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Is 'Hurricane' Carter Finally Winding Down (New Jersey Law Journal)

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Prosecutors Ponder Appeal

Is 'Hurricane' Carter Case Finally Winding Down?

By David Brooks

A week after a federal appeals court refused to reinstate the convictions of Rubin "Hurricane" Carter and John Artis, the prosecution and defense teams are reflecting on how they got to this point and what the future holds. What both sides find striking is that the 21-year-old, emotionally charged, triple-murder case apparently has turned on a minor procedural mistake and a telephone call that was made on a hunch.

John P. Goceljak, Passaic County's acting prosecutor, says he is leaning toward an appeal to the U.S. Supreme Court. He can ask the Court to review the Aug. 21 ruling by a three-judge panel of the Third U.S. Circuit Court of Appeals, or he can petition the circuit for an en banc rehearing.

Myron Beldock and Lewis M. Steel, the chief defense attorneys, hope he will do neither. "It has been a long, bitter case, and I hope it will be over," says Beldock, Carter's chief counsel and a partner in the New York firm of Beldock, Levine and Hoffman.

Says Goceljak: "There has been a lot of blood, sweat, and tears and midnight oil spent on this case. We're not going to lightly pass up a chance to have it reviewed."

Goceljak says he probably will decide about an appeal this week after discussing the opinion with other attorneys in his office. The ruling in *Carter v. Rafferty*, Docket No. 85-5735, upheld District Court Judge H. Lee Sarokin's decision in November 1985 to grant, by summary judgment, Carter's and Artis's petitions for habeas corpus. Sarokin ruled that the convictions of Carter and Artis, who are black, were grounded in racial prejudice and that the prosecution improperly withheld from the defense the results of a polygraph test. Sarokin's order freed Carter, 49, after he had served 19 years in prison. He had been sentenced to two consecutive and one concurrent life sentence. Artis, 40, had been released on parole in 1981 after serving 15 years. They were convicted in 1967 and again in 1976 of the murders of the bartender and two patrons of the Lafayette Bar and Grill in Paterson in 1966.

PHOTOGRAPHY COURTESY OF ASSOCIATED PRESS

The refusal late last month by the Third U.S. Circuit Court of Appeals to reinstate the murder convictions of Rubin 'Hurricane' Carter and John Artis brings their celebrated case closer to an end. From left to right: Artis and defense attorneys Myron Beldock and Lewis Steel, as shown in a 1985 photograph.

The appellate panel ruled only on the polygraph issue. It held that the second trial in Superior Court was tainted because the prosecution did not disclose to the defense a polygrapher's report regarding a lie-detector test administered to the only purported eyewitness to testify in the 1976 trial.

Procedural Error

Goceljak acknowledges that convincing the Supreme Court to reinstate Artis's convictions would be difficult because his office neglected to include Artis's name in the body of its notice to appeal Sarokin's ruling.

"It's procedural, and trying to get that changed by the U.S. Supreme Court is not easy," Goceljak says. "They generally don't get involved in procedural issues. The federal courts usually delegate procedural issues to the districts and circuits."

That quirk of a procedural error, combined with a constitutional issue that arose after a phone call that might never have been made, seemingly have put Carter and Artis, as appellees, in control.

Between the conviction and the sentencing at the second Superior Court proceeding, Beldock was reviewing his notes about the lie-detector tests administered to Alfred Bello, whom the prosecu-

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tion had offered as an eyewitness. Bello, who, court papers say, was near the scene because he was breaking into a nearby factory, changed his story several times and attempted to recant his testimony. But rulings by Superior Court Judge Bruno L. Leopizzi frustrated Beldock's attempts to cross-examine Bello.

"I can't tell you what instinct I had. But in the shambles and the rereading and reviewing, I guess it was just a feeling, without any real basis, that something was wrong," Beldock says.

Because Beldock felt that the conviction so greatly hinged on Bello's testimony, he called Leonard H. Harrelson, the Chicago polygrapher who had tested Bello and found that Bello apparently had told the truth at the first trial, in 1967.

"Harrelson told me, 'The testimony was the truth, which means, of course, that Bello was in the bar at the time of the shooting.' Was I surprised!" Beldock recalls, noting that Bello had testified in 1967 that he was in the street, outside the bar where the shootings had occurred.

It turned out that Harrelson had not known the substance of Bello's testimony at the first trial but had determined that Bello was telling the truth when he said he was in the bar when the shootings occurred. Several phone calls and flights to Chicago later, Beldock and Steel, a partner in the New York firm of Steel, Belman and Levine, found out that Harrelson had previously told prosecutors what he had told them: that Bello was telling the truth when he said he was in the bar. Harrelson's written report said only that Bello's testimony at the first trial had been truthful.

Parlaying a Discrepancy

Beldock, Steel, and co-counsel Leon Friedman, a professor at Hofstra University Law School, parlayed the discrepancy and Harrelson's statement that he had told investigators that the in-the-bar version was legitimate into an argument that the prosecution had violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to inform the defense of Harrelson's oral report.

In the Aug. 21 ruling, the circuit court stated that the prosecution had withheld exculpatory material from the defense and that the information was material to the defense's case. The *Brady* rule also covers evidence that might be used to impeach a witness, such as Bello. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Writing for the three-judge appellate panel—which also included Chief Judge John J. Gibbons and Circuit Court Judge Joseph F. Weis—Circuit Court Judge Ruggero J. Aldisert said the appeal turned on whether Harrelson's oral reports were material. The dissenters in the New Jersey Supreme Court's 4-3 1982 ruling against Carter and Artis had argued that it was material.

Aldisert wrote: "Appellants apparently concede that the reports should have been turned over to the defense before trial. . . . They maintain, however, that the reports were not 'material' under the controlling legal standard: 'Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley*, 473 U.S. 667, 676 (1985).

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>
> **—John P. Goceljak, Passaic County's acting prosecutor.**

"Carter's theory is that the prosecution used Harrelson's written report to pressure Bello to return to his 1967 'on-the-street' testimony. He contends that if he had known of Harrelson's contradictory oral reports, he would have used this information to impeach Bello's credibility at trial and thus undermine an essential basis for the guilty verdict."

The appellate panel agreed with Sarokin and with the three dissenters among New Jersey's justices, including Justice Robert L. Clifford, who had written the dissent. *State v. Carter*, 91 N.J. 86, 134, 449 A.2d 1280, 1306 (1982) (Clifford, J. dissenting).

Opportunity to Impeach

The appellate panel disagreed with the claims of the prosecutor's office that Sarokin had not given enough weight to the state trial court's determination, at an evidentiary hearing, that the oral report was not material because the defense had ample opportunity to impeach Bello. Because the claim involved mixed questions of law and fact, the opinion said, the state courts are not entitled to presumptions that they would be accorded on questions of fact.

Aldisert also wrote that merely because the prosecution did not misrepresent the polygraph and "the prosecution acted in good faith," the withholding was still material to the defense's case.

Aldisert then quoted Sarokin's opinion: "Whether the conduct was deliberate or negligent, the consequences to [Carter and Artis] were the same: they were deprived of a vital opportunity to totally discredit the key and only eyewitness to the crime. Indeed, if the trial court knew and was satisfied that Bello finally selected one of his many versions merely because he was told that it was independently confirmed by the polygrapher (albeit mistakenly), it might well have stricken his entire testimony." *Carter v. Rafferty*, 621 F. Supp. at 553.

Aldisert also wrote that Bello's testimony was so crucial that the panel did not need to examine how close the rest of the case was. "[U]nder any reasonable characterization of the 1976 trial, the critical importance of Bello's testimony to the prosecution's case clearly looms large and commanding. Bello's eyewitness identification testimony was the only direct evidence placing Carter and Artis [at the crime scene] . . . . We are not confronted by a situation in which the suppressed evidence—here, information impeaching Bello's credibility and challenging his professed vantage point—was of only minor importance. Justice Clifford noted in dissent, and we agree, that a complete account of Harrelson's polygraph examination and the prosecution's use of his conflicting oral and written conclusions had 'the real capacity . . . to bring about the utter destruction of by far the most important witness in the State's arsenal, with the fallout levelling the vaunted polygraphists and casting doubt on the tactics of the prosecution. Never before [this information was uncovered] could defendants argue so persuasively that Bello was in all respects a complete, unvarnished liar, utterly incapable of speaking the truth.' " *State v. Carter*, 91 N.J. 86 139, 449 A 2d 1280, 1309 (1982) (Clifford, J., dissenting).

Brady Issue

Goceljak conceded that the *Brady* issue was one that could be contested, but he felt the prosecution had stayed within the guidelines of the *Brady* ruling. Steel says he is more comfortable with federal judges—four of whom agreed with the defense on the *Brady* issue—than with state judges on rulings on sophisticated constitutional issues because they confront them more often and spend more time thinking about them.

"I'm not surprised they saw fit to essentially adopt the analysis of Justice Clifford," Steel says. "I thought we had an extraordinarily strong *Brady* issue."

Goceljak attributes the error in the notice of appeal to an oversight by his office and to confusion regarding Artis's status at the time Sarokin granted the writ of habeas corpus.

Sarokin's original writ covered only Carter because Artis still had a petition pending before the New Jersey Supreme Court. Goceljak's office had argued successfully that Sarokin did not have jurisdiction while the matter was pending in a state court. When Sarokin ordered Carter freed, the prosecution filed a notice of appeal that included only Carter. When the defense, seeing that Carter's petition for habeas corpus had been granted, dropped its petition before the state Supreme Court, the prosecutor's office neglected to amend its notice of appeal.

"His name was in the caption but not the body," Goceljak says. "We served both defendants with copies, and nobody said anything. After the deadline passed, Artis's counsel pops up and moves to have the appeal on Artis dismissed. All along we assumed they were on notice. At the oral arguments in June was when we found out the Court of Appeals was taking that seriously."

Aldisert wrote that the panel lacked jurisdiction to hear the appeal of Artis's writ: " . . . [W]e hold that appellants have effectively appealed from only that portion of the district court's judgment relating to Rubin Carter. The notice of appeal . . . specifically limited itself to the order releasing Carter. Rule 3(c), F.R. App. P., requires that '[t]he notice of appeal . . . shall designate the judgment, order, or part thereof appealed from . . . .' Because the notice here is silent as to Artis, it effectively challenges only that portion of the district court's judgment granting relief to Carter."

Faulty Writ

Steel says he was not surprised that the appellate panel ruled that the appeal of Artis's writ was faulty.

"As it relates to Mr. Artis, the opinion stated the obvious—if you don't file an appropriate notice of appeal, you haven't appealed," says Steel, Artis's chief counsel.

Steel adds that since the appellate panel refused, on the merits of the case, to reinstate Carter's conviction, it probably would have done the same with Artis's. Yet he applaudes the decision excluding Artis's writ from the appeal and is grateful because, he says, it helps insulate Artis from further appeals.

"This ruling follows the law, which is clear, and puts Mr. Artis in a position where the state has no grounds to take further appellate action. It's hard to see how this court en banc or the Supreme Court or any other court would grant further review to this," Steel says.

Beldock says the appellate panel's strict adherence to court rules regarding appeals follows a general tightening of those rules in the circuits. A similar issue in a Second U.S. Circuit case was also resolved in favor of the appellee, he says.

"It's not just this case," Beldock says. "If you file appeals that are not timely, you're out."

Steel recalls the first time he discovered that Artis's name was not in the body of the notice of appeals.

"I smiled and I certainly suspected right away I had something," Steel says. "I thought, 'Look at this issue, after all these years of a hard-fought, deeply consuming case, appearing from nowhere.' I assumed their [the prosecutor's] office thought they had filed an appropriate notice, and my bet was that because attorneys are busy in any office, nobody would take a second look. Mr. Goceljak is a good attorney and, I'm sure, extraordinarily busy. I'm not sure even I noticed it from day one. These things happen."