

**UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT**

Docket 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.

**BRIEF
OF
RESPONDENTS – APPELLANTS**

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STATEMENT OF THE CASE

A. The Habeas Corpus Petitions

The petitions for writ of habeas corpus filed by Rubin Carter and John Artis in the United States District Court for the District of New Jersey relate to their respective convictions of three counts of first degree murder entered on February 9, 1977 following a lengthy jury trial which terminated with verdicts entered on December 21, 1976.

Separate petitions were filed by Carter on February 13, 1985 (1aD 82-138) and Artis on February 28, 1985 (1aD 139-155). The latter petition incorporated the numerous grounds included in the petition of Rubin Carter and added a further ground relating to an identification issue as to John Artis being one of the perpetrators.

Because petitioners had been tried together in both state trials and had participated jointly in the numerous related proceedings and appeals arising from their convictions over the years, and because of the identity of the issues raised in their respective petitions for writ of habeas corpus, petitioners and respondents agreed that the petitions should be consolidated for consideration by the United States District Court (1aD 158-159; 164-171), and an Order consolidating the petitions was entered on May 6, 1985 (1aD 172-173).

At the time the respective petitions for writ of habeas corpus were filed, there remained pending in the Appellate Division of the New Jersey Superior Court an appeal by petitioners from a ruling by the trial court denying a motion brought by petitioners seeking, alternatively, an evidentiary hearing or a new trial based upon allegedly exculpatory material contained in a personal file maintained by a former prosecution investigator, Richard Caruso.

Since the pendency of this state appeal was perceived to raise a threshold issue of non-exhaustion of state remedies (1aD 158-159), respondents filed an answer addressed primarily to the exhaustion of state remedies issue (1aD 178-199).

Before this issue was addressed by the district court, petitioners on May 25, 1985 filed a motion for summary judgment on seven of the grounds asserted in the petitions (1aD 200-202). This motion was supported by oversize briefs submitted by petitioners (1aD 203-208). Petitions also filed a statement of facts under Rule 12G (1aD 209-223); respondents filed a reply (1aD 224-235), and a hearing date of July 26, 1985 was scheduled on the summary judgment motion (1aD 236).

Oral argument was heard on that date by the district court (1aD 249-334).

In the interim, the Appellate Division of the New Jersey Superior Court on July 2, 1985, in an unpublished opinion (1aE 154-157), had denied the appeal of petitioners concerning their new trial motion brought on the basis of the so-called Caruso file.

The Appellate Division determined that the information from the so-called Caruso file was not “favorable” to the defendants. The court said it was not “usable” or “significant” and that it did not justify a hearing much less a new trial.

At the hearing before the United States District Court, Petitioner Carter stipulated amendment of his petition to exclude the issue raised by the Caruso file (1aD 4-6; 240-248). Petitioner Artis, however, did not exclude this claim, having filed a notice of petition for certification on July 22, 1985 addressed to the New Jersey Supreme Court (1aE 158-160).

Following oral argument on the motion for summary judgment before the district court, respondents on August 30, 1985 filed an answering brief and filed with the district court the transcript of the 1976 trial proceedings as well as the 1981 remand hearing before the trial court directed by the New Jersey Supreme Court (1aD 237-239).

Earlier, petitioners had submitted to the district court numerous materials including briefs, opinions and related documents involved in the various state proceedings (1aD 160-163).

On October 29, 1985, the New Jersey Supreme Court denied the petition for certification filed by Petitioner John Artis (1aE 161). This Order was received by the parties on November 5, 1985.

On November 7, 1985, the United States District Court issued its opinion, finding that petitioners had made a sufficient showing in the two grounds considered by the court for the court to grant the writs of habeas corpus (1aD 64-65).*

At a hearing before the district court on November 8, 1985, relating to the enlargement of Petitioner Carter, upon being advised of the exhaustion of the Caruso issue claims as to Petitioner Artis, by the denial of the petition for certification by the New Jersey Supreme Court, the district court issued Orders granting the motion for summary judgment, and granting writs of habeas corpus as to both petitioners (1aD 73-78).

Respondents' notice of appeal to this court was filed the same date (1aD 79-81).

B. Prior State Court Proceedings

Petitioners Rubin Carter and John Artis were charged in Passaic County Indictment No. 167-66, returned in November 1966 with three counts each of first degree murder for the deaths of James Oliver, Robert Nauyaks and Hazel Tanis in the City of Paterson, New Jersey on June 17, 1966.

The first trial of petitioners took place in May and June of 1967, when they were each convicted of three counts of first degree murder. The jury recommended mercy, and the trial court, on June 29, 1967 imposed two consecutive and one concurrent life

* Carter v. Rafferty, 621 F.Supp. 533 (D.C.N.J.) 1985.

terms on Petitioner Carter and three concurrent life terms on Petitioner Artis.

On direct appeal to the New Jersey Supreme Court, the convictions were affirmed. State v. Carter, 54 N.J. 436 (1969), cert. den. 397 U.S. 948 (1970).

In 1974, recantation statements from the two eyewitnesses who testified at the 1967 trial were obtained by investigators working on behalf of petitioners, and a motion for a new trial was brought before the judge who had presided over petitioners' trial. The trial court conducted a hearing over a six-day period in October – November 1974, found the recantation testimony unworthy of belief, and denied the motion for a new trial. State v. Carter, 136 N.J. Super. 271 (Cty. Ct. 1974).

Petitioners thereupon substituted counsel and filed another motion for new trial. A further hearing was held by the trial court in January 1975, and the motion, which had asserted various grounds, was denied. State v. Carter, 136 N.J. Super. 596 (Cty. Ct. 1975).

On appeal, certified by the New Jersey Supreme Court, the trial court's findings and rulings relative to the lack of credibility of the recantation testimony were not disturbed. However, the court reversed the convictions of petitioners and ordered a new trial because of undisclosed promises which had been made to the two witnesses relating to protection and favorable treatment. State v. Carter, 69 N.J. 420 (1976).

Following the remand for new trial, the prosecution conducted an extensive reinvestigation of the charges and ultimately proceeded with the original indictment without amendment.

There were numerous pretrial and corollary motions and proceedings which commenced with the reversal by the New Jersey Supreme Court on March 17, 1976 and continued almost uninterrupted until the opening of the second trial of petitioners on October 12, 1976. Certain of these proceedings are included in the transcript consisting of Appendix "B" to this brief.

The trial itself, consisting of the 46 volumes of transcripts included as Appendix “A,” was conducted six days a week until the return of the verdicts on December 21, 1976.

Following the convictions, petitioners made further applications to the trial and appellate courts. One of these related to a claim alleging various items of misconduct by jurors who sat on the case. This issue became the subject of a lengthy hearing before the trial court, which denied the motion for a new trial in a comprehensive opinion which was sustained on appeal.

Petitioners perfected their appeal early in 1979, it was argued before the Appellate Division on May 30, 1979 and June 27, 1979, and in an unpublished opinion dated October 22, 1979, that court affirmed the convictions (1aE 1-58).

A petition for certification was granted by the New Jersey Supreme Court, which heard argument on September 9, 1980. On March 3, 1981, the Court remanded to the trial court for an evidentiary hearing to determine whether there was a Brady violation relating to an undisclosed oral report of a polygraph test given to eyewitness Alfred Bello prior to the second trial. State v. Carter, 85 N.J. 300 (1981).

The hearing on the remand was conducted from May 18, 1981 until June 8, 1981. The trial court, in an unpublished 80-page opinion dated August 28, 1981 (1aE 59-149) and forwarded to the New Jersey Supreme Court, made various fact findings and conclusions drawn therefrom, essentially concluding that the information which the prosecution failed to disclose to the defense could in no way have affected the outcome of the trial.

The New Jersey Supreme Court heard further argument on March 9, 1982, and on August 17, 1982, affirmed the convictions of petitioners. There was a dissent by three Justices on the Brady polygraph issue. State v. Carter, 91 N.J. 86 (1982).

Thereafter, petitioners sporadically pursued the Caruso file issue, which as previously noted, was still pending in the Appellate Division at the time they filed the subject petitions for writ of habeas corpus.

STATEMENT OF THE FACTS

A. PREFACE

The United States District Court, in its review of petitioners' convictions following the lengthy state trial court proceedings in 1976, concluded that the State violated the requirements of the rule in Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose an oral report of a polygraph test given to an eyewitness which was inconsistent in some particulars with the later written report of the polygraph test (1aD 64-65).

The district court also concluded that the State violated the Due Process rights of petitioners by improperly introducing evidence that the murders were motivated by racial revenge (1aD 64-65).

The determination by the district court that writs of habeas corpus should issue on these grounds was predicated in a substantial degree upon the court's further conclusion that the prosecution's case against petitioners was "sufficiently close" that evidence of racial revenge motive probably contributed to the verdict, and that because the State's evidence had been "substantially called into question by petitioners...." disclosure of the withheld oral polygraph report would probably have changed the result of petitioners' trial (1aD 33, 64).

Respondents contend that the trial evidence overwhelmingly pointed to the guilt of petitioners, that the case could not in any sense have been characterized as a "close" one on the issue of guilt, and that the district court in its opinion gave undue deference to petitioners' version of the trial evidence in the face of the total record and jury verdict.

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.

Hazel Tanis was 51 years of age. She was seated at another section of the bar. She had just come from work at the Westmount Country Club, a banquet hall where she worked as a waitress. Her upper right arm was struck by a blast from the shotgun. She was fired at five times with the handgun and was struck by four of the bullets. She was hit in the right breast, stomach, lower abdomen and genital area. The bullets perforated her lung, liver, spine and rectum. Hazel Tanis survived four weeks.

On December 21, 1976, the defendant, Rubin Carter, was convicted for the second time of three counts of first degree murder for these killings. On the same day, the defendant, John Artis, also was convicted by jury for the second time of three counts of first degree murder for these killings.

The record of the testimony and evidence, which is the basis for these convictions, is enormous. Respondents are mindful of the realities of appellate review. There is a limit to the time and energy which a reviewing court can devote to the study of the record in a given case. Respondents recognize an obligation not to burden this court with an unduly large record. However, the district court has reversed long-standing murder convictions based on two grounds, each of which (as will be discussed hereafter) is premised on the proposition that the jury which convicted the defendants was presented with a close case. This is simply not so and is not supported by a study of the record in its entirety. The district court's opinion contains numerous representations regarding the state of the evidence as submitted to the jury. The respondents contend that the district court's recounting of the evidence is not accurate and does not constitute a fair rendition of the case given to the jury. The respondents cannot demonstrate their position short of a detailed presentation of the voluminous record.

The district court's opinion states:

The picture of the evidence painted by the petitioners and respondents is often conflicting

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 8 1/2 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.

These categories related to 1) the positive identification of Rubin Carter's car as that used by the killers; 2) a shotgun shell and a .32 caliber bullet, respectively, matching the guns used in the shootings, which were found in petitioner Carter's car shortly thereafter; 3) evidence of the movements of the respective petitioners prior to and shortly after the killings, consistent with their involvement; 4) a search by petitioner Carter for guns which had apparently been stolen from him a year earlier, conducted by him a few hours before the shootings; 5) statements given by the respective petitioners regarding their movements prior, concurrent to and following the time of the murders, which contained inconsistencies and omissions; 6) testimony by four witnesses concerning a fabricated alibi used by petitioner Carter at the 1967 trial to mask his movements during the critical minutes prior to and after the killings; 7) evidence relating to motive for the murders as being in retaliation by petitioners for the earlier killing of their friend's stepfather; and 8) eyewitness testimony by Alfred Bello that he saw petitioners Carter and Artis, armed, respectively with a shotgun and pistol, coming from the Lafayette Grill immediately after the shootings.

This cumulative evidence was presented to the jury over a period of many trial days, through numerous witnesses. The jury was, therefore, offered a comprehensive view of the State's evidence, which it considered in light of the testimony offered on behalf of petitioners, in its function of assessing the credibility of the witnesses and making its ultimate fact-findings.

A summary of these respective categories of evidence, with appropriate references to the review of same by the United States District Court, follows.

1. IDENTIFICATION OF DEFENDANT CARTER'S 1966 DODGE CAR

The district court determined that "there is considerable dispute as to the identification of the [Carter] car at the scene." (1aD 5).

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 down the

street. As the car was leaving, she attempted to get a description and the license plate number. She was able to observe that the license plate was dark blue with yellow or gold lettering and the taillights were shaped like butterflies, were triangular, wider at the outside and tapered towards the center (15aA 3346, 3354).

With respect to the taillights, Mrs. Valentine further explained that they did not light across the whole back of the car, that they were wide on the outside, tapering off, and not a direct triangle, since a direct triangle comes to a point and these did not, but tapered and “squared off” (16aA 3544-46).

Valentine stated that after the car left she threw a raincoat over her pajamas and ran downstairs into the bar. As she entered the side door of the tavern, she saw the front door of the bar open and saw Alfred Bello already there. She observed William Marins holding onto a pole in the center of the bar, blood on his face, apparently dazed, and saw Hazel Tanis lying on the floor, her waitress uniform covered with blood (15aA 3364-69).

When Valentine approached Hazel Tanis, the latter asked “help me, call the police,” and Valentine ran up to her apartment and notified the operator (15aA 3367-68). Returning to the bar, Tanis asked her to notify a friend, which Valentine did by making another call from her apartment. She then dressed and came back downstairs by which time the police were already at the scene (15aA 3373-74).

Mrs. Valentine was taken by Officer Greenough upstairs to her apartment where she gave him a description of the car she had observed leaving the area and drew a rough sketch of the car’s taillights for him on a scrap of paper. (15aA 3374-75).

At the 1976 trial, Mrs. Valentine was requested to draw a replica of the diagram she had drawn for Officer Greenough shortly after the shootings, which replica was marked S-40 for identification and later placed into evidence (15aA 3376-77; 44aA 10552-53). She also drew a circle around that portion of the taillights 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 (1aF7-8).

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

* In his testimony, Officer Greenough referred to Mrs. Valentine as Ms. Graham, her maiden name.

brief description from Alfred Bello, who had told him that two colored males driving a new, white car with blue license plates had departed the scene (30aA 6471-72).

Mrs. Valentine likewise told Officer Greenough that the car she had seen was a “white car, big, new white car and that it had blue license plates with gold letters.” Officer Greenough added that she had tried to draw the taillights for him, but he was unable to tell from her diagram what make or model of car it was (30aA 6474).

The drawing was made on a piece of paper from his notebook, which he did not preserve, and Officer Greenough at the trial drew a diagram to replicate that drawn by Mrs. Valentine at the time, describing it like a “rectangle with tapering down to the center” (30aA6474-75).

Officer Greenough further testified that Mrs. Valentine identified the Carter vehicle when it was brought to the scene, that she became upset after she saw it and ran around the corner where the officer had to catch up with her (30aA 6479-80).

On cross-examination, Officer Greenough stated that Valentine had described the taillights accurately and clearly although at the time he couldn’t relate them to a particular model. (30aA 6483). After the Carter vehicle was brought to the scene and Valentine identified it, he gave little thought to the sketch she had drawn for him since it had been of no immediate help to him (30aA 6491).

Officer John Unger, who was Officer Greenough’s partner, and with him the first officers to arrive at the scene, in his testimony stated that Officer Greenough at the time had shown him his pad with a description and drawing or sketch on it (17aA 3794-95).

Following her identification of Carter’s car at the scene as the same car she had earlier seen flee the area, Mrs. Valentine went to police headquarters to give a statement. There she was taken by Detective LaConte to the adjacent police garage to

observe the Carter car, which had by then been taken there. She again identified the car as the getaway vehicle to Detective LaConte and later gave a written statement as to that identification (15aA 3384-86; 24aA 5234-36). This was confirmed by the testimony of Detective LaConte (23aA 5065-67, 5100).

The second witness who identified the Carter vehicle as the one which sped from the crime scene was Alfred Bello.

Mr. Bello was in the vicinity of the Lafayette Bar and Grill at the time of the shootings because he and two others, Arthur Dexter Bradley and Kenneth Kellogg, were attempting to effect a break and entry at the Ace Sheet Metal Company located at the other end of the block (19aA 4292-94).

While Bello was acting as lookout at the corner of Lafayette and East 16th Streets, he observed a new white car, highly polished, with two black males seated in the front moving along East 16th Street toward Franklin Street, the next street parallel to Lafayette Street. Shortly after that, the same car came slowly down Lafayette Street from the direction of East 18th Street and turned on East 16th, again going toward Franklin Street, in effect circling the block. Two black males were seated in the car, the one on the passenger side having what appeared to be a weapon or pipe between his legs (19aA 4294-97).

A little later, Bello started walking up Lafayette Street toward the Lafayette Bar and Grill to get cigarettes, and as he was approaching the bar he heard a few shots. He stopped, lit his last remaining cigarette, and thought the noises might have been drums coming from a band in the bar. As he proceeded further, he heard a volley of shots (19aA 4298-4309).

As he got toward the rear of the building, he saw two black males come from the bar. Alfred Bello noticed that the shorter, who was closer to the building, was swinging

a shotgun, the one closer to the cars had a pistol. “They were laughing and talking loud” (19aA 4300-02).

At that point, Bello turned and ran down the street. He had approached to within 10 to 14 feet of the men before he turned and ran. Ballistics evidence suggests the likelihood that at this point both weapons had been emptied of their ammunition. As will be indicated hereafter, the ballistics expert testified that the handgun used was in all probability a seven shot “Arminius” revolver of a German manufacturer. Seven shots were fired from the handgun inside the bar and two rounds had been fired from the shotgun.

At trial, Bello identified defendant Rubin Carter as the man he had seen with the shotgun and defendant John Artis as the man with the pistol, describing Carter as wearing a light or white jacket, which was open, with a black vest and black pants, and with a goatee. The defendant John Artis was described as taller, well-dressed, with “darker, dark or brown clothing.” One of them was wearing a hat although he could not recall which (19aA 4302-06).

Bello stated that while he was walking toward the Lafayette Grill he saw the same white car he had earlier seen, circling the block, now parked “out away” three or four feet, facing toward East 16th Street (19aA 4306-07). After he turned and ran down the street, Bello went into an alleyway. He heard the screeching of a car, came to the front of the alleyway and observed the same car he had been seeing and which had been parked near the bar come past. As it came by, it slowed down when the brakes were applied, and the back of the car “lit up” (19aA 4307-08).

Bello testified that he saw that the license plate was out-of-state, New York or Pennsylvania, being orange and blue, and that the back of the car had a “funny geometric design,” sort of wide like a triangle, and it tapered in, and it was shorter on the end part, and both ends of it lit up when it hit its light.” The car itself was white, highly polished, brand new (19aA 4309).

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.” (9aA 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

* Erroneously spelled Capter throughout the trial transcript.

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-

state plate and taillights that looked like butterflies when they lit up. Capter testified that upon hearing this description, “I looked at my partner and he looked at me and we took off looking for the car again.” (30aA 6541-42).

Capter shortly thereafter spotted the same car, this time at Broadway and East 18th Street, pulled the car over, waited for another police car, and then escorted the Carter vehicle back to the Lafayette Grill (30aA 6542-43). When they returned, Capter saw Alfred Bello standing near the side of the street, called him over and asked him to look at the car, at which time, Bello said “that’s the car.” At that point, the two occupants, Rubin Carter and John Artis, were taken out of the car and “put up against the wall over there” (30aA 6551-52). The car was then driven to police headquarters by a police officer (30aA 6553).

On cross-examination, Capter testified that the only reason he had brought the Carter vehicle to the Lafayette Grill was because of the description which had been given him by Bello (30aA 6581), which conformed to the car they had stopped at 2:40 a.m. (30aA 6590) and added that Bello identified the car when it was brought back (30aA 6588).

The State also produced testimony at the 1976 trial of Detective Lieutenant Aloysius Lynch, who had testified at the first trial of the defendants but had subsequently died, through having that testimony read into the record (34aA 7765-66).

Lieutenant Lynch who was the officer in charge of the crime scene, had testified that after speaking to Officer Greenough, he had the latter radio out the description which Greenough had received. He also spoke to Alfred Bello and was present when the white car bearing defendants Carter and Artis was returned to the scene by Sergeant Capter and other officers (34aA 7769-70).

Lieutenant Lynch’s testimony was that when the Carter vehicle was brought to the Lafayette Grill, Mrs. Valentine was brought over to the rear of the car by Officer

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 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; 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 came 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 definitely 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 (1aF99-178). 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 definitely 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.

2. THE SHOTGUN SHELL AND BULLET

Aside from the identification of the 1966 Dodge Polara leased by Rubin Carter as the vehicle seen leaving the murder scene with two murderers, additional evidence linking that car to the crime was found in the car itself. This consisted of a shotgun shell and a revolver bullet, each respectively matching the caliber of the weapons used to shoot the four people inside the Lafayette Grill.

The validity of this evidence is well supported by the record. From the way the jury conducted its deliberations there is nothing to suggest that the jury found this evidence subject to question. The district court concluded otherwise. Each of the two prongs of the court's opinion is expressly based on the determination that, on the evidence, the jury was confronted with a close case. The district court opinion states:

Meanwhile, the police searched the car in which they later alleged that they found a live 12-gauge shotgun shell in the trunk and a live .32 caliber shell on the floor of the front seat. There was considerable dispute about this evidence. (1aD 5).

The district court determined that this is another area of evidence that is weak ("frayed") (1aD 54). The record suggests just the opposite.

After the Carter vehicle was separately identified at the scene by both Patricia Graham Valentine and Alfred Bello as the car they had a half hour earlier seen flee the area, suspects Rubin Carter and John Artis on the order of Lieutenant Lynch were transported to police headquarters by patrol wagon and Carter's car was driven to the police garage at headquarters by Officer Edward McSheffrey.

Officer McSheffrey, who died prior to the 1976 trial, had testified at the first trial, and his testimony from that trial was read into the record (34aA 7793-7807). In his testimony, McSheffrey identified a photograph of Carter's car as depicting the car he had been directed by Lieutenant Lynch to drive from the Lafayette Grill to police

headquarters. He drove the car into the police garage, located on the first floor of police headquarters, closed the windows, locked the doors and took the keys upstairs to the detective bureau, and gave them to Detective Emil DiRobbio (34aA 7794-97).

Detective DiRobbio, at the time of the Lafayette Grill shootings, was a 12 year veteran of the Paterson Police Department and was at headquarters when the notification of the shootings was received at 2:34 a.m. (35aA 7970-71). He then caused Lieutenant Lynch and other detectives to be notified to respond to the scene, while he remained at headquarters (35aA 7971).

Later, he received instructions from Lieutenant Lynch at the scene to search a white Dodge car which was being driven to the headquarters garage. When the keys were brought to him by Patrolman McSheffrey, Detective DiRobbio went down to the garage to search the vehicle (35aA 7971-73).

Detective DiRobbio testified that he unlocked the trunk, removed some boxing equipment that was there and underneath found a 12-gauge “Western” shotgun shell. He then checked the front of the car and alongside the front seat on the floor, he recovered a .32 caliber S&W long bullet (35aA 7974, 75, 77). Detective DiRobbio at the 1976 trial identified Exhibit S-117, which had inscribed upon it his initials and the date of June 17, 1966, as the shotgun shell he had found in the trunk of Carter’s car, and Exhibit S-118 as the .32 caliber S & W long bullet he had found on the floor of the car (35aA 7980-82). Both the bullet and shell were “live,” or unexpended rounds (35aA 7984).

During his testimony, Detective DiRobbio stated that at the time he was searching the car, he saw Paul Alberta, a reporter for the Passaic Herald News, inside the police garage near the door and had a brief conversation with him. As he was leaving the garage, Detective DiRobbio also met Detective Donald LaConte who was with a woman (Patricia Graham Valentine, had a brief conversation with LaConte and showed him the shotgun shell and bullet he had recovered from the car. (35aA 7977-78).

Detective DiRobbio then proceeded to the third floor to the detective bureau, and showed the shotgun shell and bullet to Rubin Carter, who was there (35aA 7978-79). This was sometime after 4:00 a.m., the search of the car having taken place around 3:45 a.m. (35aA 8056).

Detective DiRobbio testified that he entered the shotgun shell and bullet into the Detectives' Property Book, under Tag No. 23887, on the morning of June 17, 1966, prepared a report that morning and, subsequently, the shell and bullet were turned over to the property clerk, whose book noted an entry for June 22, 1966 (35aA 7985-88).

Paul Alberta testified at the retrial, recounting that at the time of the Lafayette Grill murders he lived only five blocks away from the scene and responded there rapidly in his capacity as a reporter for The Herald News, arriving about 2:40 or 2:45 a.m., and prior to the Carter vehicle being brought to the scene (35aA 8117-20). He stayed there 20 to 30 minutes then went to an all-night diner where he got a half dozen containers of coffee and buns, and went to the Paterson Detective Bureau to cover the story (35aA 8119-23).

Later, "little before or after 4:00 a.m.," he was on the first floor of headquarters, saw that the door to the garage was open and recognized the white car which he had earlier observed at the scene. It appeared to him that someone was searching the car, so he went over and watched (35aA 8123-24). He recalled vividly the search of the trunk, seeing boxing equipment being placed on the floor, and recognized Detective DiRobbio. He saw the detective look down, exclaim, "Holy cow, look what I found," and bring up his hand which disclosed a shotgun shell (35aA 8124-25).

Mr. Alberta further testified that he also saw Detective DiRobbio find a small caliber bullet in the passenger compartment of the car (35aA 8160-62).

Patricia Valentine testified that she likewise had seen Detective DiRobbio in the police garage on the morning of June 17, 1966, with a bullet and a shotgun shell in his hand. After having identified Carter's car at the scene as the getaway vehicle, Mrs. Valentine had gone to police headquarters to give a statement. There, Detective LaConte took her to the police garage to identify the car, which by that time was parked there, and which she again identified, later giving a statement to that effect (15aA 3384-86; 24aA 5234-36).

Mrs. Valentine testified that as she and Detective LaConte were going into the garage, Detective DiRobbio was coming out, that there was a conversation between the two detectives, at which time, she saw the bullet and shell (15aA 5304-05; 16aA 3470). She reiterated this testimony later in the trial (34aA 7759-62; 7765-67). Her memory regarding the incident, concerning which she had not testified during the 1967 trial, as she had not been questioned on the subject, was revived by an article which she had read in the newspaper in 1974 or 1975 concerning the logging of the bullets (15aA 3259-60).

Detective DiRobbio's testimony was likewise corroborated by Detective Donald LaConte.

Detective LaConte testified that on the morning in question, he was taking Patricia Graham Valentine to look at the white 1966 Dodge, which had been taken to the police garage, and met Detective DiRobbio near the elevator, the latter holding out his hand to disclose a shotgun shell and a live bullet (23aA 5064-66).

Chief Vincent DeSimone testified at the retrial that on the morning of June 17, 1966 he had gone to Paterson Police Headquarters and there questioned defendants Rubin Carter and John Artis and took in his own handwriting a resume of their account as to their respective whereabouts during the hours preceding their being taken into custody at approximately 3:00 a.m. (32aA 7038-59).

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,

James Oliver, conformed to the type of discharged shotgun shell which was found by the police at the foot of the bar in the Lafayette Grill following the shootings (36aA 8268-69; 8271-73). Wadding is a portion of the contents which would be found inside a live shotgun shell. Detective Lintott testified further that the wadding which was recovered from the wall behind where Hazel Tanis had been shot, was an H-Wad with filler-wads, as opposed to a one piece power piston-wad (36aA 8273-74). Consequently, two different kinds of 12-gauge shotgun ammunition had been fired inside the bar.

Lintott added that although the waddings from the respective shotgun shells used to shoot James Oliver and Hazel Tanis were each from a 12-gauge shotgun shell, and both could be fired from the same shotgun and might have the same size pellet, the shotgun shells and wads from inside of the bar were dissimilar (36aA 8274-75). The witness further testified that he had examined the live 12-gauge shotgun shell that Detective DiRobbio testified he found in the trunk of Carter's car and that it could be fired from the identical weapon which was used to fire the two shotgun shells expended in the Lafayette Grill (36aA 8278-80).

As with the identification of the Carter car as that used to carry the murderers from the crime scene, the testimony concerning the recovery of the shell and bullet from that car was convincing and corroborated. It constituted very significant evidence demonstrating the guilt of the defendants.

Detective DiRobbio's testimony as to finding the two incriminating items was clear and direct and was supported by that of three other witnesses who were present at the time. In addition, the testimony was that both Detective DiRobbio and Lieutenant DeSimone had shown the recovered shell and bullet to the defendant Carter that morning.

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 vouch for 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.

* 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).

The bullet and shell found in the Carter car were the kind of ammunition which could be used in the murder weapons. The district court points out the defense argument that the make of the ammunition from the car is somewhat different than that found in the bar. This argument is meaningless because the ballistics evidence showed that the ammunition found in the bar was not itself similar. Two different makes for 12-gauge shotgun ammunition were used inside the bar. The defense argument, recited by the district court, that the ammunition came from the Holloway murder is further disproven by the fact that no handgun ammunition was involved in the Holloway murder. The only weapon used in that killing was a shotgun.

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. Numerous witnesses testified to seeing the bullet and the 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. In order for the jury to reject the evidence of the bullet and shell, they would have to disbelieve Detective DiRobbio. They would have to disbelieve Reporter Paul Alberta. They would have to disbelieve Mrs. Valentine and Detective Donald LaConte. They would have to disbelieve Chief DeSimone. As with the evidence relating to the identification of the car, the district court's determination that the evidence regarding the bullet and shell is weak, is based upon credibility assessments and theorizing by the court contrary to what the jury believed at the trial and contrary to what a reasonable reading of the record shows.

3. MOVEMENTS OF THE DEFENDANTS AT THE TIME OF THE MURDERS

Highly significant evidence of the defendants' complicity in the Lafayette Grill murders was shown by the fact that the defendants were found operating the same car

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.

Based upon evidence concerning the sightings of the fleeing car and the locations of the sighting of the Carter car, taken with reference to the murder scene, the Nite Spot Bar, the house of Eddie Rawls, and petitioner Carter's house, the prosecution was able to offer a theory well-founded on the evidence and consistent with the defendants' involvement as to why they were at those locations at the times noted.

The Lafayette Grill is situated on the corner of Lafayette Street and East 18th Street in Paterson. The only sighting of the white car before the shootings was contained in the testimony of Alfred Bello who said he saw the car occupied by two black males, circling the block prior to the shootings, supra, p.15. According to the testimony of Alfred Bello, Patricia Valentine and Ronald Ruggerio, immediately after the shootings the car was on Lafayette Street facing East 16th Street, supra. These witnesses testified that the car departed the scene by traveling on Lafayette Street toward East 16th Street, the next intersecting street. None of these witnesses knew whether the car continued on Lafayette or turned off at East 16th Street.

The first telephone notification which was received by the police as to the shooting was recorded at 2:34 a.m. on June 17, 1966 (30aA 6465; 33aA 7414; 35aA 7971). Since the telephone call made by Patricia Valentine to the police was some three to five minutes after she saw the killers' car drive from the scene, that would indicate that the car departed at about 2:30 a.m. or a minute before that (15aA 3378; 16aA 3422).

One of the police cars which responded to the initial police radio alert at 2:34 a.m. was occupied by Officers John Nativo and Robert Tanis. Upon hearing the alert, they turned their car around in order to go east on Broadway to reach East 18th Street, which is the street the Lafayette Grill was located on (40aA 9221-24).

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 Nite Spot

Tavern was located on the corner of Governor Street and East 18th Street. The activities of the defendants in the hours and minutes just prior to the murders repeatedly placed them at the Nite Spot.

There was testimony offered at the trial that Edward Rawls, the bartender at the Nite Spot, was friendly with both the defendant Carter and the defendant Artis. Carter was a regular patron of the Nite Spot and was considered somewhat of a celebrity there. Carter had a special corner reserved there known as “The Champ’s Corner” (39aA 9094-99). The defendant Carter was a professional boxer.

During the hours following the murder of Mr. Holloway and before the shootings at the Lafayette Grill, Eddie Rawls and the defendant Carter were together on different occasions (36aA 8343; 8370-72).

The relationship among Rawls, Carter and Artis as well as the circumstances relating to the murder of Mr. Holloway were developed at the 1976 trial as part of the State’s theory that the Lafayette Grill shootings were motivated as a revenge action in retaliation for the Holloway murder. This will be discussed further hereafter.

Evidence and inferences drawn therefrom bearing upon the movement of the perpetrators following the crime and the possible involvement of Eddie Rawls would, therefore, be relevant and probative to the jury’s consideration.

The jury heard testimony by Elwood Tuck, who, at the time of the Lafayette Grill murders, had been the defendant Rubin Carter’s personal advisor and chief second. Elwood Tuck was also the manager of the Nite Spot (39aA 9048-49). Mr. Tuck testified that on the night in question, defendant Rubin Carter “had been in and out of the bar,” and that “the last time that I recall seeing him was when I was closing my back room” (39aA 9053-54). This testimony was significant because Mr. Tuck testified that he closed the “back room” of his establishment at 2:30 a.m. “bar time” which was 15 minutes ahead of actual time, which would be 2:15 a.m. (39aA 9054-55). 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).

Sergeant Capter, having observed the out-of-state plates attempted to head off the white car before it could leave the city, by traveling across 12th Avenue to 10th Avenue and then down 10th Avenue to the vicinity of the Route 4 bridge, briefly searching the area with negative results. Returning into Paterson and traveling toward the crime scene via Broadway, he observed a white car crossing Broadway on 28th Street. The officers stopped the white car two blocks south of there (30aA 6535-37).

This was at 2:40 a.m., which was some ten minutes after the white car matching the description of the Carter car, and positively identified as such by witnesses, Patricia Valentine and Alfred Bello, fled the Lafayette Grill; some six minutes after the initial police alert; and some five minutes after Capter and DeChellis had seen a white car with foreign plates cross in front of them heading easterly on 12th Avenue (30aA 6537-38; 6567-68).

Upon stopping the car, Sergeant Capter recognized the defendant Carter in the back seat, wearing a white sport jacket with brown pencil stripes, a red vest and a “straw hat” with a brim (30aA 6538-39). Capter was advised by one of the occupants that they were on their way to Carter’s house to get more “bread.” Capter in turn advised the driver, John Artis, that 28th Street on which they were, was not a through street to 20th Avenue, where the defendant Carter resided (30aA 6539-40; 6553-54).

Capter testified that the distance between the point where he saw the speeding white car with foreign plates at 12th Avenue and 24th Street, and where six minutes later he saw Carter’s car on 28th Street at Broadway, was about five blocks (30aA 6568). Sergeant Capter testified that the two cars he had seen six minutes apart “looked the same.” He did not obtain the plate number of the car that was speeding down 12th Avenue and could not testify that it was the exact same car other than it “looked the same” (30aA 6574).

At the 1976 trial, the State offered evidence to explain the reason why the defendant Carter's white car with the foreign plates would be speeding east on 12th Avenue at 24th Street at 2:35 a.m., as testified to by Sergeant Capter and why the same car, some five or six minutes later would be moving at a normal rate of speed on 28th Street at Broadway only five blocks away.

The prosecution offered testimony that Eddie Rawls lived at the corner of 12th Avenue and East 28th Street. Detective LaConte testified that in the early investigation of the case, he had visited that residence which had a long driveway leading from 12th Avenue to the secluded entrance of Rawls' quarters (23aA 5069-72).

When Officers Capter and DeChellis first saw the white car, it was speeding down 12th Avenue towards East 28th Street. When they next saw the car, it was traveling at a normal speed on East 28th Street away from 12th Avenue. If lines are drawn in the direction the car was going on 12th Avenue and the direction it was coming from on East 28th Street, the lines intersect at Edward Rawls' house on the corner of 12th Avenue and East 28th Street. Edward Rawls connects with the defendants Carter and Artis.

There was compelling circumstantial evidence before the jury to support the prosecution's argument that the murderer's car stopped at Edward Rawls' house to permit them to unload the weapons and, to affect whatever clothing changes they wished. This explains why the car was speeding on 12th Avenue and traveling at a normal speed on East 28th Street. The brief stop at Rawls' house accounts for the time interval of five to six minutes between Officer Capter's first sighting on 12th Avenue and the stop on East 28th Street.

Furthermore, Sergeant Capter testified that when the white car passed in front of him on 12th Avenue, it was followed by a black car (30aA 6533-34). Officer Nativo could not recall whether the white car he had seen turn quickly onto 12th Avenue was

followed by a second car (40aA 9240). The black car was not present on East 28th Street. Elwood Tuck, the Nite Spot's manager's recollection was that Edward Rawls owned a black car (39aA 9094). The district court in support of its position that the jury had a close case and that this area of the evidence is also frayed dealt with this part of the case in the same way it dealt with all the evidence against the defendants. The court did not say why it felt the evidence was weak, but again recited some defense argument against the evidence. The following is the sum total of the district court's retort to this part of the evidence:

Petitioners point out that the policemen who stopped his [Carter] car could not identify it as the one they chased out of town (30aA 6572-73). Another police officer testified that he saw the Carter car and asked both headquarters and the officer at the crime scene whether they wanted the car stopped, and he was told no both times (31aA 6896-98). The 1967 trial testimony of the officer in charge of the crime scene made no mention of a detailed description of the getaway car or an identification of Carter's car by Bello (1aD 58-59).

This statement by the court seems non-responsive, unsubstantial and consistent with the district court's approach of ignoring the great weight of the record in favor of the specks suggested by the defense. It should be noted that Officer Capter did not chase the white car out of town. The record does not suggest that the car drove out of town. When Capter reached Route 4 which leads to New York City, he could see a substantial distance ahead of him and did not see the white car driving to New York, supra.

Furthermore, while it is true that the police officer (Sergeant Capter) who stopped Carter's distinctive-looking car could not say positively that it was the same car that passed in front of him minutes before since he did not have the benefit of a plate number or serial number, nevertheless he did say "it looked the same," supra. In its

opinion, the district court totally ignored this. Respondents contend that in the context of the totality of the record, it is fair and reasonable to conclude it was the same car. It is unreasonable to conclude Sergeant Capter saw two cars in the same area of Paterson at that time of the morning that looked the same (distinctive taillights, brand new, highly polished, blue and gold color plates, etc.) In addition, the defense essentially admitted that it was the Carter car which Capter saw traveling on 12th Avenue. The defendant Artis testified that he and the defendant Carter traveled down 12th Avenue in the Carter car going in the same direction as the car Sergeant Capter saw at about the same time Officer Capter made his first observations of the car. The defendant Artis testified that just prior to being stopped (by Sergeant Capter) he had driven the defendant Carter's car down 12th Avenue and turned onto East 28th Street (42aA 9973). It is ridiculous to suggest that in light of the total picture of the evidence, the jury could entertain any thought that two white cars looking like this car could have traveled down 12th Avenue within a minute or two of one another.

On this point, the district court again refers to the 1967 trial testimony of the officer in charge of the scene, which testimony did not contain a detailed description of the car or a reference to Alfred Bello's identification of the car at the scene (1aD 55). The court seems to avoid the reality of the evidence on this point. As was delineated at length earlier, the testimony of numerous credible witnesses and the documents recorded at the time, attest to the fact that the car was well described before it was returned to the scene and was identified by the witnesses at the scene.

4. SEARCH FOR GUNS

Very significant evidence was presented to the jury regarding a "search for guns." There is no dispute in the evidence that at the time of the murders, defendant Carter had owned certain guns, including a 12-gauge shotgun. These guns had been

missing for about a year. While these guns had been missing all that time, the evidence showed that the defendant Carter was searching for his guns, for the first time, in the space of the few hours from the time that Mr. Carter met Edward Rawls and learned of his father's murder and the time of the Lafayette Grill murders. The prosecution argued that this information presented the jury with very relevant and highly probative evidence as to the guilt of the defendant Carter. Certainly the defendant Carter's efforts to locate long-missing guns at this particular time would seem to constitute very incriminating evidence, particularly when considered together with all the other evidence in the case.

The jury at the second trial was read the testimony of defendant Rubin Carter given before a Grand Jury preliminarily looking into the matter on June 29, 1966, less than two weeks after the event. This Grand Jury was simply recording information. No complaint had been filed against anyone. There was no target of the Grand Jury (36A 8339-74).

In that testimony, defendant Carter indicated that the weapons, including two or three .22 caliber rifles and a 12-gauge pump shotgun, had been stolen from his training camp many months before. Carter had for a considerable time intended to confront Neil Morrison concerning information he had from a witness, Annabelle Chandler, who had seen Mr. Morrison with the guns. Carter testified he had intended to take Morrison to see that witness. On the evening of June 16, 1966, Carter met Neil Morrison at the Nite Spot and confronted him with this information (36A 8339-42).

At the time, Carter was with Neil Morrison, Merritt Wimberly and Jerry Reeves, in a car outside the Nite Spot. At about 11:00 p.m., they saw Eddie Rawls and heard about his father being shot. Rawls had just returned from the hospital, and Carter and the others gave him their condolences according to Carter's testimony (36A 8343-45).

Rawls then went into the bar, while Carter and the other three men drove to the Christopher Columbus Housing Project to the home of Annabelle Chandler in an effort to track down his missing guns (36aA 8345-49).

The district court states (1aD 24) that, “the ‘search’ [for Carter’s guns] may have occurred even before petitioners knew of the shooting of James Oliver (36T 140-145).” (Emphasis added). This statement by the district court apparently contains a typographical error. The court must have intended to say that the search may have occurred even before the petitioners learned of the death of Leroy Holloway who was Eddie Rawls’ stepfather. James Oliver was the bartender at the Lafayette Grill. However, this statement by the court with the citation (36T 140-145) given by the court makes no sense because that citation refers to the testimony which the appellants have outlined in the four paragraphs preceding this one. The citation given by the district court refers to Rubin Carter’s testimony before the Grand Jury which was read at the trial (36aA 8339-74). In that testimony, the defendant Carter said that after he spoke with Eddie Rawls at the Nite Spot about the death of his father and after he offered Eddie Rawls his condolences, then he (Carter) became involved in the search for his guns (36aA 8343-49). The reference to the record cited by the district court does not support what the court says is shown there. In fact, the record shows just the opposite. The record shows that the defendant Carter said he became involved in the search for his guns after he learned of Mr. Holloway’s death.

This area of the record was specifically brought to the attention of the district court. The district court’s reference citation to the record to support its statement that the search for guns may have occurred before the petitioners knew of Mr. Holloway’s death is stated by the court as (36T 140-145). Page 140 of volume 36 of the trial transcripts is missing from the appellant’s set of trial transcripts. However, at that place (page 140) in the transcript, the prosecution was in the process of reading to the

trial jury, the Grand Jury testimony of Rubin Carter. By comparing the transcript of Mr. Carter's Grand Jury testimony with the trial transcript, it readily can be determined what testimony was read to the trial jury on page 140. By examining where the reading of the Grand Jury testimony ended on the bottom of page 139 and where it began on the top of page 141, it can determined what testimony was read on page 140.

The appellants specifically submitted to the district court the pages of Rubin Carter's Grand Jury testimony which correspond to the testimony read to the jury on page 140. This transcript was enclosed with a letter to the district court from the First Assistant Prosecutor John P. Goceljak dated October 1, 1985. That letter and the relevant transcript has been included in the appendix as (1aD 335-345). The contents of page 140 of volume 36 of the trial transcript appear on page 150 of the Grand Jury transcript as indicated there.

On page 140, Rubin Carter momentarily says he and Mr. Morrison drove off from the Nite Spot without getting out of the car. However, he immediately takes that back and says that he (Carter) got out of the car, spoke to Eddie Rawls about his father's death and then drove off to search for his guns. The pages of the testimony which follow do not support the district court's statement that "the search for guns may have occurred before the petitioners learned of Mr. Holloway's death." This testimony cannot be made to read that way short of distorting what is clearly stated there.

According to Carter's Grand Jury testimony, he took Mr. Morrison to Miss Chandler's apartment "for her to tell him that she seen my guns because she had described my guns to me." However, Carter alleged that the woman at the time was ill with cancer and reluctant to confront Mr. Morrison with the information she had, so he (Carter) dropped the matter. They then returned to the Nite Spot, arriving there after midnight (36aA 8349-51).

This trip to Annabelle Chandler's apartment for the purpose of ascertaining whether Morrison had knowledge of the whereabouts of Carter's long-missing guns, was verified by the testimony of George Andrews, a neighbor and a friend of Annabelle Chandler at the time. George Andrews testified that he had seen Carter, Morrison and Wimberly leaving the apartment that night. His recollection was that this had been between 9:30 to 10:30 p.m. (39aA 8968-71).

Merritt Wimberly, who like George Andrews was a defense witness at the retrial, testified that his recollection was that after a conversation had begun between Rubin Carter and Neil Morrison about whether the latter had stolen guns from Carter, Rubin Carter, Morrison, Reeves and himself had gone to see Annabelle Chandler about 11:30 p.m. that night in Morrison's car. They returned to the Nite Spot about 12:30 a.m. (39aA 8904-09).

In his Grand Jury testimony, as read to the jury in the retrial, defendant Carter testified that after he returned to the Nite Spot there were conversations there concerning the murder of Leroy Holloway, and "It was all around that there was going to be some shaking going on." At the time Eddie Rawls was at the Nite Spot with his brother (36aA 8352-57).

Carter further testified that he met Eddie Rawls again at Richie's Hideaway at about 1:20 a.m. (36aA 8370-72).

Was this evidence regarding the defendant Carter's search for his guns "frayed"? The district court doesn't say that it was and it doesn't say that it wasn't. It avoids any such evaluation. The district court states that the search for guns does not constitute evidence of motive (1aD 23-24) and then when the court goes on to itemize and present each area of the State's evidence which the court says is weak ("frayed"), it simply does not include any mention of the area of the evidence that deals with the defendant Carter's search for his guns.

The only response to this evidence from the district court is contained in its discussion of the relevance of the search for the guns to the question of motive. The court states:

...links of this evidentiary chain are corroded.
There was no evidence that Carter found the
weapons (1aD 23).

The fact that there was no definitive evidence to show that Carter found his lost guns or located other weapons, does not in the slightest detract from the value of the evidence that he was searching for long-missing guns under all these surrounding circumstances. It is not reasonable to expect that there will ever be a criminal case in which the prosecution can account for every step, every act, every thought undertaken by the defendant during the time leading up to the commission of the crime. This is particularly true in murder cases. The fact that in every criminal case, the prosecution cannot present a universal accounting of the defendant's thoughts and acts just prior to the crime, does not of itself constitute a valid basis to assail that information about the defendant's activity which has been discovered and can be submitted in evidence.

In the long space of time that the defendant Carter's guns were missing and in the long period of time that Carter knew about Neil Morrison's connection with those guns, there was no evidence before the jury that Carter made any effort toward reclaiming the guns until after he learned of Mr. Holloway's murder and before the Lafayette Grill murders. The record regarding this evidence cannot be fairly and reasonably construed in any way other than that the jury had to have considered this compelling and probative evidence of guilt.

5. THE STATEMENTS OF THE DEFENDANTS

The jury had before it the oral statements given later on the morning of the shootings to then Lieutenant Vincent DeSimone, by the defendants John Artis and Rubin Carter, respectively.

In his statement, as recorded in the notes of Lieutenant DeSimone and read to the jury, the defendant Artis said that he had met Carter shortly after 10:30 p.m. on the evening before, accompanied him to the LaPetite Tavern where Carter spoke to his manager for about an hour and a half, then went to the Nite Spot at 11:30 p.m. (32aA 7044-47).

According to that statement, Artis and Carter stayed at the Nite Spot until the bar closed, which was at 3:00 a.m., and Carter did not leave the Nite Spot while they were there. (32aA 7047-49).

The defendant Carter's oral statement of his whereabouts given the same morning, contained a number of inconsistencies with the account given by the defendant Artis. Carter stated that he had initially gone to the Nite Spot at 10:00 p.m., stayed about 20 or 30 minutes and then went to the Club LaPetite where he spoke to his manager, Nathan Sermond. He talked to him about 45 minutes, left there alone and returned to the Nite Spot, where he met Eddie Rawls (32aA 7054-56). The defendant Artis had said he was with the defendant Carter at the LaPetite Tavern.

The defendant Carter's statement continued that he, Eddie Rawls, Artis and another man then went to Richie's Hideaway, a tavern located in another section of the city, this being sometime around midnight or thereafter. According to Carter, he left there with Artis and was ultimately stopped by the police and brought to police headquarters. The defendant Artis in his statement maintained that they never left the Nite Spot.

Aside from the fact that what each defendant said was inconsistent, what is also significant is what they did not say. The defendant Carter's account of his whereabouts began with his eating dinner at 5:00 p.m. on June 16, 1966 and continued to 3:00 a.m. of June 17, 1966 without any mention of his efforts and travelings in search of his long

missing guns, supra. It cannot reasonably be suggested that the defendant Carter simply forgot to mention the search for his guns because Carter did mention the names of the people who were with him in the course of his efforts to find his guns. The defendant Carter told Lieutenant DeSimone of his (Carter's) being at the Nite Spot with Jerry Reeves, Merritt Wimberly and Neil Morrison.

Two police units, that of Officers Nativo and Tanis and that of Sergeant Capter and Officer DeChellis saw the murderers' car traveling down 12th Avenue, supra. In their oral statements both Carter and Artis omitted any mention of being on 12th Avenue. At the second trial, the defendant Artis' testimony put him in Carter's car on 12th Avenue at about the time the police units made their observations (42aA 9973).

John Artis told Lieutenant DeSimone that he and Rubin Carter left the Nite Spot at closing, which was 3:00 a.m. Mr. Artis stated that he and Rubin Carter then went to an eating establishment known as Graddy's where he, Artis, ordered two chopped barbecue sandwiches and coleslaw, and that the bill was \$1.35 which he paid for by borrowing a \$1.50 from the defendant Carter. Defendant Carter's statement made no mention of being at Graddy's.

With regard to this area of the evidence, the district court reached the same factual conclusion that the evidence was "frayed" (1aD 54). The court presents the following paragraph as the 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 (32aA 7089, 7140) and that the detective who interrogated them conceded destroying his original notes after reducing them to typewritten form (32aA 7095-96). 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 (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 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 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 to sever the case against the defendant Carter from the trial then in progress.

Furthermore, at the pre-trial conference on October 8, 1976, the prosecution itself raised the severance issue. Prosecutor Burrell Ives Humphreys made a detailed presentation 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 one of the defendants (14aB 1611-15). The defense did not seek a severance.

In the context in which it is presented, the district court's statement that the New Jersey Supreme Court criticized the admissibility of the oral statements 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. Why didn't the district court point this out? Furthermore, since the criticism concerned a Bruton issue which was not involved in the second trial, why did the district court even bother to mention this criticism, except that on its face, but not in fact, it seems to support the court's contention that this evidence is frayed?

These statements had significant probative value. The defendants gave inconsistent accounts of their whereabouts just the evening before. The defendant Artis said that he was at the Club LaPetite with the defendant Carter. The defendant Carter says he was there alone. The defendant Artis said that after he and Mr. Carter traveled from the Club LaPetite to the Nite Spot, they remained there till closing. The defendant Carter said that they left the Nite Spot and went to Richie's Hideaway. (There was other evidence that the defendants were at Richie's Hideaway with Eddie Rawls an hour before the murders.) The defendant Carter deliberately withheld any 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 Artis lied about his whereabouts and activities in the critical time period just before the murders. This evidence was meaningful to the jury. The district court ignored it.

In his testimony at the retrial, John Artis attempted to misrepresent his relationship and associations with the co-defendant, Rubin Carter:

Q. How long had you known Rubin Carter at that time [time of murders]?

A. A couple of weeks, a few weeks, something like that.

Q. How many times had you palled around with him?

A. Palled around with him?

Q. Yes. How many times were you with Mr. Carter prior to that day [day of Lafayette Grill murders]?

A. Two or three times. (43aA 10051).
(Emphasis added.)

The prosecution produced Evonne Seldon as a rebuttal witness. The defendant Artis had dated her sister, Alice, prior to the Lafayette Grill murders (43aA 10238). She testified that she also knew the defendant Carter prior to that time (43aA 10236). Evonne Seldon testified that prior to the Holloway killing and the Lafayette Grill shootings, she had seen Rubin Carter and John Artis together “many” times. She said that prior to the killings she had seen them “palling around together” at the Kenya Club, the Paradise Club, Club LaPetite, the Nite Spot, the Polynesian Bar, Richie’s Hideaway and other bars. She said they were “close friends” (43aA 10236-37).

This is also significant evidence that impeaches the credibility of the defendant Artis in a meaningful way and demonstrates a consciousness of guilt on his part. These areas of record, ignored by the district court, further illustrate why the jury’s deliberations readily produced convictions.

6. STRUCTURING AND SUBMITTING A FALSE ALIBI

The prosecution presented additional compelling evidence of guilt in the form of numerous witnesses who testified about the defendant Carter's systematic efforts at both trials to solicit and submit false testimony to place him away from the scene of the crime at the time of the murders.

The district court determined this area of evidence was also "frayed" (1aD 54) although the court also stated that the evidence concerning the false alibi fabricated by defendant Carter was on its face "the most damaging evidence against Carter" (1aD 60). A fair look at the record, unquestionably shows that the evidence before the jury clearly demonstrated that defendant Carter set up a false alibi to conceal his guilt. At the second trial the defendant's close friends were unwilling to again lie under oath for him and they separately admitted to having committed a crime at the first trial.

The alibi had been directed to cover the critical time period between 2:15 a.m. and 2:40 a.m. on the morning of June 17, 1966. 2:15 a.m. was the last time that Elwood Tuck, manager of the Nite Spot, had seen Carter at the bar (39aA 9053-55) and 2:40 a.m. was the time that Sergeant Capter stopped the Carter car with the defendants in it, some 15 or 16 blocks from the crime scene (30aA 6535-38, 6567-68). The shootings at the Lafayette Grill and the killers' flight therefrom had occurred in the interim.

Welton Deary, one of the former alibi witnesses, testified that he had been called as a defense witness for defendant Carter in 1967, and that he knew Carter at the time because of the places he used to "hang out." In 1967, he had testified that he was in the Nite Spot in the time period around 2:00 a.m. on the morning of June 17, 1966, when in fact that was not true. He had, however, in fact seen the defendant Carter earlier that night with Eddie Rawls at Richie's Hideaway. (27aA 5805-07, 5813).

In that 1967 testimony, Mr. Deary said that he had seen Carter at the Nite Spot with Catherine McGuire and her mother, that he had asked Carter for the loan of \$5, but that the latter had said he had to first drop the ladies off and would return. This testimony as well had been false (27aA 5807-09). He also had testified to seeing William Hartney at the Nite Spot at the time. This also was false testimony (27aA 5809-10).

Some days prior to his 1967 testimony, Mr. Deary had been asked by Neil Morrison to go to a motel in Paterson, where he spoke to Carter's attorney who, Mr. Deary stated, gave him the information to which he testified at the 1967 trial (27aA 5810-11).

On cross-examination at the retrial, Deary recalled that he had asked to borrow \$5 from Carter, but that this occurred at Richie's Hideaway where Carter was at the time with Eddie Rawls and the latter's brothers (27aA 5830-31). He testified he had been asked by Mr. Carter's defense prior to the first trial to say he had seen the defendant Carter at the Nite Spot rather than Richie's Hideaway, and to make the time approximately 2:00 to 2:30 a.m. (27aA 5838).

Anna Brown, formerly Anna Mapes, likewise testified she had given false alibi testimony on Carter's behalf in 1967. At that time, she had testified that the defendant Carter had driven her and her daughter, Catherine McGuire, from the Nite Spot to their home on Governor Street at 2:15 a.m. on the morning of June 17, 1966, and that she had been sitting on the porch after he brought them home. In 1976, she acknowledged at the retrial that this testimony was false. Carter had, in fact, driven them home at about 1:00 a.m. on another night (27aA 5872-76).

Anna Mapes Brown also testified that prior to the first trial, she and her daughter had gone with Eddie Rawls to the Thunderbird Motel in Paterson on three different occasions to see defendant Carter's attorney (27aA 5876). Mrs. Brown knew Eddie

Rawls and had previously dated him (27aA 5881-82). Rawls had asked her in 1967 to come to court to testify “to help a friend, to help a buddie” (27aA 5904).

Catherine McGuire, Anna Brown’s daughter, also testified at the 1976 retrial that in 1967 her alibi testimony was false. In that version she had stated that Rubin Carter had driven her and her mother to their home on the morning in question at 2:15 a.m., that she sat in the car a few minutes with him, that she was then seated on the porch and saw Carter pass by again in his car about 15 minutes later (28aA (a.m.) 5996-97).

Catherine McGuire admitted at the 1976 trial that the 1967 testimony in that regard was untrue and that Carter had, in fact, driven her and her mother home on another evening at 1:00 a.m., not 2:15 a.m. (28aA (a.m.) 5998-99). At the time of the 1966 incident, she had known Carter about two years and had gone out with him. (28aA (a.m.) 6000).

She added that prior to the 1967 trial, she and her mother had been taken to see Carter’s defense counsel by Eddie Rawls on a number of occasions (28aA (a.m.) 6001). When she first went to Carter’s defense counsel in 1967, she told him that she had asked Rubin to take her home at 1:00 a.m., or a little after that, and that “what happened there is the time was edged up five minutes here, ten minutes there and this is how we came to the 2:00, 2:30” (28aA (a.m.) 6025).

Catherine McGuire testified that in July 1976, with the retrial pending, she was visited at her home by the defendant Carter and another person, that she had a conversation with him and made a memorandum of the conversation for her use (28aA (a.m.) 6032-33). She testified that Rubin Carter had come to talk to her and asked her to help him and she said to him she would, but wouldn’t tell a lie. “I let him know that I wouldn’t tell lies. I said there were lots of lies going at the other trial and I wasn’t going to do that this time” (28aA (p.m.) 6066-67).

William Hardney had not been an alibi witness for the defendant Carter in 1967. At the time of the trial, Hardney was living in Washington, D.C., being wanted for non-support in New Jersey, so he did not come to be a witness although he had been asked to do so by letter from Carter's attorney (27aA 5743).

At the 1976 retrial, William Hardney testified that he had been primed as a potential witness by Rubin Carter. Mr. Hardney had been a sparring partner and close friend of the defendant Carter (27aA 5736-37). Sometime after the shooting at the Lafayette Grill on June 17, 1966, and before Carter's arrest for the murders in October of that year, Rubin Carter had spoken to Mr. Hardney at the training camp where both were training (27aA 5738-39). Mr. Hardney testified that Carter at the time asked him to say, if he were asked, that he and the defendant Carter had been sitting at a table in the Nite Spot near closing time on the morning of June 17, 1966, with other people, and Carter got up and left with two girls. Further, that he returned about ten minutes later and spoke to Mr. Hardney at the Nite Spot asking him to take a ride with him, but that Mr. Hardney had a girl with him and left for Newark (27aA 5739-40).

This story, according to Mr. Hardney, was to be used in the event someone approached him, because Carter "was innocent and needed some help." Mr. Hardney had at the time agreed to do it because he and Carter were good friends, although the story was not true since Hardney had not been at the Nite Spot, or even in Paterson, at the time (27aA 5740-43).

William Hardney added that he had received a letter from Rubin Carter in 1970 or 1971 asking whether he was still willing to help him, as he would be seeking a new trial, and that sometime in 1976 Carter had twice visited Mr. Hardney at his home in Maryland (27aA 5744-46). At that time, Hardney had gone over the "Night Spot" story with Carter, and when the latter heard it, he said, "good, stick with it" (27aA 5746).

In further testimony, Mr. Hardney said that one of the reasons he did not testify in 1967 was that he had been advised by a friend, who was a probation officer, that it would be best not to go to testify if the testimony were not true (27aA 5796). Prior to coming to testify at the retrial, Hardney had also informed his lawyer in Washington, D.C., that he had been lying about the “Night Spot” story, and his lawyer then called Carter’s present defense counsel and informed him. William Hardney then likewise told the investigators from the Prosecutor’s Office that the story was untrue (27aA 5799-5800).

The testimony of these four witnesses, detailing how the defendant Carter had attempted to cover his movements during the 25 minute time period immediately preceding and following the murders at the Lafayette Grill, by concocting a false alibi in which he purportedly had driven Catherine McGuire and her mother home and was talking to the young lady in the car while her mother sat on the porch at approximately 2:15 to 2:30 a.m., was telling evidence of the defendant Carter’s “consciousness of guilt.”

The district court’s determination that this evidence is weak can only be based on a credibility evaluation of these witnesses made without the benefit of ever having seen or heard their testimony. Furthermore, there can be no middle ground. Their evidence cannot be rejected or minimized by claiming that perhaps each of them was simply honestly mistaken in their testimony. Either they out-and-out lied at the second trial when they testified that the defendant Carter solicited and obtained from them a false alibi, or they did not. The district court’s claim that their testimony is weak can only be founded on the determination that each of these witnesses separately and deliberately falsified testimony at the second trial. In addition, the court’s determination must include the proposition that each witness somehow deliberately testified falsely in exactly the same terms as every other witness.

It would be helpful if the district court stated why it concluded the evidence is “frayed.” Instead the court recites the defense arguments against the evidence which the jury obviously rejected and which never had been found worthy of merit by any of the many state court judges who have reviewed this case (1aD 62-63). The district court recites the defense position that the lives of the original alibi witness changed between the first and second trials (1aD 62). The clear implications suggested by the district court is that this somehow accounts for their testimony at the second trial. The court opinion seems to shape a rendition and evaluation of the record that will support its conclusion while discounting the damaging testimony as to defendant Carter’s role in the false alibi.

The district court states that Welton Deary who testified for the defendant Carter at the first trial had become a housing authority police officer at the time of the second trial (1aD 62). How does Mr. Deary’s employment account for the claim that his testimony at the second trial was a total lie? At the second trial, Welton Deary admitted that he had committed a crime when he testified at the first trial. This can’t be thought to enhance his position as a housing authority officer. However, the admission (the statute of limitations had run) would seem preferable to committing perjury anew. Since he was a law enforcement officer, why would this witness otherwise admit to the commission of a crime. The fact that Mr. Deary had become a housing authority officer defeats more than supports the district court’s implied position. Does not the district court’s position adopt the assumption that by reason of the fact alone that this witness had become a law enforcement officer, he would deliberately testify false about the defendant? Is not this the kind of “unarticulated assumption” which the court claims was so terrible about the State’s motive evidence?

The district court deals with the testimony of Catherine McGuire in much the same way (1aD 62). She had been a girlfriend of the defendant Carter at the time of the

first trial. She was still friendly with Rubin Carter at the time of the second trial. In fact, he sought her out to solicit a reputation of the false alibi testimony. Catherine McGuire told him that she would help him, but would not tell the lies again. The district court recites the defense claim that at the time of the second trial, she was engaged to a black Paterson policeman. The implication again being that this explains why she would testify falsely at the second trial. At the second trial she admitted she committed a crime at the first trial. How does her connection to a local police officer, by itself, suggest motivation to admit the commission of a crime? Doesn't the district court's point here also involve the same kind of "unarticulated assumption" which the court claims was so bad about the prosecution's introduction of motive evidence? Not only being a law enforcement officer (like Welton Deary), but being engaged to a law enforcement officer, is, of itself, the basis to assume the witness Catherine McGuire deliberately testified falsely and thereby gave "the most damaging evidence against Carter."

Catherine McGuire's mother, Anna Mapes Brown, also admitted at the second trial that she had tried to "help a friend" at the first trial by giving the defendant Carter a false alibi. The district court's position with regard to her carries the court's "unarticulated assumption" still one step further. The assumption here is that being the mother of a woman who is engaged to a law enforcement officer is the basis to assume that Anna Mapes Brown lied at the second trial.

Just as Welton Deary's testimony at the second trial independently confirms Catherine McGuire and Anna Mapes Brown, William Hardney's testimony at the second trial independently confirms Welton Deary, Catherine McGuire and Anna Mapes Brown. There was no evidence to suggest collusion between Welton Deary and Catherine McGuire and her mother. There was no evidence to suggest collusion between Welton Deary and Catherine McGuire and her mother. There was no evidence

to suggest collusion 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 without

coercion. At the very best from the defense view of this evidence, this presents a credibility issue. However, this is a province specially reserved for the jury that heard the live evidence and, if anything, an objective view of the record clearly resolves the credibility issue in favor of the witnesses for the prosecution.

In its presentation of its position that this portion of the evidence is “frayed,” the district court concludes:

Finally, petitioners point to United States v. Burse, 531 F.2d 1151 (2 Cir. 1976) to underscore the point that the jury should not have utilized disbelief of an alibi defense to lessen the state’s burden of proving guilt by a reasonable doubt. (Opinion, 63).

This statement apparently is offered by the district court as some fortification for its position that the evidence of the fabricated alibi is weak. The court’s statement is totally superfluous. It does not relate at all to the status of the evidence in the record regarding the false alibi. The Burse case deals with a trial court’s refusal to give a requested charge that evidence of a fabricated alibi does not lessen the government’s burden of proof. The State has never suggested that the evidence against the defendants in any way reduces the State’s burden of proving its case beyond a reasonable doubt.

The law of the Burse case does not apply to any issue involved in this case. The district court says that the “petitioners point to United States v. Burse.” Yet the Burse case was not cited by the petitioners in either their main brief to the district court, or in their reply brief to the district court. In all the appeals, over all the years, the defense has never raised the legal point regarding alibi evidence which is addressed by the Burse case. It has no application to this case. The only time ever that this point was mentioned was when the district court itself raised it at oral argument on the defense motion for summary judgment on July 22, 1985.

7. THE REVENGE MOTIVE

At the first trial of the defendants in 1967, the prosecution did not offer evidence of motive, and the defense at that trial had raised this absence as a failure of proof of an essential element as to the defendants' guilt. At the retrial in 1976, the prosecution argued before the trial court that the State should be allowed to introduce evidence of motive (31aA 6798-6800).

The prosecution offered to introduce evidence that the motive for the shooting of the Lafayette Grill bartender, James Oliver, was a retaliation for the similar shooting several hours earlier of Leroy Holloway, a black bar owner who was the stepfather of Eddie Rawls, a close acquaintance of both defendants. Further, that the other three persons who happened to be in the Lafayette Grill at that time were shot because they were witnesses to the event. The prosecution alerted the trial court and the defense to this at a pretrial conference (14aB 1620).

The prosecution avoided any reference to the matter of motive in its opening statement to the jury and well into the trial, until the point when the trial court ruled on the question. This came after a proffer of evidence and after argument from both sides.

Early on in the trial and well in advance of the court's ruling, the defense introduced to the jury, in no certain terms, the theory that the motive for the killings at the Lafayette Grill was to avenge the earlier killing of Mr. Holloway at the Waltz Inn.

Specific reference to the revenge motive was contained in a tape recorder interview of State witness Alfred Bello by Detective Lieutenant Vincent DeSimone and Detective Robert Mohl. The tape recording (marked Exhibit D-267 in evidence at the trial) was played for the jury who also had the benefit of a transcript of the interview. The district court's opinion states that the transcript of this interview was "offered by

the State (1aD 22, n. 5). The district court's language here seems misleading. At the trial, this tape recording and its accompanying transcript were offered to the jury by defense attorney, Myron Beldock who requested that the entire tape be played for the jury. This is clearly stated in the transcript (21aA 4661).

Mr. Beldock: We'd like to play the tape Your Honor.

Mr. Humphreys: The State has no objection. Is the whole tape going to be played?

Mr. Beldock: Yes.

The Court: Alright. Set it up right in front of the jury. There's a plug right underneath the jury box.

At a point in this interview just after Lieutenant Vincent DeSimone obtains from Alfred Bello an admission that after the murderers fled the scene, Bello took money out of the bar cash register, the following conversation occurs with regard to the motive for the murders:

DeSimone: Alright. You're telling me the truth now an you're, you're, you're telling me this information. Now let me say this to you Al—and this is important, I firmly believe that these men went in there simply for the reason of revenge because there had been a shooting earlier. [The earlier shooting referred to here was explained to the jury by the defense in the course of its cross-examination of subsequent witness, Detective Donald LaConte]. Alright. Now listen to me Al, listen carefully. I firmly believe that these men didn't go anywhere near the cash register, because they had no thoughts, they just wanted to get even. (Emphasis added).

Bello: Yeah.

DeSimone: You understand what I mean now therefore, it's my belief, I may be wrong. If you're telling the truth, you stay with it. I don't wanna change your story. It's my belief that they never went near the register. Now is it possible that in your haste, some of the money fell to the floor?

Bello: No.

DeSimone: In other words, the money was on the floor.

Bello: Well let me tell you just the way I seen it.

DeSimone: Yeah. Alright.

Bello: When I actually came aroun' the bar, the register was open...

DeSimone: The register was open.

Bello:...an' there was money laying all over the well like thrown aroun' the floor, on, by the register.

DeSimone: Alright.

Bello: I took a dime. I figured in my mind that uh I knew that uh, there was no robbery.

(2aF 232-233).

The district court is mistaken when it says that the transcript of this interview was offered by the State. The district court is also wrong when it says that “Bello suggested that revenge was the motive” (1aD 22, n. 5). It was Lieutenant DeSimone who said that revenge was the motive, not Alfred Bello.

The “shooting earlier” referred to in the above excerpt was defined for the jury by the defense when, very shortly after the aforesaid tape was introduced, defense attorney Myron Beldock cross-examined Detective Donald LaConte. As noted by the district court (1aD 22, n. 5), this “Paterson Police Detective testified under cross-examination that he was present during the funeral of Holloway in his capacity as an investigator in the Lafayette Bar murders.” The fact, that the investigation of the Lafayette Grill murders was connected with the murder of Mr. Holloway was open to the jury by the defense.

It was the defense, through this combination (tape of Bello interview and cross-examination of Detective LaConte), that laid before the jury, in specific terms, theory that revenge was the motive for the killings. The district court opinion takes no account of this fact.

The defense would want to have it both ways. They wanted the jury to hear the tape in its entirety and to read the transcript. But, at the same time, they want to preclude the State from offering evidence of the revenge motive which is specifically recited on the tape.

Why didn't the district deal with the significant factor that the revenge motive was introduced to the jury by the defense? That may be because the district court thought that the tape and transcript were offered to the jury by the State (1aD 22, n. 5).

If the trial court had ruled against the State and not permitted the State to offer evidence and argument as to the motive, the jury nevertheless would have known of the theory of the revenge motive because it specifically was delineated for them by the defense. Yet the State's position as to the motive was the primary basis for the district court's ruling.

The district court concludes from its evaluation of the evidence that the jury was presented with a "sufficiently close" case so that the evidence of motive was "critical in the jury's determination of guilt" (1aD 33). This finding of a close case essential in order to sustain the district court's ruling, but the respondents contend is not supported by a fair study of the record.

The district court supports this determination by stating that the prosecution "conceded" that the revenge motive "was essential to its procuring a conviction and without it, its case was in jeopardy" (1aD 33). This is not so. The prosecution did not take such a position. The prosecution did not make such a concession. The only support which the court presents for its position is a reference to a statement by the prosecution when arguing to the trial court regarding the admissibility of motive evidence. The district court quotes this language:

if the State does not attempt to prove motive in this case, the State will be handicapped because these defendants will have every right to argue to the jury at the conclusion of the case that motiveless murders do not occur, that the State has not addressed any evidence of motive and for that reason these defendants did not do the crime for which they are charged (31aA 6798) (1aD 33).

The clear meaning of this statement was that the disqualification of motive evidence would “handicap” the prosecution and work an unfairness to the State. It is not fair to interpret this statement to read that the prosecution presented a position that the revenge evidence was essential to obtain a conviction and that no conviction could be procured without it. The jury at the first trial returned convictions without hearing evidence of motive. The district court has exaggerated the prosecution’s position in order to present support for its ruling.

The evidence presented at the trial eliminated robbery as a motive.

The first officer on the scene, Patrolman John Unger, testified that upon entering the bar and seeing the carnage, he assumed it was a holdup, but when he asked William Marins what had happened, Marins said that two black men had come in and started shooting (17aA 3728-32, 3789). Patrolman Unger asked Mr. Marins if when they came in did they say it was a holdup and Mr. Marins replied, “No” (17aA 3789).

Patricia Valentine in her testimony recalled that she had seen money on the floor near where the slain bartender was lying (16aA 3452) and Alfred Bello likewise testified that he saw money laying around the floor, that the cash register was open and that he had taken some of it (19aA 4314).

Detective Edward Callahan arrived at the Lafayette Grill about two or three minutes after the initial notification of a shooting, and noticed that a cigarette in the hand of one of the dead victims was still smoldering (32aA 7165-66). He likewise noticed that there was money on the floor, other money still in the cash register, as

currency and silver on the bar near the dead patron (32aA 7167). The wallets and purse of the respective victims were not disturbed (32aA 7167-71).

Detective Callahan further testified that about a half hour after the shootings, he went to the hospital and spoke to Hazel Tanis, and asked if there had been a holdup, to which she replied, “No, two colored men walked in the place and shot everybody in the place” (33aA 7517-20). As a result of these facts, the designation of the crime was changed from a holdup murder to “just a murder” (33aA 7425-26).

The district court does not discuss the significant consideration (clearly shown by the evidence) that this was not a robbery or attempted robbery but a premeditated murder in the style of an execution.

It is not surprising that the investigation of the Lafayette Grill murders almost immediately looked toward a connection with the murder of Mr. Holloway. Two bartenders were murdered. Each man was killed by a single blast from a shotgun fired at close range. The murders occurred in Paterson, several hours apart while the victims were tending bar at taverns down the street from each other. Neither murder involved a robbery or attempted robbery. While there was considerable evidence beyond this basic information to link these murders, just these bare facts raise a natural projection that there is a connection between the killings and a competent investigation should look in that direction.

The prosecution, through Detective Callahan, introduced evidence concerning the murder of Leroy Holloway, the owner-bartender at the Waltz Inn, at 8:15 p.m. on the night of June 16, 1966 (32aA 7179-82).

Detective Callahan had responded to the scene of that murder and single-handedly apprehended the killer, Frank Conforti, a white man who had previously sold the Waltz Inn to Mr. Holloway (32aA 7192-94). Detective Callahan testified that shortly after that, when he attempted to take his prisoner to the police car, there were some 25 to 30 people outside, predominately black, who “were hollering ‘give us

him...” and that other officers had to form a cordon for him to escort the prisoner from the bar (32aA 7194). Mr. Holloway had been killed by a single shot in the head and shoulders by a shotgun wielded by Frank Conforti (32aA 7192-93).

Officer Charles Franco, who responded to the Waltz Inn shooting, likewise testified there was “quite a crowd” of blacks at the scene, on both sides of the entrance. Officer Franco stated that the crowd seemed to be irate over what happened and that Detective Callahan had difficulty keeping the prisoner away from the crowd, which Franco and other officers were attempting to restrain (31aA 6865-69).

The district court counters the testimony of Detective Callahan and Officer Franco by reference to the testimony of Clarence Carr:

While there was testimony at trial by two police officers that there was a crowd of 25 to 30 “unruly and angry” people outside the Waltz Inn, the atmosphere among the crowd was contradicted by another witness, Clarence Carr, who testified that while the group which included whites, was upset, there were no racially derogatory terms used by the crowd, nor was anyone urging mob retribution on Conforti as he was brought through the crowd by police (41a 9429-30) (1aD 20-21 - Emphasis added).

The district court outlines this supposed contradiction in the course of what the court claims is “a view of the prosecution’s case in its most favorable light” (1aD 20). The appellants invite a reading of Clarence Carr’s brief testimony. It cannot be fairly said that Mr. Carr “contradicted” the detective and the officer. It certainly cannot be said from “a view of the prosecution’s case in its most favorable light.”

Mr. Carr testified that he was in the Waltz Inn when Frank Conforti entered the tavern and without speaking a word pointed the shotgun at Mr. Holloway and shot him in the head (41aA 9436-37). Mr. Carr said that Mr. Holloway was a “popular, well liked man” (41aA 9436). He said that a pretty good crowd gathered (41aA 9430). He

said that there was a few whites but that the crowd was mostly black. He said, “everybody seemed to be upset, you know, over the killing, but as far as angry, no” (41aA 9429-30).

After he saw Mr. Holloway shot, Mr. Carr hid in the men’s room (41aA 9433-34). When the police took Frank Conforti to the police car, Mr. Carr stayed behind in the tavern for a few minutes (41aA 9435). He did not testify that he saw Mr. Conforti while he was being taken from the tavern to the police car. There is no testimony that he made observations of Mr. Conforti, the crowd or the police at this point. Mr. Carr’s testimony was that he was inside the tavern when Mr. Conforti was taken out (41aA 9428), and that, when he did come outside, Mr. Conforti was already at the police car about to be put in it (41aA 9435).

The appellants do not understand why the district court states that Mr. Carr testified that “there were no racially derogatory terms used by the crowd,’ because the detective and the officer did not testify that such terms were used.

Mr. Carr’s testimony does not contradict the detective and the officer. Even though he was called as a defense witness, his testimony essentially is a confirmation of what Detective Callahan and Officer Franco said. Mr. Carr confirmed that there was a large crowd (black except for a “few whites”) around the police. He said these people were upset about the killing of Mr. Holloway. Mr. Carr confirmed the fact that when he came out of the tavern there were “quite a few [police] cars” there and that there were two rows of police officers leading right up to the car in which Mr. Conforti was being placed (41aA 9435). This testimony was a confirmation rather than the contradiction suggested by the court.

Detective Callahan recalled that later that evening while he was preparing his report at police headquarters, Eddie Rawls, who identified himself as the stepson of Leroy Holloway, came there with two other men, and “wanted to know what we intended to do about the guy that killed his stepfather.” Upon being advised the matter

was being properly handled according to law, Rawls “became very aggravated and agitated and told me you better well do it or we will goddamn do something about it,” following which they were ordered to leave and did “in a very agitated atmosphere” (33aA 7315-16, 7317-18).

This incident at police headquarters occurred sometime before midnight, and Detective Callahan added that “the way these guys were carrying on, it sticks in your memory” (33aA 7408-09, 7412).

William Johnson, testifying at the retrial, stated he had been with Eddie Rawls during the incident described by Detective Callahan, that earlier he had been to the hospital with Rawls, and that the latter’s father, who was in the emergency room, was dead when they arrived. He recalled that they went to police headquarters about 9:00 or 9:30 p.m., where Rawls spoke to the detective (34aA 7630-32).

Then they returned to the Nite Spot where Mr. Johnson saw Rubin Carter, and where there was “general conversation” concerning Rawls’ father (34aA 7633-34). When Mr. Johnson left the Nite Spot at about 11:30 p.m., Rawls was still there (34aA 7647).

The district court made reference to the testimony of William Johnson. In the course of the court’s presentation of “a view of the prosecution’s case in its most favorable light,” the court claims that Detective Callahan's testimony about Eddie Rawls’ behavior at police headquarters was contradicted by William Johnson (1aD 20-21).

A fair view of the record shows that William Johnson’s testimony did not contradict the testimony of Detective Callahan. It confirmed it. Mr. Johnson was asked what occurred at police headquarters:

Q. What did he [Eddie Rawls] tell the detective?

A. Well, he asked the detective could he see the man that killed his father. And the detective told him no. And he asked him what were they going to do about it. And the detective told him, the

detective told him, we are going to handle it. And he said, if you don't, I will (34aA 7649-50).

In the context of Mr. Johnson testifying about something that happened ten years before, doesn't his testimony sound very much like Detective Callahan's account that Mr. Rawls "wanted to know what we intended to do with the guy that killed his stepfather" and when told it was being handled according to law, Rawls became agitated and responded that "you better well do it or we will goddamn do something about it." (33aA 7318).

As part of the State's case, portions of the testimony which the defendants John Artis and Rubin Carter gave, respectively, before a Passaic County Grand Jury on June 29, 1966, were read into the evidence.

The defendant Artis, in his testimony, had stated that about 10:00 p.m. on the night of June 16, 1966, he was in the vicinity of River and Bridge Streets, when he was informed by one Albert Thompson that there had been a shooting, and "that he heard it was Eddie Rawls' father that just bought a tavern, Waltz Tavern on Montgomery and Summer Street... he said that somebody walked in and just opened fire on him."

Shortly after that, the defendant Artis testified (before the Grand Jury) that he met Rubin Carter and asked him what was going on about the shooting since he had heard it was "Eddie's father," and Carter replied, "Somebody just walked in and shot him, blew his head off or something" (36aA 8334-36). At the trial in 1976, the defendant Artis again testified that the first thing that he and the defendant Carter spoke about when they first met on the evening of June 16, 1966, was the killing of Eddie Rawls' father (43aA 10058-61). It is illuminating to read these three pages of the record and observe the defendant Artis's effort to downplay his conversation with Rubin Carter to the jury. Mr. Artis offers the absurd statement that in his neighborhood "mayhem and violence" are so common that the event of Mr. Holloway having his head blown off meant nothing.

The defendant Carter, in his 1966 Grand Jury testimony, stated that while he was outside the Nite Spot on the evening of June 16, 1966, Eddie Rawls had just come back from the hospital where his father had died, and the defendant Carter and others were present and gave him their condolences (36aA 8344-45). Carter didn't know whether Rawls was angry, and Eddie Rawls made no references about getting even, according to Mr. Carter's testimony to the Grand Jury (36aA 8347).

However, inside the Nite Spot there was conversation, as there was all around Paterson, about the Holloway murder, and "that there was going to be some shaking going on." The defendant Carter didn't know exactly what that meant, "if they were going to go up to the corner of Carroll Street and throw some rocks and break some windows or what was going on" (36aA 8354-56). Obviously it meant retaliation. There was no evidence that any other forms of retaliation occurred that evening or immediately thereafter.

In that Grand Jury testimony, the defendant Carter further stated that everyone knew Eddie Rawls, the bartender at the Nite Spot, and that he (Carter) knew there was going to be a "shaking" and knew there would be trouble. "No one specific person" was talking about it, it was just "like a cloud...." Rawls was saying nothing, was not angry according to Carter and was not making any statements about getting even (36aA 8356-57).

With regard to this portion of Rubin Carter's Grand Jury testimony, the district court states:

Carter testified that there was talk among the black community of a "shaking," which he said meant to include rock and bottle throwing, but not murder (36aA 8356). The state took Carter's definition further, implying that he meant murder, and stating in its summation that the only reason Carter mentions the talk of "shaking" to the Grand Jury was that he knew the police were aware of it (1aD 21-22).

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 talk of a "shaking" which means

retaliation. How could anyone look at this evidence and suggest that from all the defendants heard and from all the defendants talked about and from all that was being said about the awful murder of Mr. Holloway, the defendants did not learn that the murderer was white? How could the defendant Carter be a witness to the talk of a “shaking” and not know the victim was white?

Between the time when Rubin Carter learned of the Holloway killing and saw Rawls on the latter’s return from the hospital, and when he (Carter) again returned to the Nite Spot around midnight or 12:30 a.m., Mr. Carter occupied himself with efforts and travelings in search of his guns, which included a 12-gauge shotgun. SEE SEARCH FOR GUNS, SUPRA.

The district court determined that this evidence of Carter’s search for his guns was not relevant to the State theory of motive:

...the court concludes the “search for weapons” scenario lends no support to the State’s racial revenge theory...

The fact of the search adds nothing to the evidence of motive (1aD 24).

Respondents contend that the district court’s reasoning is mistaken because the court simply ignores the consideration of the timing of the search. In the time period of the year these guns were missing, the defendant Carter went looking for them during the period of a few hours between learning that Eddie Rawls father was murdered and before the Lafayette Grill murders. In this context, could not a jury fairly and reasonably conclude that the search for the weapons was motivated by the murder of Mr. Holloway, which occurred just before the search, particularly in connection with the other evidence in the case? If as the district court says, “Certainly motives can be derived from actions....” (1aD 24), could not the State fairly argue and the jury reasonably conclude in the context of this case, that the search and the timing of the search were not simply curious and extraordinary coincidences?

The jury also had evidence before it that Eddie Rawls, the Nite Spot bartender, was well acquainted with Carter, who had a special corner reserved at the tavern, and that Mr. Rawls was even closer with John Artis (39aA 9094-95). There was also evidence that Rubin Carter and Eddie Rawls, aside from being at the Nite Spot that night, were together at another bar, Richie's Hideaway, as late as 1:30 a.m. or just one hour before the shootings at the Lafayette Grill (36aA 8370-72). Elwood Tuck, the Nite Spot Manager, testified to having seen Mr. Carter with Artis and Rawls at the tavern at various times that night (39aA 9054-63; 9086-87).

As was shown previously with the aid of the local, street diagram, the murderers' car traveled down 12th Avenue to East 28th Street where Eddie Rawls' house is located. At the trial, the defendant Artis testified to traveling down 12th Avenue to East 28th Street. Mr. Artis's explanation for being on East 28th Street was that they were en route to the defendant Carter's house to obtain money. As shown from the diagram, East 28th Street did not run through to the defendant Carter's home. There was good evidence from the totality of the record to support the State's position that the murderers' car stopped briefly at Eddie Rawls' house providing an opportunity to unload weapons and alter clothing. MOVEMENTS AND ACTIONS OF THE DEFENDANTS BEFORE AND AFTER THE MURDERS, SUPRA.

Eddie Rawls' connection with the defendants' involvement in the Lafayette Grill murders was further evidenced by the fact that prior to the first trial he had been instrumental in taking alibi witnesses to defense counsel to assist the defendant Carter's case. These witnesses testified at the retrial that their original alibi testimony was false. STRUCTURING AND SUBMITTING A FALSE ALIBI, SUPRA.

Officer John Unger was one of the first officers to respond to the Lafayette Grill, since he and his partner, Officer Greenough, were regularly assigned that area of patrol. He had been assigned this area for two years preceding June 16, 1966 (17aA 3747-49).

He, therefore, was familiar with the Lafayette Grill, as well as the Nite Spot and Waltz Inn Tavern, as well as the ethnic and racial make-up of the area (17aA 3749-51).

Officer Unger described the Lafayette Grill as being on the border between predominately white and black areas in that part of the city. He described the Lafayette Grill as a “white” bar, while the Nite Spot was patronized mostly by blacks, as was the Waltz Inn (17aA 3753-56).

Officer Unger further testified that he had on occasions responded to the Lafayette Grill because of complaints that the bartender, James Oliver, would not serve blacks (17aA 3757-58).

The district court’s opinion seems to undertake a character study of the defendants as some basis for the projection that it is not likely that these particular defendants would commit these crimes for these reasons. The district court states:

Arrested four months later for the murders were Rubin Carter, 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; and 20 year-old John Artis, who was about to enter college on a scholarship (1aD 3).

The implication suggested by the district court is “why should these defendants shoot total strangers” (1aD 17, 19-20, 22, 33). This is even more inexplicable, the district court suggests, when one of the murderers (the defendant Carter) is “well-known in the community and easily recognizable” (1aD 20).

On this last point, it might be suggested that when the perpetrator of the crime is “well-known in the community and easily recognizable,” (1aD 20) that presents especially strong motivation for the elimination of all witnesses. The prosecution maintained at the trial, that while the murder of the bartender, James Oliver, was retaliation, the others were shot because they witnessed the Oliver murder.

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"?

The district court accepts as fact what is recited by the defense and records such statements as fact in its formal written opinion without substantiation from the record. If the district court is bound to make judgments about this case based on its character study of these defendants and contrary to the weight of the evidence in the record, it ought to get the true facts.

As indicated above the district court's opinion repeatedly suggests that the prosecution's theory of motive contends that these defendants set out to murder four strangers (1aD 17, 19-20, 22, 33). This is not a fair statement of the prosecution's position. First of all, the prosecution did not contend that the defendants set out to murder four people. The prosecution contended that James Oliver was the target and that the rest were shot in an effort to eliminate witnesses. Secondly, James Oliver was not a "stranger" in the sense that the prosecution's theory suggested (as the district court implies) that he was murdered just because he was white.

A black man was killed by a white man in Paterson during a period of racial tension. The black man was a bartender. James Oliver was not just any white man, he was a bartender. His bar was on the boundary line of the white and black communities. His bar was down the street from the bar where the black man was murdered. Mr. Oliver's bar was on the white side of the boundary. Mr. Holloway's was on the black side. Mr. Oliver had a history of being prejudiced about serving blacks. James Oliver, therefore, was not just any white man in the sense that he was "a stranger" as suggested by the district court. He was, in fact, the perfect target as argued by the prosecution at the trial. The prosecution never urged that the motive evidence suggested the random killing of any white man.

The presentation of this motive is a sensitive issue and it involves unpleasant considerations. This is not because the prosecution presented evidence of motive, but because of the ugliness of what the defendants did and why they did it. As the district

court acknowledges, “trials are searches for the truth” (1aD 69). Justice is not served by shunning truth because it is unpleasant to hear.

The prosecution dealt with this sensitive issue in a responsible and fair way. The prosecution alerted the defense and the trial court at the pretrial conference that it intended to offer evidence of motive:

...we intend to offer evidence to establish that the motive for this murder was a revenge slaying for the death a few hours earlier of Roy Holloway; and also the slaying of the other patrons of the bar was to make sure that there was no witnesses available (14aB 1620).

As was indicated previously the prosecution made no reference to the motive for the Lafayette Grill murders until well on in the trial, after argument and a ruling permitting the State's theory of motive.

Recognizing that the State’s position as to the motive for the murders involved a sensitive issue, the prosecution deliberately sought to include blacks on the jury. The first jury that convicted the defendants was made up of all white jurors. The jury at the second trial contained a black man and a black woman, both of whom deliberated on the verdict.

The district court did not have the benefit of the voir dire record which has been included in this appendix. Cecelia Sharpe and James Biddle were the black jurors. Mrs. Sharpe was selected as juror number seven and Mr. Biddle as juror number ten. Sixteen jurors were impaneled and each side was given additional challenges in light of the enlarged jury. As shown from the record the jurors were questioned individually and challenges were exercised at the conclusion of the questioning of each juror. The State did not exhaust its challenges and had numerous challenges available at the time it accepted each of these jurors.

The questioning of the jurors was conducted by the court. The defense submitted to the trial court over one hundred questions which the defense wanted put to prospective jurors. Many of the defense questions were directed to racial matters such as busing, riots in cities like Newark and Paterson in the mid-sixties, association with blacks, etc. The prosecution did not object to the submission of any of these questions to the prospective jurors. The trial court acceded to every defense request in its painstaking questioning of the jury in this regard.

The district court did not know what the record shows with regard to these aspects of the voir dire because the district court did not have the transcript of the jury selection. However, the district court did offer the following comment about the voir dire.

The State argues that even if there were minimal prejudicial impact, it was somehow blunted by the great pains taken by the court to minimize jury prejudice through extensive voir dire of the racial attitudes of potential jurors (thereby forewarning the jury that sensitive racial issues would be coming before it). Even a careful voir dire cannot ensure that in the context of a long and complex trial, jurors will not succumb to an appeal based on racial prejudice (1aD 17, n. 4).

Before the district court reaches conclusions about the impact of the voir dire on jurors, fairness suggests, that the court ought to know what happened at the voir dire. The record of the voir dire is tedious. This is unavoidable. The trial court persevered through this wearying process to ensure that the jurors fully appreciated their responsibility to objectively decide these most serious charges.

In the face of this total record it is just outrageous for the district court to say that the prosecution urged the jury to convict these defendants solely because the defendants are black and the victims are white (1aD 2, 17, 26, 34). The jurors were selected in a foreign county at the request of the defense. They were sequestered and

bused to Passaic County each day of the trial. Their participation in this lengthy trial involved great personal sacrifice. It is an insult to their service and sacrifice to suggest that these people based their momentous decisions on the view that the defendants are guilty because they are black and the victims are white.

The record does not at all support the district court's claim that the prosecution made an "insidious and repugnant" appeal to racism (1aD 20). Indeed it seems that the district court is extremely hard pressed to find some place in all the record to support its rather sensational claim. In all this enormous record the district court can point to only one reference to support its claim. That solitary reference offered by the district court is taken from the summation of Prosecutor Humphreys:

PROSECUTOR: Strand Number Five: Motive. Defense counsel say that is a sensitive issue and it is. It's a very sensitive issue. None of us like to admit that things like race prejudice and anger and hate for people because of the different color of their skin exists in this world. We avoid it. We teach our children the contrary. We support civil rights. We support courses in our schools. We bear in mind the words of Reverend King, in which he has a dream of a day where people would judge his children by the quality of their character, not by the color of their skin, Now ladies and gentlemen, we don't live in that world yet and we certainly didn't live in that world in 1966. It was a world and is a world filled with people who hate. You remember in the voir dire a number of questions were asked of you about racial prejudice. We wanted a jury which is free from racial prejudice. But, we recognised in making those questions that not everybody is free from racial prejudice and, of course, we know that no group, no class is immune from hate and we know that revenge is one of the most powerful motives that any human being can have. We look around the globe and see it everywhere. We see Greeks and Turks and...

COUNSEL FOR ARTIS: Your Honor, I object to Greeks and Turks and things outside this courtroom.

THE COURT: No. Counsel is making a point. He is illustrating a point by describing as other counsel did. I will permit that.

PROSECUTOR: We see hate and anger and revenge there and we see people in Ireland fighting because of religion and we know that in 1966 there were many blacks with legitimate grievances and some blacks and some whites did not act as law-abiding citizens. It's an area which everybody goes into with a great deal of trepidation, but does it mean we should hide, look away; we should say, well these motives are too repulsive, too ugly, we don't want to deal with them. We have to look at them. We have to analyze them. And I suggest to you, as much as you may want to look away, as much as you may want to say it couldn't have happened for that reason, it did happen for that reason. What other reason could it have happened for? (45aA 10802-04) (Emphasis added).

This is a statement taken from a lengthy summation. This is argument, not evidence. The jury was emphatically instructed as to that. This is the sum total of the basis in the record which the district court can find to support its position. This statement speaks for itself. It is certainly not what the district court makes of it. In the context of this case, it is a fair and balanced statement. Many state court judges have reviewed this argument and this record, and specifically this summation. Not one of those many judges gave this statement the construction and meaning attributed to it by the district court.

There is one reference in the opinion where the district court points out a racially prejudicial statement from the testimony of State witness, Alfred Bello:

In fact, the only blatantly racial statement placed before the trial court was Bello's testimony that while he was being interviewed by a prosecutor's detective in October 1966, that detective referred to blacks as "niggers" and "animals" (1aD 26).

The way the district court presents this statement conveys the natural understanding that Mr. Bello testified at the trial to these racial slurs being made and that it was “placed before the trial court” by the State. The fact of the matter is that these racial slurs were “placed before the trial court” by the defense. The fact of the matter is that, in his testimony at the second trial, Alfred Bello, said that it was not true that racial slurs were made by the detective (21aA 4618). The fact of the matter is that this statement, attributing racial slurs to a county detective, is part of a statement taken from Mr. Bello by a defense investigator in 1974 (21aA 4612). This statement has come to be referred to as the “recantation.” In it Alfred Bello recanted his identification of the defendants Carter and Artis as the murderers. This is discussed at length in the next section.

The trial judge at the first trial presided over hearings in 1974 based on this recantation. In a lengthy and sound opinion, State v. Carter, 136 N.J. Super. 271 (Cty. Ct. 1974), that court determined that Alfred Bello’s recantation was not true. That opinion has never been questioned by any reviewing court. At the retrial in 1976, there was considerable, persuasive evidence to support Alfred Bello’s testimony that the recantation was untrue and solicited by bribe offers from the defense. This is outlined, infra.

Why didn’t the district court say that this evidence of racial slurs was “placed before the trial court” by the defense? Why didn’t the district court say that it was not Alfred Bello’s testimony at the retrial and that, in fact, Mr. Bello said it was untrue? Why didn’t the court mention the ruling of the first trial court that found the statement containing racial slurs to be untrue? Why no mention of the extensive record at the trial to support the position that the recantation was untrue and induced by bribes from the defense? This reference by the district court to racial slurs is not a fair presentation. It distorts the true facts of the record.

The district court states that “The New Jersey Supreme Court majority accepted the racial revenge theory as probative...” (1aD 15) (Emphasis added). The court’s use of the term “Supreme Court majority” suggests that part of the New Jersey Supreme Court did not approve the prosecution position on motive. This is not so. The dissent in the New Jersey Supreme Court did not disapprove of the motive evidence. The Supreme Court was unanimous on this point. In fact of the numerous state court judges who have considered this same defense argument regarding motive evidence based on the same record submitted to the district court, not one judge from one court has agreed with the district court’s judgment on this issue.

The application of common sense to an objective view of the total record of the evidence shows that the jury had very good reason to believe that the people in the Lafayette Grill were murdered in the course of retaliation for the terrible murder of Mr. Holloway.

8. THE IDENTIFICATION OF THE DEFENDANTS

At the 1976 trial, eyewitness identification testimony was given by Alfred Bello who testified positively that he saw the defendant Carter, swinging a shotgun and the defendant Artis carrying a pistol, come from the Lafayette Grill moments after he heard a series of shots emanate from the bar (19aA 4300-06).

The testimony of this witness has been the subject of tremendous scrutiny in the course of the almost 20 years of judicial review involved in this case. Mr. Bello had a long history of involvement with the law, essentially as a thief. He has given various accounts of his observations at the time of the murders. These accounts will be outlined here.

The district court views Mr. Bello’s testimony as the “crucial” evidence against the defendants and the “pillar” of the State’s case (1aD 17, 43). Respondents maintain that an understanding of the total record as has been outlined heretofore shows that 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 murders. 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. He testified that

at this time he was approached by people associated with the defense and how he was offered money to take back his identification. At the trial, the jury heard a great deal of evidence to support what Mr. Bello said about how the recantation came about. This will be developed further hereafter, but this is a whole side of Mr. Bello's testimony which the district court did not deal with.

At the trial, Mr. Bello explained how after the recantation, he became associated with two men named Joseph Miller and Melvin Ziem who attempted to exploit Mr. Bello's situation as a witness by turning a profit from the release of a more sensational story and who during the course of this venture maintained frequent contact with defense counsel (this will be developed further hereafter). There was considerable independent evidence at the trial to support this explanation. Likewise this is another whole area of the case relating to Alfred Bello, which the district court ignored in its opinion and its depiction of the record of Mr. Bello's testimony and the role of that testimony in the total picture.

In his testimony at the trial, Mr. Bello described Carter as wearing a light jacket, which was open, with a black vest and black pants, while Artis was wearing dark clothing (19aA 4304). "They were laughing and talking loud" (19aA 4300-02).

Later, when the defendant Carter's car was brought to the scene by the police, Bello recognized the car as the one he had seen earlier, and when the occupants got out, he recognized Carter and Artis as "the same people that I seen coming around the corner" (19aA 4320-22).

At police headquarters a little later, Bello gave a statement identifying the automobile, but did not identify the defendants because, "I didn't want to be involved.... I didn't want to identify anyone." Bello added that he knew there was going to be an investigation, and that he and Arthur Bradley were "doing a job [burglary] on the corner...." and that he had taken money out of the Lafayette Grill register, and since he

was on parole at the time, he didn't want to have anything 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).

The defendant Carter was identified by Mr. Bello as one of “those two men that I seen at the scene, and the same men they brought back.... the people I seen were the people I seen in person” (21aA 4694-95). He later saw Artis at the police station as well (21aA 4699).

Bello testified that Artis had been wearing dark colored clothing, although he didn’t remember “all the way now what Mr. Artis was wearing.” He recalled that Artis later was not dressed the same way as when he first saw him, that “there was a hat missing there.... there may have been another sport coat” (21aA 4699).

Chief Vincent DeSimone during his testimony at the retrial stated that he had taken an oral statement from Mr. Bello on June 18, 1966, the day following the shootings at the Lafayette Grill (29aA 6245-47). In that statement, Bello told DeSimone that at the time of the crime, he had seen two black men, one taller than the other, the shorter man had a beard and/or mustache (29aA 6249-50). Chief DeSimone further testified that at one point Bello had identified a photograph of Carter as having been one of the men, but then retracted the identification during the interrogation saying he didn’t want to get involved (29aA 6250). Chief DeSimone incurred Alfred Bello’s displeasure by accusing him of having stolen money from the register at that time (22aA 4798-99). The next time that Chief DeSimone had any detailed contact with Bello was almost four months later, on October 11, 1966 when Bello was interviewed by Lieutenant DeSimone and Patterson Detectives Robert Mohl and Donald LaConte. That session was tape- recorded without Bello’s knowledge (29aA 6251-53;6256).

A tape of that session which was transcribed and which was played to the jury at retrial, contains a complete detailing of the recollection of Bello given four months after the event, of what he observed on the morning of the Lafayette Grill murders.

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 near by Ace Sheet Metal Company and his theft of the 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 the 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 court

determined that the recantation was not truthful. State v. Carter, 136 N.J. Super. 271 (Cty. 1974).

During the recantation hearing, the prosecution produced the tape recording referred to previously memorializing the interview of Alfred Bello on October 11, 1966, by Lieutenant DeSimone and the other detectives. During the interview, Alfred Bello was promised protection and the transfer of his parole to another county. Although Sergeant Mohl testified to the taping at the first trial, the New Jersey Supreme Court determined that the tape should have been supplied to the defense, State v. Carter, 69 N.J. 420 (1976). In reversing the first convictions, the Supreme Court did not disturb the finding made by the trial court at the recantation hearings. That finding, that Alfred Bello's recantation was not true, State v. Carter, 136 N.J. Super. 271, 295 (Cty. Ct. 1974), has never been contradicted by any judge who has reviewed this case.

The district court makes repeated references to the fact that Alfred Bello changed his testimony. However, the district court makes no mention at all of the fact that the court which presided over the first trial conducted extensive hearings with regard to the first change in Mr. Bello's testimony, and determined that the change whereby Alfred Bello departed from his testimony identifying the defendants as the murderers, was not true.

While Alfred Bello's recantation of his identification of the defendants was found to be untrue as a result of the hearings in 1974, it was not until just prior to the retrial in 1976, that the prosecution learned the circumstances of how that recantation came about. This information was disclosed to the State as a result of a polygraph examination of Alfred Bello in August 1976 by Professor Leonard Harrelson.

After the recantation of 1974, Alfred Bello gave a more sensational account of the events surrounding his observations at the Lafayette Grill. This account placed him in the bar and, at one point, involved the incredible scenario of Alfred Bello saving

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 testimony. Mr. Bello testified that Fred Hogan visited him at the Passaic County Jail late in 1973, at which time, Hogan offered him money if he would recant (22aA 4834-40). A few days later, Hogan again appeared and offered him a percentage of Rubin Carter's book (22aA 4840-41).

In the summer of 1974, Mr. Bello, who was in the Passaic County Jail, was visited by Hogan who again promised money (22aA 4850-52). Another visit at the jail followed, during which, Hogan mentioned that he would be sending Selwyn Raab and Hal Levinson to see him, because "if you go ahead and recant, you have to have exposure.... You got to have publicity" (22aA 4854-55).

The prosecution produced evidence to confirm the fact that public official Hogan had a financial interest in Rubin Carter. Philip Salinardi, the treasurer of The Viking Press, produced a contract between his company and the defendant Rubin Carter for the publication of the defendant's book The Sixteenth Round. The contract contained the incredible revelation that Fred Hogan was designated therein as the agent for the defendant Rubin Carter. Mr. Salinardi further testified that \$10,000 of advance money was given to (public official) Hogan in his capacity as the defendant Carter's agent (25aA 5565-68). According to Mr. Salinardi, this money was given to Hogan in three installments of \$3,000, \$2,000 and \$5,000, respectively (22T 180-181). Mr. Salinardi produced the canceled checks (25aA 5570). The last check of \$5,000 was given to Fred Hogan on November 16, 1973 (25aA 5570). This date is significant when related to Fred Hogan's meeting with Alfred Bello on November 21, 1973 as will be discussed hereafter.

Barrett Gray, a representative of Colonial First National Bank testified that Fred Hogan cashed the \$5,000 check by endorsing it on the account of his wife, Dorothy Hogan (25aA 5584-86). The other two checks from The Viking Press were also cashed by Fred Hogan (25aA 5586-88).

Fred Hogan was not a private investigator. He was a public official. This \$10,000 belonged to a client of the Public Defender. How, in the first place, is the Public Defender's Office representing a defendant who has \$10,000? Mr. Hogan could produce no documentation to account for how he disbursed the funds. If he was acting on behalf of the defendant Carter with regard to the receipt of this money, he served in a fiduciary capacity and certainly should have records to account for his disbursements.

Do not the records from The Viking Press and Mr. Hogan's bank, along with the absence of documentation from Fred Hogan as to the disbursement of the \$10,000, confirm Mr. Bello's testimony that Fred Hogan tried to bribe him with the proceeds of Rubin Carter's book?

The jury had no doubt at all about this after it heard the testimony of Mr. Hogan when called as a witness by the defense. The most startling revelation came when Mr. Hogan admitted he listed the \$10,000 as income on his (Hogan's) tax return (37aA 8490-95). This man paid taxes on Rubin Carter's money.

At the time that Selwyn Raab and Hal Levinson broke their stories of the recantation in 1974, Fred Hogan was portrayed as a hero. At that time the State did not know the facts surrounding the recantation. By the time of the trial in 1976, the jury learned the facts.

The truth about Mr. Hogan's involvement and motivation was demonstrated to the jury during the course of the trial itself. On the witness stand he became trapped by his own efforts to withhold evidence and conceal the truth.

At the 1976 trial, Fred Hogan was called as a defense witness on December 9, 1976. On the witness stand, he produced typewritten reports of his meetings with Alfred Bello at the Passaic County Jail, including meetings on November 21, 1973 and November 23, 1973. Mr. Hogan testified that he prepared the typewritten reports the

evening before, i.e. December 8, 1976. He said the typewritten reports were prepared from handwritten notes which were discarded (37aA 8507-13). *

Mr. Hogan's testimony shocked the trial court (37aA 8513-14). When pressed by the trial court, Mr. Hogan admitted that although he had said the original notes had been discarded, they might still be available. He assured the trial court that the typed reports had been copied "verbatim" from the original notes (37aA 8540-41).

The typewritten notes of Mr. Hogan were marked D-332 (37aA 8528). They were not returned to Mr. Hogan when he left court on December 9, 1976. they were retained by the prosecution with the approval of the court.

Two days later, public official Fred Hogan returned to the witness stand for further cross-examination. He had retrieved his original notes. His cross-examination covers only three pages of transcript, but it is most illuminating (39aA 8870-73). Mr Hogan is exposed. His original notes state that Alfred Bello would testify for the highest bidder and that \$20,000 was mentioned. This information was withheld from his typewritten notes and would never have come out before the jury if the trial court had not expressed outrage and directed Mr. Hogan to produce his original notes. In his initial appearance on the witness stand, Mr. Hogan had insisted that his typewritten notes were verbatim reproductions of the original notes.

* Neither the handwritten notes nor the typed reports of the defense investigator had been supplied to the state in discovery. Two years before this, there had been hearings conducted by the trial judge from the first trial regarding the so-called recantation which Alfred Bello allegedly made to Fred Hogan. Mr. Hogan was now on the stand at the retrial and for the first time the State learned of his notes of his conversations with Alfred Bello. The same situation developed with subsequent defense witness, Hal Levinson, who was also a major player in the so-called recantation and who also produced his notes and records for the first time in the midst of his testimony at the retrial. There have been other similar instances during the prosecution of this case where the State was given discovery while the witness was on the stand or after the witness left the stand.

Fred Hogan when further cross-examined concerning his involvement in the case, stated that he had received a \$5,000 check, constituting the balance of the \$10,000 advance on Carter's book on November 16, 1973. This was just five days before his first visit to the Passaic County Jail to see Alfred Bello (37aA 8613-14). At the time Fred Hogan approached Alfred Bello, he had just acquired \$5,000 in cash of Rubin Carter's money.

At the time of the Harrelson polygraph examination in August of 1976 when Alfred Bello told the prosecution about how he came to recant his identifications of Carter and Artis, he (Alfred Bello) didn't know the prosecution would uncover the contract at The Viking Press and locate the canceled checks for \$10,000. He didn't know what was in Fred Hogan's notes. Aside from the fact that this evidence confirmed what Alfred Bello said about the circumstances of the recantation, this was shocking evidence and obviously impacted on the jury. How can the district court's assessment of the evidence ignore this whole area? Is it fair to present an evaluation of Alfred Bello's identification testimony by simply reciting that he changed his story without any mention of the startling record that supports his testimony that the change involved in the recantation was solicited by bribe offers from defense associates?

In the course of his involvement in obtaining the so-called recantation from Alfred Bello, Mr. Hogan worked closely with Reporters Hal Levenson and Selwyn Raab. When these reporters first became involved in this case, they worked together at Channel 13, a local, public, television station. At the time that the recantation story was reported in the media, Selwyn Raab had secured a position with the New York Times which was the first newspaper to break the recantation story. At that time, Hal Levenson had also moved up substantially. He was the managing editor of Channel 5 News, which was the first television station to put out the recantation story.

During certain periods of time in 1973 and 1974, Alfred Bello was incarcerated in the Passaic County Jail and the Bergen County Jail. He became ill in jail and was angry with Passaic County officials, particularly, Lieutenant Vincent DeSimone for not interceding on his behalf regarding the petty offenses which produced his confinement. Mr. Bello had many visits at the jails by Fred Hogan, Selwyn Raab and Hal Levinson. The records from both jails were produced as evidence of the visits with Alfred Bello. Patrick Wright testified with regard to the Passaic County Jail records (25aA 5534-46). Thomas Heyboer, testified with regard to the records of the Bergen County Jail (25aA 5547-52). At both institutions Fred Hogan identified himself by signing, S. Hogan.

Alfred Bello testified that Mr. Hogan told him that he would be sending Selwyn Raab and Hal Levinson to visit him because the recantation needed publicity (22aA 4854-55).

Mr. Bello testified that Hal Levinson came to visit him the next day. Mr. Levinson told him that Arthur Bradley had received \$1,000 for a documentary that Levinson had made. He wanted Mr. Bello to recant then and there and when Mr. Bello declined, Mr. Levinson left but returned another day. When Bello still declined to recant, Levinson “got all upset” and said that “Selwyn Raab will come down and talk to you” (22aA 4856-58). Alfred Bello was transferred to the Bergen County Jail where he was visited by Selwyn Raab. Hogan also visited him there, and Raab paid a second visit, during which, Raab advised him that “when you get an article... one of the words you should use is duress” (22aA 4859-63).

Hal Levinson was initially called to the stand by the defense on December 10, 1976 (38aA 8800). Mr. Levinson indicated that he had records and notes regarding his involvement in this case. He selectively brought to court certain of the documents (38aA 8800-8801). Mr. Levinson indicated that he had other notes and records in his

car outside the courthouse and also in his home in Maryland. He was excused from the stand at that point to permit him to go to Maryland to retrieve his notes as directed by the court and to permit him his request to consult with an attorney (38aA 8801-19).

In the interim, the defense called Selwyn Raab as a witness. Mr. Raab had refused to testify at the recantation hearing, according to defense attorney Myron Beldock (38aA 8823). However, he was willing to testify at the retrial (38aA 8820). Mr. Raab testified that he had no recollection of any conversation with Hal Levinson about Alfred Bello asking for money (41aA 9508). Selwyn Raab stated that it would have been very significant to him if Alfred Bello had talked to Fred Hogan about money in exchange for his testimony (41aA 9508-09), and he (Raab) would have looked into it (41aA 9509). Mr. Raab was definite: “Nobody told me anything about an offer of money or a request for money” (41aA 9510).

Hal Levinson retrieved his notes from Maryland and returned to the witness stand on December 17, 1976. He testified that with regard to his involvement in this case, he worked “very closely” with Mr. Hogan and Mr. Raab (44aA 10317). Hal Levinson’s diary (located in Maryland) noted at least 30 conversations with Hogan in the five month period ending in August of 1974. Mr. Levinson testified that Selwyn Raab was his superior at Channel 13 and that, during this investigation, he reported to Mr. Raab and kept him “closely advised” (44aA 10319). Selwyn Raab had definitely denied knowing anything about a request for money or any offer of money regarding Alfred Bello’s testimony. Hal Levinson’s diary showed Mr. Raab’s testimony was false. Mr. Levinson’s records showed notations for November 21, 1973 and November 23, 1973 with a reference that, Bello could cut Carter loose for \$20,000 (44aA 10312-15). Mr. Levinson was asked about Selwyn Raab’s knowledge of that information:

Question: And when you learned early in the investigation from Mr. Hogan that Mr. Bello had said that he could cut Carter loose for \$10,000 or

\$20,000, you, of course, told Mr. Raab that, didn't you?

Answer: Yes, surely.

Question: So that Mr. Raab knew that early in the investigation Mr. Bello had indicated that he could cut Carter loose for \$10,000 and \$20,000?

Answer: I have no doubt that there was discussion of that item, sure.

Question: And you continued with the investigation after that, did you not, sir?

Answer: Yes.

Question: And you didn't advise anybody in law enforcement about that \$10,000 to \$20,000, did you? \$10,000 to \$20,000, did you?

Answer: No, sir.

Question: And when you later reported on this story, you didn't write that, did you sir?

Answer: No.

Question: You didn't put that in any news broadcast, did you, sir?

Answer: No, sir.

This evidence and the efforts by the defense witnesses to withhold it, along with their false testimony about it, supports Alfred Bello's explanation of the circumstances surrounding the recantation. It is true that Alfred Bello changed his story. But the record does not consist of simply that. It is not a fair statement of the record to merely recite that Alfred Bello changed his testimony and recanted his identification of the defendants. There is a vast area of the record to support the conclusion reached by the first trial court at the recantation hearings, namely, that the so-called recantation of Alfred Bello was not true. The district court's presentation of the evidence on this

point is slanted because it ignores a vast and most 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 to 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 by 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 Ziem 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

talked with the defendant Rubin Carter in prison and told him of the taping of Alfred Bello (41aA 9670-71).

The Hawkins investigation contacted Alfred Bello in October and November 1975 and obtained from him the version of Alfred Bello being in the bar during the shooting. This account was given in the midst of this promotional activity by Messrs. Miller and Ziem which was being carried out in the context of mutual association and cooperation with the defense.

At some point during their involvement with Alfred Bello, Messrs. Miller and Ziem came into substantial sums of money, according to the testimony of Mr. Bello (23aA 4966-67).

There was considerable evidence at the trial bearing on this part of the case. The testimony of one other witness should be mentioned with regard to this part of the evidence which supports Mr. Bello's explanation of the circumstances surrounding this new version. That witness was a journalist named Blake Fleetwood. In the course of preparing an article on the Carter-Artis case for Rolling Stone Magazine, he talked with Joseph Miller and Melvin Ziem. Mr. Fleetwood was called as a rebuttal witness by the State and he testified that his conversation with Messrs. Miller and Ziem lasted for several hours (44aA 10514-15). The conversation took place in Mr. Miller's real estate office which was above Mr. Ziem's furniture store. Mr. Fleetwood testified that Messrs. Miller and Ziem told him that they had Alfred Bello's complete story on tape and that it contained startling new information (44aA 10515). In the course of this lengthy conversation, Joseph Miller and Melvin Ziem presented four or five different versions of Alfred Bello's involvement in the Lafayette Grill murders (44aA 10515). Mr. Fleetwood spelled out five different versions as they were presented to him by Messrs. Miller and Ziem (44aA 10515-18). Mr. Fleetwood explained that this was a very lengthy conversation and they did not begin by saying they had four or five

different versions. He said they would present a version and when he would raise questions about it or the proof for it, they would suggest another version (44aA 10518-21). Mr. Fleetwood testified that they were clearly out to sell a story (44aA 10518).

This witness's testimony was very credible. It was in direct contrast to that given by defense witness Melvin Ziem who definitively testified that several different versions were not given to Blake Fleetwood (41aA 9751). A comparison of the testimony of these two witnesses (Blake Fleetwood and Melvin Ziem) leads to the inescapable conclusion that one of them lied. We suggest that an objective study of the record in this area shows that the testimony of defense witness Melvin Ziem was not true.

The district court ignores this entire area of the evidence in this case. The district court takes the position that Alfred Bello's testimony was the "crucial" evidence in the case and the "pillar" of the State's case. The respondents don't agree with this assessment. However, if the district court made this determination and believes that Mr. Bello's testimony was crucial for a conviction, how can the district court present the record of that crucial evidence by simply saying that Alfred Bello changed his story several times? If Alfred Bello was the crucial evidence against the defendants and Mr. Bello's version changed several times, how can the district court not address the enormous record of the startling and revealing evidence directed toward the explanation for those changes (the recantation and the sensational story of Mr. Bello in the bar during the murders).

The jury did not believe that Mr. Bello's testimony was the crucial evidence in the case. Their deliberations reflect the contrary. A full and fair study of the record shows that the persuasive and overwhelming evidence against the defendants is found in the totality of the record of the circumstantial evidence. The defendants were in the

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.