF, TRIAL SECTION B

RICHARD F. THAYER  
CHIEF, GOVERNMENTAL CORRUPTION  
AND WHITE COLLAR CRIME SECTION

David Lampen, Esq.  
Appellate Division of the Superior Court  
State House Annex  
Trenton, New Jersey 08625

Re: State v Rubin Carter and John Artis  
Passaic County Ind. No. 167-66  
Notice of Motion for Leave to Appeal  
Docket No. AM-827-75

Dear Mr. Lampen:

In order to supplement the fact history and to correct any misconceptions arising out of the statement of facts contained in the brief and appendix submitted in support of the Notice of Motion for Leave to Appeal, regarding the trial court's language of reprimand, this letter (with four copies) is being sent to you, requesting that it and the additional copies be forwarded to the Court in consideration of this matter. Copies of this letter are being mailed to counsel for defendants.

A review today of the transcript of hearings before Judge Marchese on August 4, 1976, much of which dealt with other aspects of the Prosecutor's alleged violations of the restraint Order beside the comment to Reporter Coffey regarding the letter bomb, discloses that Mr. Sagor, speaking for defendant Carter, had made a reference to censure as well as to relief requested, in argument before the Court. While the subject of censure may thus have been put before the Court, we submit this very limited reference does not detract from the position taken in Point I of the supporting brief that based upon the moving papers submitted by defendants there was a lack of notice that the Prosecutor was potentially subject to censure. It should also be noted that Reporter Quartucci, while testifying at the hearings before Judge Marchese, testified regarding

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David Lampen, Esq.  
September 15, 1976

another aspect of the alleged violation of the restraint Order and not with regard to the letter bomb statement. His affidavit on this point was submitted to the Court as indicated in the statement of facts in the supporting briefs.

To supplement the appendix regarding the instant motion for leave to appeal we are submitting portions of the transcript of the hearings dealing with this matter i.e. that portion of the testimony of Reporter Roger Witherspoon and argument put forward by Mr. Sagor and Mr. Goceljak on August 4, 1976. Previously ordered and contained in the appendix to the brief is the testimony of Gerrard W. Coffey.

Very truly yours,

Burrell Ives Humphreys  
Passaic County Prosecutor

By: Gary H. Schlyen  
Gary H. Schlyen  
Assistant Prosecutor

cc: Myron Beldock, Esq.  
Lewis M. Steel, Esq. ✓  
Jeffrey E. Fogel, Esq.  
Ronald J. Busch, Esq.

GHS:ms  
enclosure

BURRELL IVES HUMPHREYS  
Passaic County Prosecutor  
New Court House  
Paterson, New Jersey  
(201) 525-5000

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. \_\_\_\_\_

STATE OF NEW JERSEY,  
Plaintiff-Movant

v

RUBIN CARTER and  
JOHN ARTIS,

Defendants-Respondents.

:  
: CRIMINAL ACTION  
:  
: ON MOTION FOR LEAVE TO  
: APPEAL JUDGMENT OF THE  
: PASSAIC COUNTY COURT  
:  
:

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SUPPLEMENTAL APPENDIX TO BRIEF FOR PLAINTIFF-MOVANT

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BURRELL IVES HUMPHREYS  
Passaic County Prosecutor  
Attorney for Plaintiff-Movant  
New Court House  
Paterson, New Jersey

GARY H. SCHLYEN  
Assistant Prosecutor  
Of Counsel and on the Brief

EXPLANATION OF CONTENTS

The transcript contained herein consists of that portion of the hearing held before Judge Marchese on August 4, 1976 which pertains to the Prosecutor's remarks concerning the connection between a letter bomb sent to the Prosecutor's Office and the national attention given to the Office as a result of State v. Rubin Carter and John Artis, the subject of a reprimand issued by the trial court, which matter is presently pending upon Notice of Motion for Leave to Appeal to the Appellate Division of the Superior Court, Docket No. AM-827-75.

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THE MATERIALS CONSIST OF:

1. Pertinent testimony of New York Daily News Reporter Roger Witherspoon ..... 18 - 22
2. Portion of Argument by Mr. Sagor ..... 34 - 36
3. Portion of Argument by Mr. Goceljak ..... 63 - 66

1 MR. GOCELJAK: I have no further question of this  
2 witness on this, but on a different aspect of the motion.

3 DIRECT EXAMINATION BY MR. GOCELJAK:

4 Q Mr. Witherspoon, you're familiar with the  
5 letter bomb incident reporting some time earlier?

6 A Right.

7 Q At about the time that the letter bomb was  
8 sent to the Prosecutor's Office did you have occasion to  
9 be at a press conference of the Prosecutor?

10 MR. STEEL: Your Honor, my only objection is  
11 that there has been testimony about the letter bomb  
12 and I have no objection to counsel inquiring except  
13 that I would like the Court to at least make a mental  
14 note that with regard to this aspect of the  
15 testimony it's the Prosecutor's witness rather than  
16 the defense witness.

17 MR. GOCELJAK: We are quite content.

18 THE COURT: I understand.

19 MR. STEEL: To speed the thing along I have  
20 no objection.

21 MR. GOCELJAK: It will be very brief.

22 Q Mr. Witherspoon, do you know whether during  
23 the subject of that press conference what was the subject  
24 of that press conference? A The letter bomb,

25 the type of bomb, how it came to be there; who it was

1 addressed to. That sort of thing; possible motive and  
2 what happens now.

3 Q With relation to that matter I asked you to  
4 prepare an affidavit, is that right? A Right.

5 Q And that affidavit was--I think I volunteered  
6 it.

7 Q Yes. And that reflects your recollection of  
8 the press conference, is that correct?

9 A Yes.

10 MR. GOCELJAK: I think that has been made part  
11 of our application--or rather our answering papers  
12 before the Court and I won't go into it, it's before  
13 the Court.

14 MR. STEEL: Well, with regard to the hearing  
15 before the Court I would take the position that  
16 affidavits do not, of course, allow us to subject  
17 the affiant to cross examination. With this  
18 particular witness, if he's here--let me finish, Mr.  
19 Goceljak--if this particular witness on the stand  
20 wants to indicate that he's read over the affidavit,  
21 to save time, that the facts therein are true that  
22 will be acceptable to me. But I just don't want a  
23 general proposition to come out of this that an  
24 affidavit at this time, at this point in time is an  
25 acceptable item of proof.

1 MR. SAGOR: Your Honor, I'm in disagreement  
2 with Mr. Steel. It's very brief. I would like to  
3 know properly as we had to go through Mr. Coffey  
4 extensively what Mr. Witherspoon remembers Mr.  
5 Humphreys saying.

6 THE COURT: You have cross examination.

7 MR. SAGOR: I object to it coming through in  
8 a summary fashion through the affidavit. I would  
9 like to know what he remembers.

10 THE COURT: Cross examine him.

11 MR. SAGOR: Your Honor, direct testimony.

12 THE COURT: He's opened the door on it. He  
13 referred to an affidavit. This is part of the  
14 pleadings that you have. You want him to identify  
15 the affidavit for you?

16 MR. SAGOR: No, not at all. I would like him  
17 to hear what Mr. Humphreys had to say. I would like  
18 to do it by cross examination. All right. If  
19 your Honor is accepting the affidavit--

20 MR. STEEL: He said proceed.

21 THE WITNESS: Can I make a statement?

22 THE COURT: No, you can't make any statements.

23 CROSS EXAMINATION BY MR. SAGOR:

24 Q Mr. Witherspoon what did Mr. Humphreys say  
25 that the connection with the Carter and Artis case had



1 with the letter bomb? A He said as far as  
2 he could see there was none.

3 Q Did he say he had absolutely no evidence that  
4 there was any connection with the letter bomb?

5 A If I remember his words they were to the affect that  
6 it's absurd to think there was a connection.

7 Q Did he say that at the press conference?

8 A Yeah, because the guy that it was addressed to had  
9 nothing to do with the Carter case. He was tied up on  
10 the Cavanaugh-DeFranco murders.

11 Q And there were a lot of reporters at the press  
12 conference, is that correct? A I think there  
13 were five; and a T.V. camera.

14 Q Was anybody taking stenographic notes or taking  
15 a recording of the press conference?

16 A People take their own notes. I don't know what kind  
17 they take.

18 Q He said at the press conference where there were  
19 other reporters present, that he had absolutely no evidence,  
20 in effect, of any connection with the Carter case with the  
21 letter bombs, is that correct? A It was a bit  
22 stronger than that. He didn't/<sup>say</sup> "No evidence." He could  
23 see no reason why. It was absurd to think that it was  
24 connected.

25 Q I'm sorry. Can you repeat the last statement?

1 A He said he could see no reason why it would be  
2 connected with this. And it was absurd to think that it  
3 was connected. And he told that to some reporter on the  
4 phone over there.

5 Q Say that again? A He told some reporter  
6 that on the phone while we were there.

7 Q How do you know that? A Because  
8 during the press conference Mr. Humphreys policy is if a  
9 reporter calls up from outside he will take it during the  
10 course of the press conference. And he did at that point.  
11 And somebody asked him that on the phone. And he denied  
12 it on the phone.

13 Q And you heard him speaking on the telephone?

14 A Oh, yeah.

15 Q Do you know what reporter he was speaking to then?

16 A No, sir.

17 Q But he knew that from what you could tell that  
18 other reporters were listening to what he said on the  
19 telephone, is that correct? A Yeah, he was in  
20 the office. "I'm having a press conference at this time."

21 MR. SAGOR: All right. Fine. No further  
22 questions.

23 MR. GOCELJAK: That's all.

24 THE COURT: Anything else, gentlemen?

25 MR. STEEL: Nothing, your Honor.

1 THE COURT: Yes.

2 MR. SAGOR: Your Honor is reserving decision on  
3 this motion?

4 THE COURT: I asked if you wished to be heard.

5 MR. SAGOR: I would like to submit briefly  
6 some papers or make a brief statement now, your Honor.

7 THE COURT: I'll hear a brief statement.

8 MR. SAGOR: Will you hear me?

9 THE COURT: Yes. We don't communicate too well,  
10 Mr. Sagor, for some reason. I don't know. I said  
11 that I think three times.

12 MR. SAGOR: Maybe it's that void in the  
13 courtroom, your Honor.

14 THE COURT: We'll blame that on the architect.  
15 He's blamed for everything else around here.

16 MR. SAGOR: Your Honor, I think that I would  
17 like to focus first on the letter bomb issue. I  
18 think what has become perfectly apparent here,  
19 particularly in the absence of Mr. Humphreys, that  
20 we had a witness who I think is in all respects  
21 credible, Mr. Coffey disinterested newspaperman  
22 who indicated that he had a conversation with Mr.  
23 Humphreys the night before. And I think it's very  
24 pertinent that when Mr. Humphreys was alone with a  
25 newspaperman no one else was present. One of the

1 first reports in connection with this letter bomb,  
2 a most outrageous thing for anyone to do, maiming  
3 as Mr. Humphreys said possibly innocent people anyone  
4 who would be, of course, innocent in connection with  
5 a letter bomb. But this was particularly not a  
6 feud between people that knew each other. This was  
7 somebody with a twisted and warped mind sending letter  
8 bombs. And what Mr. Humphreys said to this reporter  
9 was that he speculated, he raised the Carter-Artis  
10 case as a speculation when he had absolutely no proof,  
11 no anything to connect this defendant with such an  
12 incident. Indeed even if he had any information as  
13 long as it wasn't part of the instant indictment,  
14 something not in the public record, it was absolutely  
15 and totally prejudicial for Mr. Humphreys to make  
16 this statement to Mr. Coffey.

17 Who is Mr. Coffey? Not the local editor of the  
18 high school newspaper, but a U.P.I. reporter who is  
19 going to flash this thing around the country, in  
20 New Jersey. And what do the residents read about?  
21 That somebody, they're not necessarily thinking it's  
22 Mr. Carter, but someone associated with Mr. Carter  
23 and Mr. Artis has sent a letter bomb by way of a  
24 retaliation to the Passaic County Prosecutor's Office.  
25 Look at the contrast, your Honor, if you will. When

1 Mr. Humphreys is surrounded by reporters, as Mr.  
2 Witherspoon has testified to very fiercely, Mr.  
3 Humphreys tried to negate every conceivable  
4 connection between the Carter-Artis case and this  
5 letter bomb. As I understand Mr. Witherspoon's  
6 testimony he said there was no connection, absolutely  
7 no connection whatsoever. And we think, of course,  
8 that properly is what he could say so he knows what  
9 to say when the time comes. But the night before  
10 he made an absolutely prejudicial comment to the  
11 newspaperman. And this was not a newspaperman  
12 pestering him, walking up to him. He tried to  
13 flippantly get rid of him. This was a man who he  
14 invited to call him back again when he particularly  
15 determined that there was, in fact, a letter bomb.  
16 So the story could be even more news worthy. And  
17 once Mr. Humphreys checked and found that it was  
18 a letter bomb he told Mr. Coffey that indeed it was  
19 a letter bomb and he raised the question that it  
20 was maybe in connection with the Carter-Artis case.  
21 This may be the speculation which is supported by  
22 the defendants--rather the Prosecutor's own exhibit  
23 S-1 in evidence we think is subject to not only the  
24 relief we requested but censure and other  
25 considerations by this Court as well.

1 which we're speaking about.

2 Now, with respect to the remaining motion of  
3 the defendant's motion I believe we had the  
4 testimony of one reporter who testified he called  
5 the Prosecutor late at night at home. He recalled  
6 that the subject matter had come up, it was his  
7 recollection, that the Prosecutor speculated that  
8 there might be some connection. I think it's  
9 significant to point out that in the article or  
10 under the news report that was filed by this reporter  
11 Mr. Coffey he had quoted the Prosecutor for saying,  
12 "I can't figure out why the hell they mailed it to  
13 us." So that that indicates the Prosecutor didn't  
14 know and was offering no hard reason why the bomb  
15 had been sent. Then he paraphrased what he recalled  
16 to be the Prosecutor's "speculation" that it may  
17 have had some connection with the Carter case which,  
18 of course, had been nationally publicized.

19 It's significant to note that at a press  
20 conference the following day when reporters were  
21 present and when intended for publication material  
22 was given out by the Prosecutor, the Prosecutor  
23 stated that he had no reasonable basis or no evidence,  
24 for that matter, to connect the letter bomb incident  
25 with the Carter and Artis case. I think that there's

1 solid testimony on that from Mr. Witherspoon before  
2 this Court.

3 There's been affidavits filed. We didn't  
4 call Mr. Quartucci for that purpose to the same  
5 effect. So that again the defense is trying to  
6 show that a late evening telephone call, it was  
7 after midnight, a telephone call to the Prosecutor  
8 at his home by a reporter in which the general  
9 subject matter was discussed that the Prosecutor  
10 may have speculated.

11 Now, how do we derive from that a deliberate  
12 violation or calculated violation of a gag order I  
13 don't follow. I think a gag order is intended to  
14 preclude a deliberate violation of material rather,  
15 of release of material which is specifically  
16 proscribed and not something which is built into  
17 an alleged violation through the use of the word  
18 "speculated" et cetera. So that I think when we  
19 look in the context of the defendant's motion, the  
20 two aspects of it, there's been no proof whatsoever  
21 before the Court on the other the proofs such as it  
22 is that connects the Prosecutor's Office through  
23 Mr. Taylor, is very weak and whatever proof there  
24 would be to lead the Court to believe there might  
25 have been a violation by parties, and I'm referring

1 to Carolyn Kelley, that is something within the  
2 contempt province of the Court rather than something  
3 related to a gag order that was issued with respect  
4 to a trial. I don't infer that, but I did want to  
5 point that out to the Court to keep in prospective  
6 what the motion here is<sup>and</sup> to try to screen out the  
7 many superfluous matters that have been raised by  
8 the defense particularly with respect to the  
9 repetitive accusations that the Prosecutor's Office  
10 has been deliberately condoning the release of  
11 this type of information.

12 MR. SAGOR: Your Honor, may I make a thirty  
13 second observation? I promise it will be thirty  
14 seconds.

15 THE COURT: Okay. I assume your estimate  
16 of time is usually as bad as most lawyers including  
17 my own.

18 MR. SAGOR: I think it's going to be thirty.  
19 I tried to argue as effectively as I could before.  
20 I'm not going to repeat myself. I only note Mr.  
21 Coffey's testimony stands uncontradicted. There's  
22 been nothing contradicted from the Prosecutor, not  
23 even by affidavit, that he--

24 MR. GUCELJAK: There is an affidavit.

25 MR. SAGOR: Nothing contradicted the affidavit.



1 There's nothing in there about the Coffey  
2 conversation with Mr. Coffey. And I think that that  
3 is very significant.

4 Would your Honor need for the record that I  
5 was within thirty seconds too?

6 THE COURT: I think you beat it by a lot.  
7 Anything else?

8 MR. STEEL: Nothing to add, your Honor.

9 MR. SAGOR: No.

10 MR. GOCELJAK: No.

11 THE COURT: All right. I will reserve on  
12 this. We have one more motion pending. I believe  
13 we'll go at nine o'clock tomorrow morning on that.

14 MR. SAGOR: Your Honor, I know that you've  
15 ruled, but if we are going ahead tomorrow morning--

16 THE COURT: On a new motion tomorrow.

17 MR. SAGOR: --can I have a witness?

18 THE COURT: I finished this motion.

19 MR. SAGOR: --in the interest of justice, a  
20 witness tomorrow morning?

21 THE COURT: No, sir.

22 MR. SAGOR: For the record, I'm referring to  
23 Mr. Johnson, of course.

24 MR. STEEL: Your Honor, I take it that motion  
25 has to do with the other contempt, the Prosecutor's