

**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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ARGUMENT

POINT I

IT WAS PROPER FOR THE TRIAL COURT TO PERMIT EVIDENCE AND ARGUMENT AS TO THE MOTIVE FOR THE MURDERS. THE PROSECUTION PROPERLY PRESENTED EVIDENCE AND ARGUMENT AS TO MOTIVE. THE DISTRICT COURT'S FINDING TO THE CONTRARY IS IN ERROR.

The United States District Court has decided that triple murder convictions returned over nine years ago in the Superior Court of New Jersey should now be set aside. These convictions had been the subject of what seemed an almost endless process of appeals by the defense through the various appellate courts of New Jersey. Through all that process these convictions remained intact.

The defense then filed a civil action (petitions for writs of habeas corpus) in a trial level court in the federal jurisdiction. They brought to that court the same argument based on the same record which they had unsuccessfully argued to the trial court, the Appellate Division, and the Supreme Court of New Jersey. After 11 state court judges reviewed this same argument regarding the motive for the murders and found it to be without merit, the district court found it meritorious and adopted it as the primary basis for its decision to issue writs of habeas corpus and overturn the jury's verdicts.

In Engle v. Isaac, 456 U.S. 107, 71 L.Ed. 2d 783, 102 S.Ct. 1558 (1982), Justice O'Connor presents a comprehensive discussion of the role of federal courts in habeas corpus matters. Justice O'Connor's reference to the remarks of Judge Henry J. Friendly and Justice Lewis F. Powell, Jr. seem appropriate here:

Judge Henry J. Friendly put the matter well when he wrote that "[T]he proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970).

Justice Powell elucidating a position that ultimately commanded a majority of the Court, similarly suggested:

“No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 262, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) (Concurring opinion) (Footnote omitted). See also *Stone v. Powell*, 428 U.S. 465, 49 L.Ed. 2d 1067, 96 S.Ct. 3037 (1976).

In addition to expressing a concern that “the writ undermines the usual principles of finality of litigation,” (p. 127) the court in *Engle* also discussed the impact of the natural sense of frustration which the issuance of habeas corpus writs presents for state court judges:

In an individual case, the significance of this frustration may pale beside the need to remedy a constitutional violation. Over the long term, however, federal intrusions may seriously undermine the morale of our state judges. As one scholar has observed, there is “nothing more subversive of a judge’s sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.” Bator, [Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451, n. 32 (1963)]. Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own. While this concern cannot detract from a federal court’s duty to correct a “miscarriage of justice,” [Citations omitted], it counsels some care in administering §2254 (p. 129, n. 33).

The dangers inherent in collateral review of state court convictions by federal courts are well documented in federal jurisprudence. See Engle. The role of a district court in a habeas matter is not analogous to the customary role of a reviewing court on appellate review of a trial. The appellate courts of the State of New Jersey which sustained these convictions had a broader scope of review than the district court which vacated them.

The function of a habeas court is the narrow one of evaluating the matter of due process. It does not extend to the scope of appellate review or of a board exercise of supervisory power. Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871, 40 L. Ed.2d 431 (1974); United States ex rel. Perry v. Mulligan, 544 F.2d 674, 678 (3 Cir.1976), cert. den. 430 U.S. 972, 97 S. Ct. 1659 (1977).

In Engle, the Supreme Court referred to the difference between the review of a habeas matter and the direct review of a federal conviction:

The federal courts apply a plain-error rule for direct review of federal convictions. Fed. Rule Crim. Proc. 52(b) Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is “greater than the showing required to establish plain error on direct appeal.” Henderson v. Kibbe, 431 U.S. 145, 154, 52 L.Ed.2d 203, 97 S. Ct. 1730 (1977); United States v. Frady, Post, at 166, 71 L. Ed.2d 816, 102 S. Ct. 1584.

(p. 134-135).

In the disposition of habeas corpus matters the conviction must stand, “unless the claimed error amounted to a fundamental defect so great that it inherently resulted in a complete miscarriage of justice,” Cramer v. Fahner, 683 F.2d 1376, 1385 (7 Cir. 1982), cert. den. 459 U.S. 1016, 103 S. Ct. 376 (1982); Jackson v. Hutto, 508 F.2d 890, 891 (Cir. 1975). A habeas court should not interfere with a state’s conduct of a criminal

trial unless there has been a “denial of fundamental fairness, shocking to the universal sense of justice,” Betts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 (1942).

Was the trial court’s permission of the motive evidence and argument, a ruling so far from the mark that it constituted a fundamental and inherent defect of such proportion that it resulted in a complete miscarriage of justice?

In reaching its determination on the question of the admission of motive evidence, the trial court engaged in a process of balancing competing interests in the exercise of its discretion. In United States v. Robinson, 560 F.2d 507, 514-515, (2 Cir. 1977), the court presented an extensive discussion of the respective roles of the trial court and a reviewing court in the context of a review of a trial court’s discretion.

The trial judge must weigh the probative value of the evidence against its tendency to create unfair prejudice and his determination will rarely be disturbed on appeal. v. United States, 361 F.2d 673, 676 (8 Cir. 1966); Wangrow v. United States, 399 F.2d 106, 115 (8 Cir.), cert. denied, 393 U.S. 933, 89 S. Ct. 292, 21 L. Ed.2d 270 (1968).

Broad discretion must be accorded to the trial judge in such matters for the reason that he is in a superior position to evaluate the impact of the evidence, since he sees the witness, defendant, jurors, and counsel and their mannerisms and reactions. [Citation omitted]. He is therefore able, on the basis of personal observation, to evaluate the impressions made by witnesses, whereas we must deal with the cold record.

Though we may strive most diligently and with all our accumulated experience to obtain from the black and white of transcripts before us a perspective equivalent to that of the experienced and able district court judge who tried this case, unless complete videotaped trial records become available, [Citation omitted] we simply cannot successfully put ourselves in his position.

The Robinson court (p.515) concluded that the appropriate rule to follow is to uphold the trial judge's exercise of discretion unless it is determined that the trial court acted arbitrarily or irrationally. The court stated (p.515) that a similar view was expressed by Judge Adams of the Third Circuit in Construction Ltd. v. Brooks Skinner Building Co., 488 F.2d 427, 431 (3 Cir. 1973).

The arbitrary-irrational standard for abuse of discretion was followed in United States v. Moon, 718 F.2d 1210, 1232-1233, (2 Cir. 1983), cert. den. ____U.S.____, 104 S. Ct. 2344 (1984). The defendants there claimed that the government presented improper evidence to the jury regarding the religious practices of the Unification Church which the defense claimed prejudiced them before the jury and caused them to be tried by religious innuendo. The main issue before the jury was whether certain stock and bank accounts belonged to the Unification Church or to the defendant Sun Myung Moon personally. The trial court had permitted evidence of church practices in order to show the defendant Moon's control over church officials. The court applied the arbitrary-irrational standard in sustaining the trial judge's discretion in balancing the competing interests of probative value against prejudice:

Absent an abuse of his broad discretion, the decision of the trial judge to admit the challenged evidence of religious practices must stand. To find such abuse, we must conclude that the trial judge acted arbitrarily or irrationally: to avoid acting arbitrarily a court must make a conscientious assessment when weighing probative value against the risk of unfair prejudice. United States v. Birney, 686 F.2d 102, 106 (2nd Cir. 1982).

The district court's ruling on the motive issue in the instant matter is based on a determination that the probative value was outweighed by the inflammatory and prejudicial effect upon the jury (1ad 15, 17-18), (although the district court is unable to find one statement in all the record which can fairly be said to be inflammatory or

prejudicial). The cases referred to above (Robinson, Moon and Birney), as well as the numerous authorities cited therein, make it clear that it is immaterial whether a reviewing court would have weighed the competing interest of probative value and risk of prejudice differently than the trial court. Short of a finding that the trial court acted irrationally or arbitrarily in the exercise of its discretion, the judgment of the trial court, made from its superior position, should not be disturbed.

The trial court in this case made a conscientious assessment of the weight of the competing interests. It withheld ruling on this issue until it had the opportunity to have a feel of the case and a “sense” of the issue. As was recited by the court in Robinson, *supra*, p.515:

The final reason – and probably the most pointed and helpful one – for bestowing discretion on the trial judge as to many matters is, paradoxically, the superiority of his nether position. It is not that he knows more than his loftier brothers; rather he sees more and senses more.

The trial court heard extensive argument prior to ruling. While the district court obviously disagrees with the trial court’s judgment in weighing probative value against risk of prejudice, the district court makes no showing that the trial court acted irrationally or arbitrarily.

The irrational-arbitrary standard is widely accepted and was applied in the above cases to direct appeals of federal convictions. Certainly a habeas corpus court in the narrow role assigned to it in the review of state court convictions, can apply no broader a standard to review of a state trial judge’s exercise of discretion than that applied to the review of federal convictions on direct appeal. Indeed, in order to set aside the state court convictions, the habeas court must find, not only that the trial court acted arbitrarily and irrationally and thereby abused its discretion, Robinson, *supra*, but also that such abuse of discretion, in the context of the entire trial, amounted

to a total miscarriage of justice, Engle v. Isaac, *supra*, Cramer v. Fahner, *supra*.

The appellants contend that the trial court correctly ruled on the issue of motive and that the prosecution dealt with this matter in a fair and responsible way. At the time the trial court made its ruling, certain things had already occurred which are relevant to a review of that ruling.

1. The prosecution had notified the court and the defense at the pretrial conference that it intended to offer evidence to prove that the motive for the murder of James Oliver was as retaliation for the killing of Leroy Holloway and that the State's position was that the patrons at the Lafayette Grill were shot in an effort to eliminate witnesses, (see Statement of Facts hereafter referred to as Facts, p.65).
2. A foreign jury had been selected outside of Passaic County to hear the case. (This jury was sequestered throughout the trial).
3. The court adopted the entire voluminous questionnaire submitted by the defense as a proposed voir dire. The prosecution did not object to the submission of these questions to prospective jurors. Each of the prospective jurors was brought into chambers where the court interrogated each juror separately and extensively regarding racial matters.
4. Blacks were included on the jury. (Two blacks deliberated on the verdicts).
5. The prosecution had withheld mention to the jury of its position on motive in its opening statement and until the matter was ruled upon by the trial court.
6. The defense had introduced to the jury in specific terms the prosecution's position that the motive for the Lafayette Grill murders was to avenge the murder of Leroy Holloway several hours earlier, (Facts, pp. 65-68).
7. Evidence had been introduced to show that robbery was not the motive. (Facts, pp. 69-70).

The trial court correctly applied the law to the issue before it. The trial court relied to a considerable extent upon the unanimous opinion of the New Jersey Supreme Court in State v. Rodgers, 19 N.J. 218 (1955). The following statement of the New Jersey Supreme Court in Rodgers, at 228, was persuasive to the trial court and is particularly pertinent to this issue:

In criminal prosecutions, whenever the motive or intent of the accused is important and material, a somewhat wider range of evidence is permitted in showing such motive or intent than is allowed in support of other issues.... Otherwise there would often be no means to reach and disclose the secret design or purpose of the act charged in which the very gist of the offense may consist. Such intent or motive may be proved either by direct or circumstantial evidence. All evidentiary circumstances which are relevant to or tend to shed light on the motive or intent of the defendant or which tend fairly to explain his actions are admissible in evidence against him although they may have occurred previous to the commission of the offense. (Emphasis added).

In the course of affirming the trial court's disposition of the motive issue, the New Jersey Supreme Court (State v. Carter, 91 N.J. 86, 103 (1982)), also relied on Rodgers and pointed out that the law of this case continues to be followed by the New Jersey courts. See State v. Baldwin, 47 N.J. 379, 391 (1966); State v. Royster, 57 N.J. 472, 484-485 (1971).

The Supreme Court (p. 103) also pointed out that the holding in Rodgers is the majority rule throughout the country. See 22A C.J.S., Criminal Law, §614 (1961) and Supp. (1982); 29 Am. Jur.2d, Evidence, §363 (1967).

Highly regarded legal treatises take the same position. See 1 Wigmore, Evidence, §118 at 1697-98 (1983); 1 Wharton, Crim. Evidence, §170 at 314-318 (13 ed. 1972). Wharton states the concept as follows:

In the introduction of evidence to show motive, a wide range is permitted. Thus any evidence which logically tends to show a motive or which fairly tends to explain the conduct of the accused, should be permitted. In order for

evidence of motive to be admissible, it is not necessary that each part of it be sufficient to prove motive. The facts supplying a motive may be adduced in connection with other evidence in the case.

The district court recognized (1aD 15) that Wharton also takes the position that: “Ordinarily, evidence as to motive is admissible even though it may be prejudicial in the sense that it will arouse or inflame the jury.” 1 Wharton, Crim. Evidence, supra §170 at 316. While the district court acknowledges that the trial judge’s range of latitude in favor of the introduction of motive evidence extends even to information which may “arouse or inflame the jury,” the appellants contend that the prosecution presented this matter in a responsible way so that it was not inflammatory.

Well-established legal precedents recognize the importance of evidence of motive in the resolution of criminal accusations. Accordingly, the great weight of legal authorities hold to the view that, in the exercise of their discretion, trial courts should permit wide latitude in favor of the introduction of evidence of motive. Federal habeas corpus courts have been directed not to disturb a state court’s exercise of this wide range of discretion short of finding a fundamental error so great that it inherently resulted in a complete miscarriage of justice, Cramer v. Fahner, supra.

The district court found that the trial court permitted the prosecution to engage in an insidious and repugnant appeal to racism. The district court claims that the prosecution did this through the offer of motive evidence and argument which urged the conviction of the defendants solely because they are black and the victims are white (1aD 2, 17, 26, 34).

This is a strong statement. It compels attention. However, it also raises difficult questions. How could the trial court permit the prosecution to obtain convictions based on the position that the defendants committed these murders solely because they are black and the victims were white? How could it be that each of the three judges from the Appellate Division of the Superior Court of New Jersey overlooked such a blatant

appeal to racial prejudice? How could it be that not even one of the seven justices of the New Jersey Supreme Court spoke out against such outrageous racism?

More than that, the district court finding assumes the prejudice of the white jurors and the likelihood of their response to the alleged appeal to those prejudices. But, how could the prosecution make such a flagrant appeal to the racial prejudice of the white jurors and, at the same time, not alienate the black jurors? In the face of such an insidious and repugnant appeal to racial prejudice, how could the black jurors ever vote these convictions?*

The district court's ruling cannot accommodate these questions because the district court's position is not supported by the record. The district court's opinion contains numerous misinterpretations and misstatements of the record. The opinion also omits reference to significant portions of the record. In order to demonstrate this, it has been necessary for the appellants to present an extensive review of the record in contrast with the impressions and statements of the record of the evidence presented by the district court. See Facts, supra.

* The district court opinion relies heavily on United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2 Cir. 1973), in its (district court's) holding on the motive issue. The Haynes opinion recites several lengthy excerpts from the prosecution summation which was saturated with blatant racial slurs. The Haynes case bears no comparison to the instant case. However, it certainly is significant that in assessing the impact of these racial slurs and in concluding that the "probability of prejudice was sufficiently great" (p. 161), the Haynes court repeatedly referred to the fact that a black man was being tried by an all-white jury:

We must bear in mind what these remarks consisted of and their implications – yet incidentally, this was an all-white jury trying a black man – to a listener supposedly trying to decide a case without bias, prejudice, passion or discrimination. (p. 155, n.3).

The district court adopted and recited in its formal opinion, numerous statements and certain terminology from the petitioners' brief. The court concludes from its analysis of the record that the jury was presented with a "close case." To support this the district court inventories certain areas of the evidence against the defendants at the trial. The district court determined that each such area of evidence was "frayed" and without stating why the district court reached this conclusion, the court recites various attacks on the respective areas of the evidence suggested by the petitioners. The appellants have assumed by implication, that the district court's determination that each area of evidence is weak, is based on the particular arguments of the petitioners recited by the district court. The determination that the jury was presented a close case is necessary to support the district court's ruling on the motive issue. The appellants contend, as demonstrated in Facts, supra, that the jury was not presented a "case sufficiently close" (1aD 33), that the motive evidence made a difference in the verdict.*

* The district court presents United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2 Cir. 1973), in support of its (district court's) holding on motive. The Haynes court (p. 161) in evaluating the numerous and flagrant racial slurs of the prosecutor, determined that a new trial should be ordered because "the probability of prejudice was sufficiently great and the case was sufficiently close." As previously noted (footnote, p. 124), in concluding that the "probability of prejudice was sufficiently great" the Haynes court emphasized that a black man was being tried by an all-white jury. In deciding that the case "was sufficiently close," the Haynes court presented a detailed study of the jury deliberations, p. 154. The court considered the relative length of the deliberations, (protracted) and the number and nature of the questions submitted by the jury. In the instant case, the deliberations were relatively brief and uneventful, Facts, supra, p.9. While relying heavily on Haynes, the district court determined that the "probability of prejudice was great" without considering the racial composition of the jury as Haynes did and the district court also determined that the case "was sufficiently close" without considering the nature of the deliberations as Haynes did.

The evidence on the issue of motive was circumstantial. The law in New Jersey has long recognized that circumstantial evidence is as worthy a means of proof as direct evidence and that circumstantial evidence is often the best kind of evidence, “more forceful and more persuasive than direct evidence.” State v. Mayberry, 52 N.J. 413, 437 (1968). There are numerous pieces of circumstantial evidence that relate to motive. This evidence is found throughout the record. The importance of viewing the record of the evidence in its totality and of examining each piece of evidence in its relationship to all the other evidence is well stated in Volpicelli v. Salamack, 477 F. Supp. 652, 663 (S.D. N.Y. 1978):

Before a federal court may set aside a state court judgment of conviction, it must be convinced that the conduct of the proceedings in the state court were not merely less than perfect, but rather that they offended fundamental principles of justice and fair play – in short that the claimed errors, either singly or in totality, were of such an egregious nature that petitioner was deprived of a fair trial. [Citations omitted].

The issue cannot be resolved by isolating a single incident but must be determined against the totality of the evidence presented at the trial. [Citations omitted]. A reviewing court cannot deal in hypotheticals or after-the-fact suppositions; it must plunge itself into the record to obtain the full flavor and atmosphere of the trial in order to evaluate the effect the challenged evidence had on the trial as a whole. It is only through such immersion and careful study of the entire trial record and of the separate testimony of each witness in relation to that of other witnesses, that a reviewing court can do justice to the claims of a defendant for the redress of alleged violation of his constitutional rights and to the strong public interest in not upsetting convictions fairly arrived at. The court has... borne in mind the admonition of Justice Frankfurter:

It is a common place in the administration of criminal justice that the actualities of a long

trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. Glasser v. United States, 315 U.S. 60, 88, 62 S. Ct. 457, 473 86 L. Ed. 680 (1942).

The appellants contend that the district court's depiction of the record of the evidence on motive is not presented from a view of the totality of the evidence giving consideration to the relationship of each piece of evidence in connection with all of the other evidence in the case. More importantly, the district court's holding on the motive issue is premised on the record as recited in its opinion. As shown in Facts, supra, the court's opinion contains at least a dozen misstatements of the evidence or omissions of significant areas of the evidence that specifically relate to motive. Some of these references are summarized below.

One: The district court's opinion states that the tape recording of the interview of Alfred Bello was offered by State (1aD22, n. 5). The tape recording and transcript were offered by the defense, Facts, supra, pp. 65-67.

The difference is quite significant because the true state of affairs is that the defense introduced the revenge motive to the jury. The district court makes no mention of this most significant difference. When the New Jersey Supreme Court presented its review of the evidence of motive, this fact was the first item the Court mentioned, State v. Carter, 91 N.J. 86, 104 (1982).

Two: The district court's opinion states that on this tape recording, it was Alfred Bello who suggested revenge was the motive (1aD 22, n. 5). It was not Alfred Bello. It was Lieutenant DeSimone, Facts, supra, pp. 66-67. Obviously it would make a considerable difference to the jury if it was Lieutenant DeSimone, as opposed to Mr. Bello, who firmly believed from the outset that revenge was the motive.

Three: The district court's opinion exaggerates the position of the State on the motive evidence. The State did not concede that the introduction of the racial revenge motive was critical to its case and that a conviction could not be obtained without it (1aD 33). Convictions were obtained at the first trial without motive evidence and without other powerful evidence which the State presented at the second trial (there was no evidence of a false alibi by the defendant Carter at the first trial, Facts, supra, p. 56 et seq., and there was no evidence directly contradicting the defendant Artis about the nature of his relationship with Rubin Carter and directly contradicting the defendant Artis's claim that shortly before the murders he was with Donald Mason in Mr. Mason's home, Facts, supra, pp. 54-55). The district court's exaggeration of the State's position on the motive issue is presented in the opinion as fortification for the court's position that the motive evidence made a critical difference in the outcome, Facts, supra, pp. 68-69.

Four: The evidence at the trial clearly established that the killings at the Lafayette Grill did not occur in the course of a robbery or attempted robbery, Facts, supra, pp. 69-70. James Oliver was assassinated. The appellants contend that these are significant factors in the evaluation of the motive for the murders, particularly, when considered in relation to all the other evidence in the case. The district court's study and analysis of the evidence of motive contains no discussion of these rather significant factors.

Five: The district court states that the testimony of Clarence Carr "contradicted" the testimony of Detective Callahan and Officer DeFranco regarding events at the Waltz Inn (1aD 20-21). Essentially, Mr. Carr's testimony was confirmatory rather than contradictory, Facts, supra, pp. 71-72. The district court's presentation of the contradiction is apparently offered to suggest some detraction from the evidence of the neighborhood reaction to Mr. Holloway's brutal murder as described in the testimony of

these police officers. Mr. Carr did not see Mr. Conforti when he was taken from the tavern to the police vehicle but otherwise his account is remarkably similar to the presented by the police witnesses.

Furthermore, it should be noted that the district court states that Mr. Carr testified that there were no “racial derogatory terms used by the crowd” at the Waltz Inn (1aD 20-21). In the court’s opinion this is made to look like a contradiction. It is not because the police witnesses did not testify to “racially derogatory terms use by the crowd.”

Six: The district court’s opinion states that the testimony of Mr. Johnson contradicted the testimony of two police officers who said that Eddie Rawls threatened retaliation at police headquarters. In fact, William Johnson’s testimony on the issue of threatened retaliation was almost identical in detail to that given by the police officers as to Mr. Rawls’ statements. All three witnesses (Mr. Johnson and the police) testified that Eddie Rawls did not hesitate to tell police officers in a police station that if they didn’t properly take care of his father’s killer, he (Rawls) would, Facts, supra, pp. 72-74. The court’s opinion presents a contradiction when, in fact, there is confirmation.

Seven: The district court’s opinion states that in the defendant Carter’s Grand Jury testimony the defendant said that “shaking” meant certain things, “but not murder” (1aD21). In fact, the record shows that the defendant Carter did not definitively exclude murder from what “shaking” meant as stated by the court. The defendant Carter said it meant some form of retaliation but that he didn’t know what it would be. He did not think it would be murder, Facts, supra, pp. 75-77.

Eight: The district court’s opinion states that the search for guns “adds nothing to the evidence of motive” (1aD 24). The record shows the contrary. The district court’s statement ignores the context and timing of the search for guns. The record

shows that the first thing the defendant Carter did after talking to Eddie Rawls about the horrible murder of his father, was to go looking for guns which had been missing for a year, Facts, supra, p. 43 et seq. The search occurred just a few hours before the Lafayette Grill murders.

Nine: The district court's opinion states that "the search [for guns] may have occurred even before petitioners knew of the shooting of James Oliver (36T 140-145)" (1aD 24). It seems clear that the district court meant to say the shooting of Leroy Holloway rather than the "shooting of James Oliver." However, the citation (36T 140-145) given by the district court refers to the reading at the trial of the defendant Rubin Carter's Grand Jury testimony where the defendant Carter clearly says that he went to look for the guns after he talked to Eddie Rawls about his father's murder and not before as stated in the court's opinion, Facts, supra, pp. 45-47.

Ten: The district court's opinion omits any reference to the significant circumstantial evidence that the murderer's car stopped at Eddie Rawls' house within five minutes of the murders. This, of course, must be considered together with the important evidence that the defendants Carter and Artis occupied that car at the time it drove down 12th Avenue to Eddie Rawls' house at the corner of 12th Avenue and 28th Street, Facts, supra, pp. 39-41.

Eleven: The district court's opinion repeatedly presents the implication that the defendants Carter and Artis would not likely have "reacted in such a vicious and violent way" against "strangers" (1aD 19-20, 22, 33). While this area is of no real importance to the disposition of the ultimate issue, it should be noted, since the district court chose to gratuitously inject these character profiles in its opinion, that the defendant Carter was not "peaking" or a "contender" for a boxing championship and the defendant Artis was not "about to enter college" and did not have the benefit of a "scholarship" as the district court states (1aD 3) Facts, supra, pp. 80-81.

Twelve: The district court made an assessment of the effect of the voir dire to blunt, sensitive racial issues by forewarning prospective jurors of their coming and by extensive probing of racial attitudes of potential jurors (1aD 17, n. 4). The district court determined that the extensive voir dire would not make a difference in its ruling without having had the benefit of reviewing the transcripts of the voir dire, Facts, supra, p. 84.

It is noteworthy that in response to a habeas petition based on a claim of prejudice by reason of the prosecution's reference to the evils of street gangs in general and the defendant's street gang membership, the Seventh Circuit (United States ex rel. Hairson v. Warden, Etc., 597 F.2d 604 (1979)), examined the voir dire and concluded:

A review of the voir dire examination of prospective jurors fails to reveal any suggestion that the jury was biased against the defendant in particular or against the defendant in particular or against his connection with any street gangs. See Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed.2d 589 (1975). p. 607*

Thirteen: The district court's opinion states that "there was no evidence that either petitioner knew that it was a white man who killed Holloway...." (1aD 22). Apparently, the district court reads a record in a way that excludes all reasonable inferences. It is not possible to read this record with any sense of fairness and reason and then suggest some doubt that the petitioners knew Mr. Holloway's murderer was white, Facts, supra, p.77. This statement is offered by the court as support for its ruling, but certainly it is a tortured view of the record.

* It is significant here that the petitioner in Hairston was convicted of murder and sentenced to 75 to 100 years in prison. The Circuit Court affirmed the denial of a habeas petition holding that the trial court properly exercised its discretion when it determined that "the probative value of street gang evidence outweighed the danger of undue prejudice." The court stated that, since the petitioner and the victim were members of street gangs, the evidence of street gang activity was relevant to motive, pp. 607-608.

Fourteen: The district court's opinion states that a "blatantly racial statement" was "placed before the trial court" in "Bello's testimony" that "a detective referred to blacks as 'niggers' and 'animals'" (1aD 26). This reference to these highly offensive racial slurs is a very unfair presentation by the court because the fact of the matter is that: (1) these slurs were placed before the trial court by the defense; (2) they were contained in the so-called recantation statement which defense Investigator Hogan took from Alfred Bello; (3) the first trial court conducted an extensive hearing and concluded that the statement was untrue; and (4) Alfred Bello testified at the trial that it was untrue, Facts, supra, pp. 86-87.

The district court determined that the trial court abused its discretion by permitting the motive evidence and argument. The district court reached this determination notwithstanding the fact that the law directs the trial judge to permit wide latitude in favor of the admission of information that tends to shed light on motive. The basis for this far-reaching ruling of the district court is set forth in its opinion. A study of that opinion in comparison with the record shows that the district court's holding was based on numerous misstatements, misinterpretations and serious omissions of evidence from the record.

The district court repeatedly states that the prosecution sought and obtained these convictions based on the position that the defendants committed these murders solely because they were black and the victims were white. In all of the enormous record of the trial, the district court can identify only one alleged reference in the record where the prosecution supposedly presented this position, (1aD 16-17). That solitary reference identified by the court is not taken from the testimony or the evidence before the jury, but rather from the summation of the Prosecutor. That very small part of a lengthy summation is quoted in the opinion, supra and is set out in the Facts, supra, pp. 85-86.

The appellants contend these remarks on summation speak for themselves. In the context of this case it was certainly within proper limits for the prosecution to say that we do not live in an ideal world free from racial prejudice; that revenge constitutes powerful human motivation; and that in 1966 in the midst of exposing legitimate black grievances, some blacks and some whites violated the law.

James Oliver was murdered because he was white, but it is ridiculous to suggest that the State's position on motive was based solely on the fact that the victim was white and the defendants are black. There was a great deal of evidence at the trial that was relevant and revealing regarding the motivation for Mr. Oliver's murder. This body of circumstantial evidence easily meets the Rodgers, supra criteria for admissibility by "tend[ing] fairly to explain" or "tending to shed light on the motive or intent of the defendant[s],"p.228.

The New Jersey Supreme Court undertook an extensive review of the evidence of motive introduced at the trial and concluded: "Defendants' membership in the class was not their only tie to motive," 91 N.J. 86, 103 (1982). In a celebrated murder case in New York, Judge Whitman Knapp of the United States District Court for the Southern District of New York addressed a similar issue involving the use of motive evidence, Butler v. Smith, 416 F. Supp. 1151, 1155 (1976):

Petitioner's second main claim is that the receipt into evidence of testimony concerning the defendants' membership in the Black Muslim Organization, Malcolm X's break with the Muslims, and his founding of the Organization for Afro-American Unity unnecessarily inflamed the jury and tended to substitute collective culpability for a finding of individual guilt. After carefully reviewing the trial transcript, we agree with the state court's conclusion that such evidence was relevant for the specific purpose of establishing motive. People v. Hagan, (1969) 24 N.Y.2d 395, 400, 300 N.Y.S.2d 835, 248 N.E.2d 588. It was not utilized for any other purpose.

In fact, a great deal of testimony of this ilk was offered by the defendants' own witnesses [Citations omitted]. Petitioner's guilt was established by proof of the hostile sentiments of the Black Muslims or petitioner's membership in that group. That evidence merely provided a reason for the murder. Rather, his guilt was established by eyewitness testimony that he did in fact shoot Malcolm X. Without testimony establishing a motive, the murder would have appeared so bizarre as to call into question the accuracy of the testimony describing it. Petitioner has suggested no constitutional infirmity in the procedure followed, nor can we imagine any.

In United States v. Sickles, 524 F. Supp. 506, 510-511 (D. Delaware, 1981), affirmed 688 F.2d 827 (3 Cir. 1982) evidence of the defendant's membership in a class and the attitudes of that class was held admissible because it shed light on the purpose and motive of the defendant. The defendant was convicted of illegal possession and transactions involving firearms. The defendant was the Imperial Wizard of the Adamic Knights of the Klu Klux Klan. The regulations of the AK were permitted in evidence. The regulations showed that the AK believed in arming its members. The defense objected to this evidence on the grounds that it was irrelevant or if relevant, that its probative value was substantially outweighed by the danger of unfair prejudice. The court concluded that evidence showing the purposes of the Klan was relevant to proving the defendant's motivation for the illegal dealings with firearms, even though there was no showing of any statement specifically made by the defendant regarding the AK's belief in arming its members.

The circumstances of the crime itself, in conjunction with other evidence in the case, "tends to shed light on" or "explain" the motive. It is a recognized proposition of law that the motive for a crime may be deduced from the circumstances surrounding the offense. Wharton's Criminal Evidence, §175, pp. 325-326 states:

In an unlawful homicide prosecution as in criminal prosecutions generally, evidence to show motive is competent and relevant and, in its introduction, considerable latitude is allowed. The motive may be inferred from the killing itself or from the actions of the accused. (Emphasis added).

If “motive may be inferred from the killing itself” and if as the district court says, “Certainly motives can be derived from actions:” (laD 24), then the actions of the killers at the Lafayette Grill supports the State’s position on motive.

James Oliver was murdered while tending bar at the Lafayette Grill. He was killed by a single blast from a shotgun which was fired at close range and which opened a gaping wound in his back. He was not killed in the course of a robbery or attempted robbery. Money was left at the scene — in the cash register and in the possession or control of the victims, Facts, supra, pp. 69-70. Both Hazel Tanis and William Marins said that the perpetrators did not say or do anything to suggest a holdup. They said that the two men entered the premises and without speaking a word immediately opened fire on the occupants, Facts, supra. This was an assassination. It is significant with regard to the issue of motive that the jury had every good reason to believe that whoever killed James Oliver, did it in terms of an assassination.

Was it just a strange and curious coincidence that there was still another assassination in Paterson several hours earlier? The jury had good reason to believe it was not. Leroy Holloway was killed when Frank Conforti walked into the Waltz Inn, pointed a shotgun at Mr. Holloway and fired a single shot at close range, blowing Mr. Holloway’s head off (as Carter told Artis about two hours later when first they met that night, Facts, supra, p.74), Facts, supra, p.71.

Mr. Holloway was assassinated. He was killed in a cold-blooded and brutal way. As Clarence Carr testified, Mr. Holloway was a popular man in the black community, Facts, supra, p.71.

A black man was assassinated by a white man while tending bar. The bar was a black bar just on the black side of the boundary between the predominantly black and predominantly white communities, Facts, supra, pp. 79-80.

This occurred in June of 1996 during a period of racial tension in Paterson and other New Jersey cities. During the voir dire the jurors were specifically questioned,

at the request of the defense, about their knowledge and experience with the racial riots in cities like Newark and Paterson in the mid-1960's.

Several hours after a white man walked into a black bar and murdered the bartender with a single blast from a shotgun fired at close range, two black men walked into a white bar and murdered the white bartender with a single blast from a shotgun fired at close range. There was considerable evidence before the jury to support the natural projection that, in a time of racial tension, the second killing occurred as retaliation for the first.

The Lafayette Grill was a natural target for retaliation. It was a white bar down the street from the Waltz Inn. It was on the opposite side of the boundary between the predominantly white and black neighborhoods. As the Waltz Inn was on the edge of the predominantly black community, the Lafayette Grill was on the edge of the predominantly white community. The bartender at the Lafayette Grill had a history of prior incidents involving his exclusions of black patrons from the bar, Facts, supra p.80.

A study of the evidence in the record covering the interval between the murder and the assassination of James Oliver supports the proposition that the Lafayette Grill murders were carried out as retaliation for the murder of Mr. Holloway and that the defendants Carter and Artis in connection with that retaliation perpetrated the killings.

Leroy Holloway was a highly regarded member of the community. In front of numerous witnesses he was shot in the head with a shotgun fired at close range. This was a horrible and premeditated killing. Under ordinary circumstances community outrage would be natural. The jury had good reason to conclude that at this time in Paterson, stronger emotions were involved.

A crowd gathered outside the scene of Mr. Holloway's murder. It was necessary for numerous police cars to respond to the scene. The police could not simply usher the murderer from the tavern to the police vehicle. It was necessary to form a cordon

of police officers to separate the crowd from the murderer while he was taken from the tavern to the police vehicle, Facts, supra, pp. 70-71. There was good reason for the jury to believe that people in the area were angry by what had happened there.

There was talk of retaliation in certain limited circles of the black community near the scene of Mr. Holloway's murder. The defendant Carter said there was talk of retaliation (shaking). Facts, supra, p.75. This talk occurred at the Nite Spot where the defendants spent most of their time in the hours just prior to the murders, Facts, supra, p.38. The first thing which the defendants talked about when first they met that night was about Eddie Rawls' father getting his head blown off, Facts, supra, p.74. The one person who the evidence specifically shows talked about retaliation was Eddie Rawls. He was a close friend of the defendants and the bartender at the Nite Spot where the defendant Carter occupied The Champ's Corner, Facts, supra, p.38. Even though he excused himself from work as the Night Spot bartender because of his father's murder, he spent considerable time that evening at the Night Spot where the talk of retaliation was going on, Facts, supra, p.75. Within a few minutes after the murders, the defendants drove down 12th Avenue in the murderer's car and stopped at Eddie Rawls' house, Facts, supra, pp. 39-42. Eddie Rawls was involved with the defendant Carter in putting together a false alibi, Facts, supra, p.56 et seq. There was good evidence from which the jury could reasonably have made all these findings.

The jury could reasonably conclude that the defendants were involved in talk of retaliation with Eddie Rawls. The defendants were with Eddie Rawls where the talk of retaliation was circulating. They were at the Night Spot at the time this talk was occurring.

The jury could also conclude that the defendant Carter attempted to downplay how Eddie Rawls was talking and acting at the Night Spot. In his Grand Jury testimony the defendant Carter said that he talked to Eddie Rawls at the Night Spot about the murder of Eddie Rawls' father. The defendant Carter described Eddie Rawls only as sad and said

there was no talk of getting even (even though there was talk of a shaking at the Night Spot), Facts, supra, p.75. Within minutes of the defendant Carter's contact with Eddie Rawls, the latter was at police headquarters where he created quite a disturbance because he (Rawls) was so agitated and was threatening retaliation, Facts, supra, pp. 72-73. Couldn't the jury expect that Mr. Rawls could feel the same emotions at the Night Spot as he displayed at police headquarters when his presence at both locations occurred within minutes of each other? Couldn't a jury even expect that he would be less inhibited in how he expressed himself at the Nite Spot as opposed to police station? At police headquarters he was aggravated and threatened retaliation. Within minutes of that, the defendant Carter was talking with Eddie Rawls at the Nite Spot regarding Mr. Rawls' father. Couldn't the jury reasonably conclude the same emotions prevailed at both places? Isn't this particularly true since the first thing that the defendant Carter did after talking to Mr. Rawls regarding his (Rawls) father, was to go looking for his (Carter's) guns? Couldn't the jury attribute meaning to the defendant Carter's efforts to downplay Eddie Rawls' reaction to his father's death at the Nite Spot.

The record of the trial is replete with numerous pieces of circumstantial evidence which when considered together and in relationship to each other constitute forceful and persuasive evidence that vividly shows the motive for the Lafayette Grill murders.

The district court's opinion embraces the petitioner's argument that the prosecution's position on motive rests on three assumptions, one articulated and two unarticulated. The district court repeats the petitioners' argument that these assumptions are "unacceptable" and "insupportable." (laD 25). This very same argument of articulated and unarticulated assumptions was submitted in the state court appeals of these convictions. It was universally rejected.

The district court maintains that the articulated assumption which is unacceptable and insupportable is that “shaking” meant murder (laD 25). The appellants contend that from the totality of the circumstantial evidence there was very good reason for the jury to believe that the shake did take the form of murder. It is clear from the record that “shaking” meant retaliation. Indeed, there is a wealth of evidence to support the position that the Lafayette Grill murders constituted the retaliation.

The person upon whom it (retaliation) was inflicted and the place where it occurred suggests revenge. Murder was the event being retaliated against. The murder committed in retaliation was strikingly similar in its dimensions to the murder being avenged.

There was good reason to expect that the form of the retaliation would involve strong action. A well-liked, black man was brutally slain before the eyes of friends and customers. This outrageous killing of a black man by a white man occurred at a time of racial tension in the City of Paterson. There was good reason to believe that strong emotions became involved. No other form of retaliation occurred at the time.

While there was no particular evidence as to what the discussions of retaliation specifically involved, that does not detract from the fact that retaliation was discussed and that there was a good basis for the jury to conclude that the retaliation took the shape of the Lafayette Grill murders.

According to the district court, the prosecution’s position on motive involves the unarticulated assumption that it is reasonable to expect the blacks in general murder when one of their own is attacked (laD 25-26). The appellants suggest that the record shows that this is a ridiculous statement. In all of this lengthy prosecution, there was never a moment when the prosecution made this argument. The district court cannot show one sentence in all of this massive record where the prosecution recited this position.

It certainly creates a sensation when the district court says that the prosecution contends that the defendants committed these murders solely because they are black and the victims were white, (laD 2, 17, 26, 34). However, this is not what the record shows. The prosecution's position did not involve any connotation about blacks as a whole and it is absurd to suggest that it did. The district court cannot find any such reference in the record because the State did not ever urge such a ridiculous position. The State maintained that these blacks (Carter and Artis) reacted this way, at this time, at this place, under these circumstances and against these whites.

The second "unarticulated assumption" which the district court copied from the petitioners is that "Rawls was a necessary co-conspirator..." (laD 25-26). Based on the evidence at the trial, there was certainly good reason for the jury to believe that Eddie Rawls was involved in some way or contributed to some extent in the commission of these crimes. Since the district court does not present the citation for a single legal authority with regard to this point, the appellants are hard pressed to understand the particular error identified by the court here. The relationship of Eddie Rawls to the defendants and his association and conversations with them prior to the murders were relevant to the evidence of the revenge motive. This is true regardless of whether or not Mr. Rawls was a co-conspirator and regardless of whether or not he was indicted.

How can the district court suggest that the defense was somehow harmed because the State did not produce Eddie Rawls (laD 26)? Mr. Rawls was a close friend of the defendants. The evidence at the trial showed that he was in the company of the defendants that evening and up to within minutes of the murders. He was actively

involved with the defendant Carter in structuring and submitting false alibi testimony. While the defense has no burden of proof, the defense was in a position superior to that of the State to produce Eddie Rawls. It is not reasonable to expect the State to have produced him as a witness, State v. Clawans, 38 N.J. 162 (1962).

In support of its holding on motive the district court cites (laD 28) the following legal authorities:

Miller v. North Carolina, 583 F.2d 701 (4 Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9 Cir. 1975); United States ex. rel. Haynes v. McKendrick, 481 F.2d 152 (2 Cir. 1973); and Soap v. Carter, 632 F.2d 872, 877 (10 Cir. 1980) (Seymour, J. dissenting), cert.den.451 U.S. 939 (1981).

The district court also cites Ross v. United States, 180 F.2d 160 (6 Cir. 1950), cert. den.344 U.S. 832 (1952) and McFarland v. Smith, 611 F.2d 414 (2 Cir. 1979).

The appellants contend that the determination of the propriety of the district court's ruling on this point is not so much resolved by a study of the legal precedents as it is by a study of the record. This is so because the district court's legal conclusion is based on factual findings that are not supported by the record. The district court determined that the prosecution urged that the defendants committed these murders solely because they are black and the victims were white (laD 2, 17, 26, 34). The prosecution never took this position. That is why in the dozens of volumes of the record, there is not one sentence to support the district court's determination that the prosecution took this position. There is a substantial basis in the record to support the position that the murders at the Lafayette Grill were committed by the defendants Carter and Artis in the course of retaliation for the murder of Leroy Holloway.

In order to respond to the district court's determination, it has been necessary for the appellants to present an extensive statement and analysis of the record.

The review of the legal authorities cited by the district court shows that they are inapplicable to the circumstances involved in this case. The appellants contend

that racial prejudice was a factor which contributed to the defendants' motivation for the Lafayette Grill murders. The district court's opinion confuses racial prejudice with racial motive. In its discussion of Haynes, supra, the district court says that in the Haynes case the racially prejudicial remarks of the prosecutor in summation were "more overt than in the instant case." The district court also notes that the Haynes prosecutor made "repeated references" to racially prejudicial matters (1aD 29). If Haynes involved circumstances that were "more overt" and "repeated," what authority is it for the resolution of the issue in this case? The fact is that the district court understates the situation in Haynes. The Haynes opinion recites several lengthy excerpts from the prosecutor's summation which do not bear the slightest resemblance to the statements made in summation in this case. The Haynes summation was loaded with overt racially derogatory remarks about "colored people" in general. These remarks were made to an all white jury in a close case.

In Miller, supra, the defense of consent was presented to the charge that a black man raped a white woman. Like Haynes, Miller, supra is another case which the district court presents, but distinguishes from the instant case:

Again the remarks were overt: that the victim could have consented to sexual relations because "the average white woman abhors anything of this type in nature that had to do with a black man." (1aD 30).

Furthermore, the prosecutor in summation quoted from Romans 13 and informed the jury that the law enforcement powers of the district attorney come from God and that to resist those powers was to resist God. The judge was off the bench and in chambers during this summation, Miller, supra, 704, n.3.

Miller involves overt racially derogatory slurs that have no basis in or out of the record. It does not involve circumstances relevant to this case.

In Kelly v. Stone, *supra*, cited by the district court, the prosecutor's remarks were both highly inflammatory and racially prejudicial:

Think about the consequences of letting a guilty man go, a man guilty of a serious and rather horrible crime, go free. Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife.... p.18.

The court in Kelly (p. 19) concluded that these remarks "constituted a highly inflammatory and wholly impermissible appeal to racial prejudice." What is most significant about the Kelly case, is that the court specifically stated (p. 19) that these inflammatory and racially prejudicial remarks did not justify granting the habeas petition. The petition was granted only because of the cumulative effect of two other improprieties, one of which included a violation of the Griffin rule (Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965)), by reason of the prosecutor's repeated indirect references to the defendant's testimonial silence.

The Kelly case provides no support for the district court's ruling on motive. That case involved obvious "highly inflammatory and racially prejudicial" statements which do not justify the issuance of a writ. The instant case does not involve any such remarks and the district court's attempt to portray a single statement on summation as offensive is accomplished by the court through statements about the case that are not supported by the record and by repeating inapplicable terminology submitted by the petitioners such as, "articulated and unarticulated assumptions" (1aD 24-25) and "render the illogical logical" (1aD 34).

In Ross v. United States, *supra*, the petitioner had been convicted of making false statements in order to obtain loans from a federal agency. The defendant testified that he had changed his name from Max Rosenfeld to Martin Ross some five or six years earlier when a prospective customer had made it known that he "didn't

want to do business with a Jew” (p. 167). In summation, the prosecutor repeatedly made irrelevant, highly offensive, ethnic statements. He referred to the fact that: “These boys [the defendants] are Jews. Why are they ashamed of what they are.” The prosecutor analogized the petitioner with Hitler - - “Well, I believe it was Hitler that changed his name from Schickelgruber.” The prosecutor then stated, “These men are traitors to their race” (p. 168). There is nothing in the circumstances of this case cited by the district court that is relevant to the circumstances of the instant case.

The circumstances involved in McFarland v. Smith, supra are likewise inapplicable to the circumstances of this case. In McFarland, the prosecutor asked the jury to assign credibility to the State’s witness because the witness was black and the defendant was black and, consequently, the witness would not lie about a member of her own race (p. 416). Consequently, the prosecutor introduced totally irrelevant and unfounded racial considerations.

Soap v. Carter, supra involved the conviction of a Cherokee Indian for the killing of another Indian. The court denied the habeas petition even though the prosecutor’s summation repeatedly referred to the defendant’s Indian background in connection with the effect of alcohol on Indians. In addition to these remarks whereby the prosecutor introduced a racial stereotype for a class of people, the court found that the prosecutor also made a “reprehensible” statement regarding his personal belief of the defendant’s guilt (p. 877).

Soap cannot be viewed as supportive of the district court’s ruling. The district court cites this case not for its holding, but for its dissent. The dissent concluded that the prosecutor introduced unwarranted, racial remarks which constituted references to a “class of people or to what typically occurs in an Indian community” and that such remarks were absolutely irrelevant to the issue before the jury (p. 879). In the instant case, the record shows that the prosecution made no attribution of motivation to blacks as a whole.

The New Jersey Supreme Court, State v. Carter, 91 N.J. 86, 102-108 (1982), studied the same legal authority cited by the district court and concluded:

Here, despite the defendants' repeated protestations in their briefs and appellate oral arguments to the contrary, the prosecutor's advocacy attributed no qualities to a generalized class of blacks. The prosecutor did not ask the jury to believe that blacks in general possess an instinct to commit senseless violence that would lead any one of them to murder whites. Rather, he urged them to find that these two particular black men, Carter and Artis committed the Lafayette Bar murders in retaliation for the slaying of a friend's stepfather. His remarks were not tangential asides to the jury designed to arouse latent racial hostility, see Kelly v. Stone, 514 F.2d 18, 19 (9 Cir. 1975), but were directed to one element of the state's case.

We find the argument set out in this case is justifiable because it was relevant to the issue of motive, there being evidence in the record to support that proposition (p. 108).

The repugnancy in this case was in the crimes which the petitioners committed and their reasons for committing them. The prosecution did not seek to appeal to racial prejudice. The record does not show that it did. Indeed, the record shows that the prosecution dealt with this sensitive issue in a responsible way. There is nothing in the record to suggest any effort to inflame the jury. The prosecution's position on motive was supported by a reasonable interpretation of the case before the jury. The district court's decision on this issue involves overruling a state trial judge in the exercise of his discretion. The district court found an abuse of discretion by the trial court notwithstanding the trial court's superior position to weigh the competing interests and acquire a "sense" of the issue by being privy to the live trial as opposed to the cold record before the district court. The district court's decision involves the determination that the trial court acted arbitrarily and irrationally and thereby abused its discretion, even though, the trial court followed the well settled law that directs the trial judge to

permit wide range in favor of evidence of motive. The district court's decision not only involves the determination that the trial court abused its discretion in this area where the law directs the trial judge to exercise wide latitude, but furthermore, that this abuse of discretion amounted to a fundamental defect so great in proportion that it inherently resulted in a complete miscarriage of justice.

The basis for this far-reaching decision is recited by the district court in its opinion of November 7, 1985 (1aD). The appellants contend that this opinion contains numerous misstatements of the record along with the omission of reference and discussion of significant areas of the record.

The appellants contend that the prosecution's position regarding the motive for the murders is well supported by a reasonable view of the record. The prosecution presented its position in a responsible way. The appellants contend that, in the sound exercise of its discretion, the trial judge correctly permitted evidence and argument regarding motive. For the reasons stated herein, the appellants contend that the district court's decision is in error and should be reversed.

POINT II

THE DECISION BY THE DISTRICT COURT THAT DISCLOSURE TO THE DEFENSE OF AN INITIAL ORAL REPORT OF A POLYGRAPH TEST GIVEN AN EYEWITNESS WOULD HAVE LED TO A REASONABLE PROBABILITY OF AN ACQUITTAL OF PETITIONERS IS NOT SUPPORTED BY THE RECORD OF THE STATE TRIAL COURT PROCEEDINGS. THE DISTRICT COURT'S FAILURE TO CREDIT A PRESUMPTION OF CORRECTNESS TO THE FACTUAL FINDINGS OF THE TRIAL COURT MADE AT A SPECIAL REMAND HEARING TO EXAMINE THE ALLEGED BRADY VIOLATION, AND THE DISTRICT COURT'S FURTHER FAILURE TO ACCORD THE REQUISITE DEFERENCE DUE TO THE STATE COURT ON HABEAS CORPUS REVIEW LED TO ERROR IN THE GRANTING OF THE WRITS TO PETITIONERS.

A.

Background of Remand

In a typed report dated August 24, 1976 and received by the prosecution a few days later, Leonard H. Harrelson, a prominent polygrapher, submitted his findings concerning an examination he had conducted on August 7, 1976 of eyewitness Alfred Bello (4aE 616-23). Consisting of a detailed account of a pre-test interview of the subject and a listing of the specific questions and answers during a series of five tests, the report stated in its conclusion

After careful analysis of this Subject's polygrams, it is the opinion of the examiner that his 1966 testimony at the trial was true, and the statement recanting his original statement is not true (4aE 623).

Alfred Bello's testimony at the first trial of petitioners in 1967 included his identification of Rubin Carter and John Artis as the two men he had seen coming around the corner from the Lafayette Grill, armed respectively, with a shotgun and a pistol, while he, Bello, was on the sidewalk approaching the tavern.

At the time of the polygraph examination, Alfred Bello was stating an account of the incident in which he had placed himself inside the barroom at the time of the shootings, and as having seen the petitioners Carter and Artis outside on the sidewalk after he, Bello, had managed to get out of the bar.

As the polygraph test report indicates, Bello responded affirmatively to questions as to whether he was inside the bar at the time of the shootings (4aE 621-22). However, the report did not contain an indication as to which of Bello's answers were considered truthful or false by the examiner, nor an analysis of how the examiner arrived at the conclusion that Bello's 1967 trial testimony, which included the account that Bello was outside the bar at the time of the shootings, was true.

At the time the polygraph examination was conducted, Harrelson had given an oral report to an assistant prosecutor and to the chief of detectives relating to Bello's account that he was in the bar during the shootings.

As subsequently developed through testimony given at the remand hearing directed by the New Jersey Supreme Court, State v. Carter, 85 N.J. 300 (1981), and conducted by the judge who had presided over the second trial of petitioners in 1976, Harrelson's oral report of August 7, 1976 was considered by the prosecution to be a preliminary indication that Harrelson was of the opinion Bello may have been truthful in stating he was in the bar during the shootings, which, opinion however, would be subject to further review by the examiner who would subsequently file a full written report.

Accordingly, when the typed, formal report was received, with its succinct conclusion that the testimony of Bello at the first trial of petitioners was true, it was accepted as such by the prosecution.

On the other hand, polygrapher Harrelson in his testimony at the remand hearing stated that the oral report given at the time of the examination was not a preliminary belief as to the truth of Bello's "in-the-bar" account.

This discrepancy between Harrelson's opinion on this particular, which he retained at the time of the remand hearing, and the stated conclusion in his final, formal report, was not discovered by the prosecution and the defense until after the trial. It was then made the subject of various applications by the defense, was included in their appeal of the convictions, and became the basis for the New Jersey Supreme Court's remand.

B.

Summary of Argument

In its opinion granting the writs of habeas corpus, the United States District Court concluded that had the information known by the State concerning polygrapher Leonard Harrelson's oral report been disclosed to the defense, there is a reasonable probability that the result of petitioners' trial would have been different (1D64a).

Respondents submit that this conclusion is erroneous for several reasons.

Initially, as potential impeachment material, testimony by the polygrapher that he believed that witness Bello was telling the truth when he stated he was inside the bar at the time of the shootings, would have been only cumulative to a mass of other impeachment material available and utilized by the defense, obviously to no avail as to Bello's ultimate credibility with the jury.

Secondly, the defense would not likely have introduced this information from the polygrapher at trial, since Harrison was also unequivocal in his testimony at the remand hearing that, regardless of whether he believed that Bello was in the bar or on the street, Bello was telling the truth when he told Harrelson that he saw both Carter and Artis at the scene with guns, that they were the only two "people" involved, and he, Harrelson, had "no doubt at all that Carter and Artis were the perpetrators of the annihilations." (2aC 466; 454-55). Introduction of this polygraph testimony at trial would also

undoubtedly have resulted in the introduction of testimony by Richard Arthur, another eminent polygrapher, who tested Bello and concluded that Bello was truthful in identifying Petitioner Carter at the scene, and who wrote to Harrelson after examining the latter's charts, that "again we are in agreement." (4aE 636).

Thirdly, respondents submit that the remaining evidence in the case, which is reviewed elsewhere in this brief, was so overwhelming and one-sided that any possible value derived from the oral Harrelson report would have had at best a negligible impact on the overall evidence presented to the jury. The district court's finding that disclosure would have led to a "reasonable probability" of a different result at trial, we submit, is totally without substantial foundation.

Lastly, respondents offer that the district court, on habeas corpus application review of a state court proceeding, indicated woefully inadequate deference to the findings of fact made respectively, by the jury at trial, and by the trial court at the remand hearing, as well as to the conclusions derived therefrom by the trial court.

C.

Controlling Standard

The applicable law relative to Brady material is now plainly stated in United States v. Bagley, _____ U.S. _____, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985).

The High Court has borrowed from its previous opinion in Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a case outside the Brady purview, to come up with a

test for materiality sufficiently flexible to cover the "no request", "general request" and "specific request" cases of prosecution failure to disclose evidence favorable to the accused. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defendants, the result of

the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384.

This newly enunciated standard has been applied by the Third Circuit Court of Appeals in United States v. Pflaumer, 774 F. 2d 1124 (3 Cir. 1985). That matter, previously titled United States v. Oxman, 740 F. 2d 1298 (3 Cir. 1984), was remanded by the Supreme Court, partly because of the revised definition for the Brady materiality standard.

Upon reconsideration, the Third Circuit Court of Appeals revised its previous decision and reinstated the conviction which had been entered in the United States District Court. The majority of the panel, in reviewing the totality of the other evidence presented at the trial concluded, as had the trial court, that there was not a reasonable probability that the result of the trial would have been different, even if the defense had been provided the withheld information concerning an immunity agreement made with a government witness. 744 F.2d at 1230.

The panel majority found that

The government’s failure to disclose the immunity agreement, in the context of the facts and full record of this case, does not undermine our confidence in the verdict. Ibid.

The majority further noted that the trial court’s weighing of the evidence leading to its conclusion that the testimony of the subject witness was “merely cumulative” to the other testimony at trial,

merits deference from the Court of Appeals ...especially given the difficulty inherent in measuring the effect of a non-disclosure on the course of a lengthy trial covering many witnesses and exhibits. Id. at 1229-30.

The dissenting judge, applying the stated Bagley standard, and noting that Bagley still requires independent judgment by the Court of Appeals, was “not satisfied”

that there is no reasonable probability that, had disclosure been made in this case, the outcome would have been the same.” Id. at 1244. A significant factor, in his opinion, was that the overall evidence of defendant’s complicity “was less than overwhelming.” Ibid.

In his dissenting opinion, Judge Gibbons recognized that the Bagley “reasonable probability” standard for reviewing Brady issues “is more favorable to the government than the ‘beyond a reasonable doubt’ standard” set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 7 L.Ed.2d 709 (1969). Id. at 1243. Judge Gibbons, however, has not read from the Bagley opinion “an intent to change the settled law, which required that the government satisfy the reviewing court that, had the prosecutor disclosed the evidence before trial, the trial’s outcome would not have been different.” Id. at 1243-44.

D.

Remand Hearing Testimony

Given this recent guidance by the United States Supreme Court and the Third Circuit Court of Appeals, respectively, and to place in perspective the district court’s conclusion that disclosure of the initial oral polygraph report would have led to a reasonable probability that the result of the trial would have been different, a brief review of the salient testimony at the 14-day remand hearing conducted by the trial court is in order.

The central witness at the remand hearing, polygrapher Leonard Harrelson, testified that he had been requested to run Alfred Bello on the polygraph because Prosecutor Humphreys had wanted to determine if Bello was telling the truth at the 1967 trial in the aftermath of Bello’s 1974 recantation, when Bello had testified that he was unable to identify the two men he had seen coming from the bar after the shootings

(2aC 499-500). See S-1000, letter of Prosecutor Humphreys to Leonard Harrelson dated July 26, 1976 (3aE 470).

Harrelson testified that he gave Bello a lengthy pretest interview (2aC 396), which was followed by test questions. As a result of the polygraph examination, Harrelson concluded that Bello was telling the truth in identifying Carter and Artis as the only perpetrators of the shootings (2aC 455-66).

He testified that after he concluded the tests on August 7, 1976, he spoke to Chief DeSimone and told the chief his opinion that Bello was telling the truth when he said that he was in the bar at the time the shootings began (2aC 400-404). Further, that Chief DeSimone expressed the opinion that Bello couldn't have been in the bar at the time of the shootings, and he and DeSimone discussed their disagreement (2aC 403-05).

Harrelson testified that he did not use the words "tentative" or "preliminary" when he orally stated his opinion at the time of the polygraph test, nor did he ever use those words or state that he was unsure (2aC 407-11). He stated that he could look at the charts and immediately interpret them, and he wouldn't have later changed his opinion (2aC 409, 453).

However, Harrelson did testify that he gave the chief a verbal report and said he would follow it with a written report (2aC 410). The written report was the "final report" (2aC 480).

Later, on August 11, 1976, Harrelson spoke by telephone with Prosecutor Humphreys. He gave the Prosecutor a brief verbal account and said it would be followed by a written report (2aC 411-12). After the written report was submitted, he did not speak with the Prosecutor again until after the trial and after defense counsel Beldock had called him (2aC 414).

In his testimony, Harrelson clearly indicated that no one from the Prosecutor's Office had sought to mislead him (2aC 478). This was a reiteration of an affidavit he had given in 1978. He further stated that no one had called him between the date of the test and the date of his report to ask him to re-clarify his report, nor did they after the report was submitted (2aC 450-52). He had been asked by the Prosecutor to forward his report to Richard Arther, another leading polygraph expert whom the Prosecutor was proposing to have examine Bello as well (2aC 426). See S-1013, letter of Prosecutor Humphreys to Professor Harrelson dated August 12, 1976 (3aE 495).

Harrelson testified that he had sent a letter dated August 25, 1976 to Arther relating to the polygrams of Bello and others which he was forwarding for Arther to review. In that letter, Harrelson wrote, "I have no doubt at all that Carter and Artis were the perpetrators of the annihilations." 92aC 454-55). See Exhibit DA 1205 (4aE 635).

Harrelson's conclusion that Carter and Artis were the murderers was reached as a result of his discussions and examination of Alfred Bello (2aC 455, 464). His polygraph test of Bello indicated to Harrelson that Bello was telling the truth when he observed Carter with a shotgun and Artis with "something in his hand," "backing out of the front door," and that "There were no other people at all." (2aC 466).

Later in his testimony, Harrelson reiterated that it was his conclusion from testing Bello that he was truthful in identifying Carter and Artis as the murderers and they were the only two involved (2aC 476-77).

The charts of Bello's test taken by Harrelson and reviewed by polygrapher Richard Arther were returned by the latter on October 25, 1976, Arther stating in his covering letter to Harrelson, "Ended up only examining Bello. Again we are in agreement." Exhibit DC 1206 (4aE 636).

In his testimony at the remand hearing, former Prosecutor Burrell Ives Humphreys testified that upon his return to the office from vacation on August 10, 1976, he was advised by one or more of the staff at a meeting that as the result of Harrelson's test, the expert was satisfied Bello was telling the truth and was a witness who could be put on the stand (3aC 696-97). There was, however, a question as to exactly where Bello had been, whether in or out-of-the-bar (3aC 697-98).

After that meeting, Prosecutor Humphreys called Harrelson to find out what he had to say. During that telephone conversation on August 11, 1976, Humphreys inquired as to whether Bello was supposed to be in the bar, and Harrelson indicated to him that he would have to consider that further and look at his charts, and he would cover it in his report (2aC 701).

Humphreys testified that he is sure he would have discussed this with Harrelson because the question which Harrelson was raising as to whether Bello was in the bar was contrary to the indication Harrelson had given him earlier at the time Harrelson had been in Paterson to examine Annie Ruth Haggins (3aC 704, 707, 709). See DA 1109, letter from Prosecutor Humphreys to Attorney General Hyland, dated July 29, 1976 (4aE 570-73).

In his testimony, former Prosecutor Humphreys was definite that he had never been told by Harrelson that Harrelson himself had any opinion that Bello was in the bar at the time of the shootings (E.g., 3aC 717, 728; 4aC 1034; 5aC 1063-66).

His distinct recollection was that after the telephone conversation with Harrelson, he was not left with any impression that the professor had any firm belief that the in-the-bar version was true (4aC 1034, 36). The witness was sure of this because if Harrelson had indicated otherwise, the Prosecutor would have taken certain steps which he did not take (5aC 1064). Also, he had earlier been informed by Harrelson that Harrelson was of the opinion that the 1967 testimony of Bello was true, and Humphreys had so written to the Attorney General (4aC 1036).

Former Prosecutor Humphreys added that as far as he was concerned, Harrelson did not have a definite conclusion until the report of August 24, 1976 was received (3aC 716, 728). Neither had he previously received any indication from Assistant Prosecutor Martin Kayne that Harrelson had a firm conclusion on that question at the time of the test (3aC 756). As a result, he was surprised when he learned long after the trial that Harrelson was saying that in regard to the question of Bello having been in the bar, the report did not mean what it plainly said (5aC 1159).

Subsequent to receipt of the Harrelson polygraph report of Bello, which was accompanied by the written reports of the tests given to Annie Ruth Haggins and Elwood Tuck, Prosecutor Humphreys forwarded copies of the three reports to the State Attorney General as part of a continuing update which he was providing on the case. In his letter to the Attorney General, Prosecutor Humphreys noted Harrelson's conclusion that Bello's 1967 trial testimony and not his recantation testimony was the truth, and indicated that based upon the polygraph tests and the prosecution's investigation, he had concluded that the State should present at the forthcoming trial essentially the same evidence and theory as was presented at the 1967 trial, with certain enumerated exceptions DA 117 (4aE 592-97).

Assistant Prosecutor Martin Kayne's testimony at the remand hearing likewise supported the prosecution's position that the Harrelson polygraph report was accepted as accurate and complete.

Kayne was present at the Prosecutor's Office on the day that Harrelson conducted the polygraph test of Bello, having driven Harrelson in from the motel that morning. Kayne, who had been assigned to the case two weeks prior to that date, did not discuss the details of the case with Harrelson prior to the test. He did offer to provide Harrelson with Bello's previous statements and other materials, which offer the professor declined (8aC 1837-39).

His recollection was that there was a discussion with Harrelson after the tests were completed, primarily between Chief DeSimone and Harrelson. During this discussion, Harrelson related that Bello indicated he was in the bar when the shootings took place, and DeSimone noted his belief that Bello couldn't have been in the bar during the shootings (8aC 1844-46).

Kayne testified that Harrelson did not indicate that it was his opinion that Bello was telling the truth when he said he had been in the bar, but rather stated that this was Bello's story (8aC 1847, 58). Further, that Harrelson indicated that Bello was not an easy subject to test, that there was some kind of heart murmur which made the polygraph reading difficult, that he would consult his notes and his charts, and would submit a final report. (8aC 1846).

Following this, Kayne recalled that there was a telephone conversation with Prosecutor Humphreys during which Chief DeSimone told the Prosecutor that Harrelson had found that Bello had been truthful as to his testimony given in 1967 and mentioned the discussion with Harrelson regarding Bello stating that he was in the bar during the shootings. The chief further advised that Harrelson would be submitting a final report after he consulted his charts (8aC 1861-63).

This testimony, which is in accord with the affidavits given by Kayne and DeSimone in June 1978 as part of the State's reply papers to defendants' motion filed at that time corroborated the testimony of former Prosecutor Humphreys with respect to the prosecution's belief that the indication by Harrelson that Bello may have been in the bar at the time of the shootings was not a belief, opinion or finding, but was a preliminary or tentative question subject to further review and clarification.

An additional degree of corroboration to this belief is provided by the polygraph report itself. There is a notation that following the fifth test given Bello, "the examiner decided to stop the examination immediately" because Bello was complaining about

numbness in his left arm, the examiner having inquired about Bello's blood pressure at that point. See DC 1202 (4aE 622). That report also indicated that the fifth test was conducted utilizing the plethysmograph, and Harrelson testified that during the test he sent for a polygraph instrument with which he was familiar, since that which was initially provided was not satisfactory (2aC 444).

These factors substantiated to a considerable degree the basis for the prosecution's impression that Harrelson's oral report at the time of the test was preliminary and subject to further review.

Kayne in his testimony noted that as far as he was concerned at the time of the Bello polygraph, the issue was whether Bello had told the truth in his 1967 trial testimony (8aC 1856-57), and the polygraph so stated (8aC 1859-60). See (4aE 616-23). After the date of the polygraph test, Kayne never spoke to Harrelson again (8aC 1853). When the written report came in, Kayne didn't read the report itself, but just the conclusion (8aC 1884).

The polygraph test of Bello was administered by Harrelson on Saturday, August 7, 1976.

On the following Tuesday, Bello was shown the transcripts from the 1967 trial by Chief DeSimone. Kayne noted that the chief asked Bello to look through the transcripts, questions and answers, indicate whenever he saw something that did not square with his present recollection as to what the facts were when he witnessed the murders in 1966 (1aC 160; 8aC 1869-70).

Kayne added that the questions were read by Chief DeSimone primarily, with perhaps Bello joining in as to the answers. Later, Kayne read the questions and answers. He added

Bello - as the conversation proceeded he kept saying yes, that's right, yes, that's right. He kept - he indicated that now this is the first time

he had a chance to take a look at what he had said and now that it was being able to read it, it was coming back to him (1aC 161).

To the best of Kayne's recollection, there was no discussion with Bello concerning the polygraph test at the time the 1967 trial transcripts were reviewed by Bello (8aC 1870). The 1967 trial transcript of Bello included his testimony that when he first saw the killers leaving the Lafayette Grill, he, Bello, was on the sidewalk walking towards the bar.

Assistant Prosecutor Ronald Marmo also gave testimony at the remand hearing supportive of the State's position that it had accepted in good faith the Harrelson written, final report on the Bello polygraph test.

His testimony was that it was not until the defense had filed motions on the issue after the trial that he had any inkling that Harrelson was stating that he was of the opinion that Bello had told the truth when he said he was in the bar during the shootings (1aC 128).

Marmo was not present at the time the Bello polygraph test was run, since he was on vacation. When he returned two weeks later, he was informed by someone familiar with the case that the Harrelson test had indicated that Bello was telling the truth when he identified Carter and Artis at the scene with guns. He further learned that Bello was disclosing the involvement of persons such as Selwyn Raab, Fred Hogan and Hal Levenson in the recantation, and that Bello was coming back to the 1967 testimony (5aC 1185-86). He did not recall any conversation pertaining to Chief DeSimone's disagreement with Harrelson relating to whether Bello may have been in the bar (1aC 117) and didn't believe that Harrelson had an opinion that Bello was in the bar at the time of the shootings (1aC 111).

Prior to the Bello polygraph test, Harrelson had been in Paterson to conduct a polygraph test of Annie Ruth Haggins, and Marmo had spoken to Harrelson at that time (1aC 93-96). He knew that Harrelson had disagreed with a polygraph test of Bello which had been conducted several months earlier by Ralph DeMasi, an Essex County investigator and a former student of Harrelson (1aC 100-101).

That test report of DeMasi had indicated that Bello was telling the truth when he related a version which had been presented to the Essex County Grand Jury, that had Bello in the bar at the time two men, not Carter and Artis, shot the bartender and three patrons. According to that version, Bello saw Carter and Artis on the sidewalk with guns in hand after he fled from the bar.

Marmo knew that Harrelson had reviewed the charts of the DeMasi polygraph, disagreed with various of the readings, and chided DeMasi on his conclusions. As a result, Marmo concluded that Harrelson was indicating that the Essex County story was not a truthful version, and that Harrelson's belief was that the first trial testimony was true (5aC 1253-54).

Accordingly, when the Harrelson written report was received by the Prosecutor's Office, Marmo had no reason to question the validity or accuracy of its conclusion, and it was accepted for what it plainly stated in its conclusion (5aC 1254-55).

The cumulative testimony recounted shows that as far as the prosecution team was concerned, if there had been a question in the polygrapher's mind as to whether Bello may have been in the bar at the time of the shootings, that question had dissipated and the issue was resolved by the written report of Harrelson dated August 24, 1976.

That testimony shows that neither former Prosecutor Humphreys, nor Assistant Prosecutors Marmo and Kayne, who testified at the remand hearing, nor the late Chief

DeSimone who submitted an affidavit in the matter in 1978, were aware that Harrelson held the opinion or belief, or had made a finding, that Bello was telling the truth when he said he was in the bar when the shootings began.

Nor did they have any basis to question the conclusion to the formal report he submitted, which would have incorporated and finalized all the types in the polygraph process. This may not have been the case if the written report had contained an indication as to which particular test questions were answered truthfully, and which were not. In similar fashion, the report was accepted by the defense as being accurate. Since the report concerned an important witness in the case, the defense would have been quick to note any apparent inconsistency in the report.

The prosecution's good faith acceptance of the report was further supported by the subsequent receipt of the results of another polygraph expert, Richard Arther.

In his testimony at the remand hearing, Arther stated that he was able to determine that Bello was telling the truth as to the four relevant questions he was asked, and that from those questions he was able to determine that Bello was on the street at the time of the shootings (4aC 784, 792-98). See Exhibit S-1004 (3aE 477-78).

In contrast to Harrelson, who did not review Bello's previous statements or testimony, Arther had exhaustively reviewed the background of the case, to the extent of spending a day in Paterson reviewing the crime scene, and he spent many hours going over statements and testimony (4aC 782, 858, 868-69, 897). In framing his questions, Arther took into account Bello's former varying versions (4aC 809), noting that he was commissioned to determine the truth in view of Bello's conflicting statements (4aC 871).

Significantly, Arther stated his agreement with Harrelson as to who the perpetrators were from Bello's standpoint, namely Carter and Artis, although Arther's test was phrased only in terms of defendant Carter (4aC 812-15; 818-19). While he did

not analyze Harrelson's charts to determine if they were correct (4aC 927) he noted his agreement with the conclusion of Harrelson's report (4aC 989-90), and so wrote to Harrelson, DC 1206 (4aE 636). In his letter to Arther forwarding his charts, Harrelson had stated his belief that the "perpetrators of the annihilations" were Carter and Artis, DC 1205 (4aE 635).

E.

Trial Court's Factual Findings and Conclusions on Remand.

The trial judge at the 1976 retrial of petitioners, Honorable Bruno L. Leopizzi, presided over the remand hearing directed by the New Jersey Supreme Court to examine into the circumstances of the Harrelson polygraph test of Alfred Bello.

As the trial judge familiar with all aspects of the evidence and proceedings related to the retrial of petitioners, he was in the best position to assess the significance of any evidence adduced at the remand hearing, particularly in weighing whether there was any basis to find such evidence might have affected the outcome of the 1976 retrial of petitioners.

The trial court in fact conducted an extensive, in-depth hearing, encompassing some fourteen full days of testimony and argument, between May 18, 1981 and June 8, 1981. There were also pre-hearing applications which took portions of six other court days.

Numerous witnesses were heard and over one hundred exhibits were identified. Petitioners' counsel were allowed to conduct wide-ranging questioning of witnesses and were given nearly free rein in the introduction of evidence even remotely relevant.

Finally, the trial court wrote an 80-page opinion on remand wherein a complete analysis of the pertinent evidence was set out, specific findings of fact were made, and conclusions of law derived (1aE 59-149).

The findings of fact made by the trial judge conducting this special hearing are, of course, entitled to a presumption of correctness upon review. 28 U.S.C. §2254(d). This is more conclusively so here in light of the comprehensive nature of the hearing itself and the thorough familiarity of the court with the lengthy 1976 trial to which the remand hearing findings were to be related.

The trial court, in its opinion, initially disposed of what it termed the “false premise” upon which petitioners had based their arguments preceding the remand hearing (1aE 63-66).

In the opinion remanding the matter back to the trial court for a hearing on the polygraph issue, the New Jersey Supreme Court expressed its understanding of the so-called “in-the-bar” version as excluding petitioners Carter and Artis as the triggermen.

A common ingredient of the “in-the-bar” narrative was that Bello was inside the tavern when two black men - not Carter and Artis - entered through the side door and began shooting; Bello was able to get out of the bar by being “shielded” by a woman who was shot; and as he ran around the corner, he saw Carter and Artis on the sidewalk. In his first statement to Hawkins, Bello insisted that Carter and Artis were unarmed when he saw them on the street. In a second statement to Hawkins and in testimony before the Essex County Grand Jury he modified this account to explain that although defendants were not the triggermen, they were in fact armed. In June 1976 Bello was interviewed by two prosecutor’s detectives and repeated essentially the same set of facts he had conveyed to the Grand Jury. State v. Carter, 85 N.J. 300, 306-07.

The trial court noted that the so-called “in-the-bar” version of Alfred Bello had been equated by the petitioners as well as the New Jersey Supreme Court to a four-man theory in which petitioners Carter and Artis were not the triggermen, and at most, aiders and abettors. See S-1032 (3aE 542); S-1035 (3aE 543-546). See also statements made by defense counsel at a motion for new trial made to the trial court (21aB 2667, 2670, 2685).

This important misunderstanding by the New Jersey Supreme Court as to its perceived significance of the “in-the-bar” version relating to the degree of petitioners’ involvement in the Lafayette Grill shootings, and undoubtedly one of the factors underlying its remand order, was cleared up at the remand hearing, as pointedly stated by the trial court.

If the testimony of polygrapher Harrelson was conclusive as to anything, it was that he believed Bello was truthful in stating that only petitioners Carter and Artis were involved in doing the shootings and that were not four men present as the defense had urged in requesting a new trial. See Remand Opinion (63aE 63-66; 118; 130-132).

Further, since Harrelson testified unequivocally at the remand hearing that Bello was truthful when he identified Carter and Artis as the killers, and they were the only two persons involved in the shooting (2aC 464-66, 476-77) the account by Bello was more consistent with the 1967 trial testimony, where Bello identified Carter and Artis as the triggermen (1aE 64).

The trial court found as fact that the Prosecutor acted in good fact when he decided to have Alfred Bello tested, in order to ascertain whether Bello told the truth when he identified petitioners in the 1967 trial, and the Prosecutor thereby used the polygraph test as an investigative tool to determine the credibility of the witness at the upcoming trial (1aE 67-68).

The court noted that Harrelson perceived his function was to determine the truthfulness of Bello’s 1967 trial testimony, was not concerned as to whether Bello was in-the-bar or on-the-street, and therefore, felt it was unnecessary to read the 1967 trial transcript (1aE 69).

Significantly, the court found that Bello “recanted his (1974) recantation” during the lengthy pre-test interview with Harrelson. In that comprehensive interview, Bello

for the first time disclosed why he had recanted his original identification of petitioners, namely, because he had been manipulated by Fred Hogan, Selwyn Raab and Hal Levenson (1aE 71).

This conclusion by the trial court was supported by the testimony of former Prosecutor Burrel Ives Humphreys that the polygraph test process, which included the lengthy pre-test interview, was the first step in getting Bello to return to his 1967 trial testimony in which he identified Carter and Artis as the triggermen (5aC 1150-54).

The court found that when the Prosecutor was informed that Harrelson's test indicated Bello was truthful when he said he was at the murder scene and saw Carter and Artis with guns in hand, the prosecution team was satisfied they had a truthful witness they could put on the stand without reservation (1aE 74). Harrelson repeated this significant finding to Prosecutor Humphreys on the telephone (1aE 74-75).

In its remand opinion, the trial court referred to the signal factor derived from Harrelson's testimony, *i.e.*, that if Harrelson had been called to testify at petitioners' murder trial, based upon his conclusions derived from the information he received from Bello during the polygraph test process, "there was no doubt in his mind that Carter and Artis were the murderers..." and "there was no indication that there were any other perpetrators involved other than Carter and Artis." (1aE 78-79).

Upon reviewing the testimony of Richard O. Arther, a renowned polygraphist who tested Bello on September 30, 1976, the court observed that Arther's independent polygraph test of Bello convinced Arther that Bello was truthful in his answers that Carter was in the bar when the shootings took place, and that Bello was outside the bar when the shootings took place and saw Carter on the street just after the shootings (1aE 81-82).

The trial court noted that in light of Arther's agreement with Harrelson that Bello was truthful in identifying petitioners as the murderers, and on the basis of their respective written reports, the Prosecutor was satisfied of the truth of Bello's 1967 testimony and concluded that the State should present the same evidence and theory at the 1976 retrial (1aE 82-83).

The court in its remand opinion evaluated the possible use that petitioners' counsel might have made at trial of the information that Harrelson, at the time he tested Bello, was of the opinion that Bello had been in the bar at the time of the shootings.

It noted that because of skillful and lengthy cross-examination, the jury had already been given a penetrating view of Bello's background, since the defense had available voluminous discovery encompassing all of Bello's prior testimony and statements. These included the 1967 trial testimony and the statements Bello had given up to that time, the various affidavits and testimony relative to the 1974 recantation by Bello, the Hawkins investigation and the numerous "fictionalized" tapes developed by Bello and Joseph Miller and Melvin Ziem (1aE 99-100). Bello was extensively questioned about the discrepancies between the 1976 trial testimony and the prior versions, as well as concerning any threats of perjury charges (1aE 100-102).

Because of this mass of material and the cross-examination derived from it extending over several days, the trial court was able to state:

The jury was fully aware of Bello's criminal background and other unlawful activities. He was portrayed before the jury as a perjurer, liar and thief. Certainly the cross-examination by these experienced lawyers had not portrayed Bello as a person of integrity and honesty. Despite this, Bello left the stand unshaken as to identification of the defendants.

The evidence before the jury was more than sufficient for it to conduct a discriminating

appraisal of Bello's credibility. His credibility was severely and repeatedly assailed from every conceivable angle through the lengthy and extensive cross-examination over a period of several days.

The jury found Bello's 1976 testimony credible despite the fact that the jury had the entire background of Bello's recantation and the 'fictionalized' version he had given in Essex County (1aE 103).

The trial court concluded, "[t]here is therefore no merit to defense counsel's argument that Bello's credibility would have been affected if they pursued the reason for his recant of the recantation.' Ibid.

Findings of fact made by the trial court in 18 important particulars are set forth in the remand opinion (1aE 112-117). These findings, which are to be accorded a presumption of correctness pursuant to 28 U.S.C. §2254, include the critical finding in the Brady context, stated in finding #18:

Bello was cross-examined at great length with regard to the contradictory statements he had given. Such versions were explored in an attempt to attack Bello's credibility, any further examination would have been cumulative and repetitious (1aE 116-117).

Another critical finding of fact made by the trial court following the remand hearing, which is entitled to the §2254(d) presumption of correctness, was that although the prosecution had failed to inform the defense of Harrelson's oral report given to Assistant Prosecutor Kayne and to Chief DeSimone, the prosecution was justified in such non-disclosure (1aE 113).

The trial court then set out the reasons why it believed that there was justification for non-disclosure, including the testimony that while Harrelson himself did not consider his initial opinion to be tentative or preliminary, the prosecution could have considered it to be such. The verbal report was to be followed by a written report, which in turn noted

that the examination had been terminated prematurely because of a complaint by Bello of numbness in his arm, and the conclusion in the report was clearly stated that Bello's 1967 trial testimony was true in the opinion of the examiner (1aE 114).

As summarized previously, there was testimony by three witnesses at the remand hearing, namely, former Prosecutor Humphreys, and Assistant Prosecutors Marmo and Kayne, that the initial oral report by Harrelson was accepted as preliminary and subject to further review. Further, that when the final, written report of Harrelson was received, it was accepted as complete and accurate as to its stated conclusion. An affidavit from the late Chief DeSimone supported this testimony.

In view of this cumulative evidence, which was accepted by the trial court in its fact-finding capacity at the remand hearing, there is no basis or substance for the district court's adoption of the thesis propounded by the defense that the prosecution knew or believed that Harrelson's written report was contradictory to Bello's 1967 and 1976 trial testimony as to where he was when he saw petitioners, and that there was concealment by the prosecution of this (1aD 45-46).

It should be noted that the defense was provided with the Harrelson written report well prior to trial and accepted the conclusion despite the ambiguities among the various questions and answers, just as had the prosecution. See Remand Opinion (1aE 92-95).

There simply is no issue of prosecutorial bad-faith or manipulation of the polygraph report, as suggested by the defense and alluded to in the district court's opinion.

This is dispositively settled by the trial court's remand findings of fact, numbers 12 and 13, respectively, which are entitled to a presumption of correctness under §224(d).

- (12) At no time did the prosecution attempt to mislead Harrelson or influence his findings;
- (13) The prosecution did not cause Bello to recant his recantation through coercion, deceit, or threats of prosecution for perjury; nor did the State misrepresent to Bello the results of the polygraph test to get Bello to go back to the “on the street” version.

In its “Conclusions of Law,” the trial court reiterated its findings of fact, namely, that the prosecution had knowledge that Harrelson in his verbal report had indicated that Bello had told the truth when he said he was “in-the-bar” at the time of the shootings, but that the prosecution was justified in its failure to disclose this report to the defense (1aE 119-124).

These particular findings do not lose the presumption of correctness merely because they are also labelled as conclusions of law, since they are identical to the findings of fact made by the trial court.

These findings were accepted by the New Jersey Supreme Court on the appeal of the convictions. 91 N.J. at 112.

The respective findings and conclusions stated in the trial court’s remand opinion were made following a comprehensive hearing where a veteran trial judge had the opportunity to thoroughly assess the evidence and the credibility of the various witnesses who appeared on the witness stand before him. This assessment was made in the context of the court’s total familiarity with the 1976 trial evidence.

The petitioners’ argument, adopted by the district court, that the jury verdict would probably have been different if they were allowed to develop the polygraph sequences involving Bello, must be considered in the face of these specific fact findings and the conclusions derived therefrom by the trial court.

F.

The District Court's Review of the Brady Violation.

In one paragraph, the district court summarizes the process by which Alfred Bello departed from his original trial testimony in 1967 and evolved into the so-called “in-the-bar” versions he was espousing up to August 1976 (1aE 35).

Respondents, earlier in this brief (pp. 95-112) have methodically traced the evidence which was presented over a period of many trial days to an attentive jury, which bared a sordid series of episodes in which Bello became the subject of a wide variety of pressures and inducements by defense oriented third parties to recant and fictionalize his account of what he had observed on the morning of the Lafayette Grill murders.

A review of that portion of the brief, and preferably of the appropriate trial transcript is necessary to obtain a true perspective of what the jury had before it to ultimately reconcile and accept Bello's eyewitness testimony identifying petitioners as the gunmen. Respondents suggest that such a review will do much to dispel the notion which has long been propagated by the defense, and apparently accepted carte blanche by the district court, that Bello's diverse statements beginning with the 1974 recantation were the product of Bello alone.

Such a complete review will also assist in assessing the effect an additional discrepancy might or might not have had, in the overall picture, upon the jury which heard all of Bello's testimony and all of the other evidence in the case, and then made its ultimate fact finding that petitioners were indeed guilty.

In its habeas opinion, the district court correctly notes that the Harrelson oral report, which the New Jersey Supreme Court stated should “[o]rdinarily...have been disclosed to the defendant,” 91 N.J. at 113, was relevant to the veracity of eyewitness Bello.

However, respondents strongly disagree with the district court's assessment as to what effect defense knowledge of the Harrelson oral report would have had upon Bello's credibility and upon the case as a whole. Specifically, respondents offer that the district court's suggestion that Bello's credibility would have been "totally destroyed" because of Harrelson's stated opinion, cannot be supported by an objective review of the entire record, particularly Bello's testimony, and the testimony related to his manipulation by the persons who obtained the recantations, the several "in-the-bar" versions, and the other "fictionalized" stories they hoped to exploit for various purposes.

The district court assumed the right of the reviewing federal court to look anew at the stated trial court's ultimate "finding" or "conclusion" that the "prosecution's non-disclosure of Harrelson's preliminary oral report in no way would or could have affected the outcome of the second Carter-Artis' trial". (1aE 74), because it was labelled as a conclusion of law (1aD 47). It should be noted that although the New Jersey Supreme Court may have considered this "finding" a "conclusion of law," the majority of that court did not reject the trial court's assessment of the value of the oral report to the defense. Furthermore, the New Jersey Supreme Court, upon review of lower court rulings, is not bound by the restrictions imposed upon a federal district court by U.S.C. §2254(d).

In its review of the materiality of the information that at the time of the polygraph examination, Harrelson expressed the opinion that Bello was indicated as truthful in stating he was in the bar at the time of the shootings, the district court referred to the potential uses the defense could have made of this information (1aD 49-53).

The first potential use mentioned is an additional factor to attack Bello's identification of Carter and Artis at the scene.

Introduction of this evidence, however, would only follow a review of all of the polygraph evidence, including that of Harrelson and Richard Arther.

How this could have benefited the defense, either before the trial judge on the Wade/Stovall hearing, or before the jury, is difficult to divine.

As ultimately clarified at the remand hearing, Harrelson would have testified that Bello was indicated as truthful when he said he was in the bar, and then saw Carter and Artis with guns on the sidewalk. Arther would have testified that Bello was truthful when he said he was on the sidewalk when he saw the gunmen. Both Harrelson and Arther would have testified that Bello was truthful in identifying Carter and Artis as the gunmen and as the only two involved at the scene.

By attempting to attack Bello's identification of petitioners because of a question as to his vantage point, use by the defense of the two polygraphers' testimony would in effect conclusively determine the identification question adversely to petitioners. Harrelson, after all, was convinced by the polygraph examination of Bello that Carter and Artis were "the perpetrators of the annihilations" (4aE 635), and Arther, who independently tested Bello and reviewed Harrelson's charts, wrote to Harrelson to state that "Again we are in agreement" (4aE 636).

There are further factors which distinguish this identification from the usual case where identification recognition of suspects is questioned. Petitioner Carter at the time was a well-known local celebrity in Paterson, whom Bello had previously met in person at the Bordentown Reformatory and at another bar in Paterson. Bello also testified that the two petitioners, who were returned to the murder scene a half-hour after he had seen the two gunmen on the sidewalk, and the gunmen were the same persons. As the trial court and the New Jersey Supreme Court concluded, the issue of Bello's testimony was not a misidentification issue but rather a credibility issue to be determined by the jury. 91 N.J. at 129-31.

The second potential use of the Harrelson oral report information suggested by the defense and the district court was to attack the credibility of Chief DeSimone and Assistant Prosecutor Kayne for having “concealed” the polygrapher’s “conclusion.”

This statement, adopted from the petitioners’ brief, presupposes there was a “concealment.” Further, the oral report was never accepted by the prosecution as a “conclusion.”

As reviewed previously, the testimony at the remand hearing clearly established that, notwithstanding Harrelson’s own belief that his oral report was not preliminary, it was indeed accepted as a tentative and preliminary opinion by the prosecution.

This was also a fact finding made by the trial court, specifically that there was justification for the non-disclosure for the various reasons testified to at the hearing and listed in the remand opinion (1aE 113-114).

Before this information could have been used to attack any prosecution witness’s testimony, the defense would have had to establish that the prosecution knew the final, typed report of Harrelson was inaccurate. This thesis, like the similar ones levelled by the defense against almost all the numerous prosecution witnesses on all aspects of the evidence of petitioners’ guilt, remains unsubstantiated, and is the subject of an opposite finding by the trial court.

The third potential use of the Harrelson oral polygraph report mentioned by the district court, relating to “Bello’s manipulation and on his total unbelievability,” I again adopted without reservation from the petitioners’ brief.

That the defense at the trial of petitioners did, or could, successfully “focus” on the manipulation of Bello, is an ironic suggestion.

The jury in fact had substantial evidence before it of the “manipulation” of Alfred Bello, all of it relating to how he had been pressured and cajoled into recanting his original trial testimony, how the opportunistic Melvin Ziem and Joseph Miller had

taken advantage of Bello to create numerous “fictionalized” versions of the “Lafayette Grill Massacre” while they were in contact with and using materials obtained from the defense, and which eventuated into the various “in-the-bar” versions which Bello offered to Assemblyman Hawkins and ultimately to the Essex County Grand Jury (pp.95-112).

The statement by the district court that Bello selected the on-the-street version only because it was confirmed by the result of the Harrelson polygraph conclusion is an oversimplification which ignores several salient facts (1aD 49-51).

The testimony which Bello gave at the 1976 trial of petitioners was the same as that he had given at the first trial in 1967. It was not just another version as the defense and the district court suggest.

That testimony was consistent with the statements which Bello gave to the police in 1966 after he had decided to come forward to identify the petitioners. See transcript of the taped interview of October 11, 1966 (2aF 201-239) and the formal statement given October 14, 1966 (2aF 240-244).

In the early statements which Bello gave to the police, prior to the time he decided to identify the petitioners as the gunmen, his account was consistent that he was on the street approaching the Lafayette Grill when he saw the gunmen (2aF 199-200). For an account of the events leading up to Bello’s identification of petitioners Carter and Artis at the first trial, see the opinion of Judge Samuel Lerner who presided over the first trial, rendered after the recantation hearing on the motion for a new trial heard in 1974. State v. Carter, 136 N.J. Super. 271 (Cty Ct. 1974).

Secondly, it was not just the polygraph test conclusion which was a factor in having Bello return to his 1967 testimony. As found by the trial court during the remand hearing, it was the entire polygraph process, including the pretest interview

where Bello began to “recant the recantation” and return from the fictionalized in-the-bar versions (1aE 55).

A few days following the Harrelson polygraph test, when Bello was read the 1967 trial transcripts, which included his testimony that he had observed the gunmen while he was on the sidewalk approaching the bar, Bello acknowledged that now that he had a chance to see what he had related at the 1967 trial, “it was coming back to him” (1aC 161).

Finally, prior to the second trial, Bello was also tested by polygrapher Richard Arther, who concluded his on-the-street account was truthful.

In the event the defense had at trial attempted to impeach Bello on the basis of having selected the on-the-street version merely because he was told it was confirmed by a polygrapher, as suggested by the district court (1aD 49-51), the prosecution could have introduced all of Bello’s prior statements in which the on-the-street account was stated, to say nothing of the damaging conclusions which would have been admitted through the introduction of the Harrelson and Arther polygraph tests and testimony.

In the context of the potential introduction of the polygraph conclusions, as amplified by the testimony of Harrelson and Arther, respectively, at the remand hearing, the statement by the district court that “Bello never identified Carter and Artis as the murderers” is incongruous (1aD 52). It is true Bello never testified he saw the actual shootings, since he was outside the tavern at the time, where he saw the armed petitioners, the only persons involved, coming around the corner from the bar. But, that is hardly to say that Bello did not identify Carter and Artis as the murderers.

In its assessment of the failure of the prosecution to inform the defense that Harrelson had given an oral polygraph report regarding Bello, upon the defense

position in the trial, the district court reviewed the totality of the prosecution's evidence (1aE 53-64).

This review, which the respondents consider to be inadequate and overly prone to accept defense assertions not substantially supported by the trial record, is explored in detail previously in this brief (pp. 10-112).

Respondents reiterate that a comprehensive review of the total record demonstrates that the prosecution evidence presented at trial was overwhelming, and that the case against petitioners could not fairly be characterized as a close case.

In light of this and the dubious and marginal value the defense could have derived from the information relating to the Harrelson oral report, respondents submit that the district court had no justifiable basis to conclude that provision of the subject information would have led to a reasonable probability of a different trial result.

G.

Materiality of the Harrelson Oral Report.

United States v. Bagley, _____ U.S. _____, 105 S.Ct. 3374, 87 L.Ed.2d 481 (1985), which has adopted a single test for weighing the materiality of Brady material, reminds us that the purpose of the Brady rule is

to insure that a miscarriage of justice does not occur....Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. 105 S.Ct. at 3380.

Stated otherwise, “if disclosed and used effectively, it may make the difference between conviction and acquittal.” Ibid.

Before the Bagley ruling, the standard applicable in the present case, assuming as did the New Jersey Supreme Court that the oral polygraph report of Leonard Harrelson

was the kind of information which “ordinarily” should have been disclosed to the defendants, was that stated in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 2397, 49 L. Ed .2d 342, 350 (1976). There the United States Supreme Court held that in the circumstance where specific information requested by the defense was not provided by the prosecution, the standard of materiality was whether “the suppressed evidence might have affected the outcome of the trial.”

Bagley has refined this standard to define material Brady evidence to be that which, if disclosed to the defendant, would lead to a “reasonable probability” that the result of the preceding would have been different. “Reasonable probability” is in turn defined as a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384.

It is the position of respondents that under either the Agurs definition or the recent, ostensibly more favorable standard from the prosecution perspective, of Bagley, the subject information relating to the Harrelson oral polygraph report does not rise to the degree of materiality, that if it had been disclosed, would have led to a different result at trial.

Central to respondents’ position is the fact that in the unique circumstances of the history of this case, there was a specially directed remand hearing for the precise purpose of exploring every facet of the alleged Brady violation, presided over by the trial court which had also presided over the lengthy trial of petitioners, and in which very detailed findings of fact and conclusions of law were made and set forth in an 80-page opinion.

The remand hearing, which encompassed fourteen days of testimony and numerous exhibits, was itself more comprehensive than the great majority of criminal trials.

In this setting, it should hardly be necessary to urge that the findings and conclusions of the presiding judge should be entitled to at least the statutory direction of a presumption of correctness as to the factual findings, 28 U.S.C. §2254(d), and to the substantial deference which a state court matter should be accorded on review by a federal court.

A review of the district court's opinion on the Brady issue, encompassing some 30 pages (1aE 34-64) discloses that the district court all but totally ignored the findings and conclusions made by the trial court. Apparently, the district court chose to instead review the New Jersey Supreme Court opinion on appeal.

Respondents suggest that the purpose of habeas corpus review should entail a closer attention by the district court to the fact findings made by the jury and the trial court, respectively, and less to the subsequent review by the state's higher courts. The district court, on habeas review, is not after all, another appellate court in the hierarchy of the state court system, but rather has the narrow function of evaluating the matter of due process. See, Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 2178, 33 L. Ed.2d 1 (1972); United States ex rel. Gentry v. Circuit Court, 586 F.2d 1142, 46 (7 Cir. 1978); Carey v. Duckworth, 738 F.2d 875, 876 (7 Cir. 1984); United States ex rel. King v. Hilton, 503 F. Supp. 303, 312 (D.N.J. 1979).

The state trial court at the remand hearing took the testimony and assessed the credibility of the numerous witnesses who appeared, considered the evidence in the context of the trial court's total familiarity with the overall evidence and testimony adduced at petitioners' lengthy retrial in 1976, over which it had presided and concluded

I find that the prosecution's non-disclosure of Harrelson's preliminary oral report in no way would or could have affected the outcome of the second Carter-Artis trial (1aE 134).

The trial court in making this determination referred to the fact, as testified to by Harrelson, that the preliminary oral report he had given at the time he tested Alfred Bello and the subsequent, detailed written report he submitted three weeks later, were essentially consistent, in that Harrelson believed Bello to be telling the truth when he revealed to Harrelson that two men committed the murders, whom Bello positively identified as Rubin Carter and John Artis (1aE 129).

The trial court found that assuming that the preliminary oral report and the subsequent written report were consistent as to Harrelson's belief that Bello was truthful when he said he had been in the bar at the time of the shootings, the only purpose the defense could have made of that would be to impeach Bello, which would have been merely cumulative or repetitious (1aE 130).

This conclusion was supported by the trial court's exposure of the false premise upon which the defense arguments relating to the "in-the-bar" version had been based (1aE 63-66).

On May 25, 1978, the defense issued a news release, relating to an affidavit they had obtained from Harrelson, and noting Harrelson's opinion that Bello was inside the bar during the shootings, but incorrectly and blandly stated that "the new facts completely contradict the story Bello told at trial and the claim that Carter and Artis were the killers." Exhibit S-1032 (3aE 542).

Similar representations were made in the papers submitted by the defense to the Appellate Division, dated May 19, 1978. Exhibit S-1035 (3aE 543-46).

From this it was evident that the defense was anticipating a determination at the remand hearing that Harrelson's polygraph test results would indicate a Bello version inconsistent with petitioners Carter and Artis being the triggermen at the Lafayette Grill murders.

This illusion, of course, was shattered by the unequivocal testimony of Harrelson that his polygraph test of Bello convinced him that Bello was truthful when he identified Carter and Artis at the scene, each armed, and as the only two persons involved in the shootings.

The trial court, noting the flawed predicate for the defense's application, found that

The account which Harrelson obtained from Bello is not consistent with the "in-the-bar" version which Bello gave in Essex County where, the common ingredient, two people, not Carter and Artis, did the killing (the four-man theory), but rather is consistent with the original 1967 version, *i.e.*, the two-man version identifying Carter and Artis as the triggermen (1aE 64).

The trial court concluded that the introduction of this testimony of Harrelson at the trial of petitioners would have in fact been "devastating" to the defense (1aE 131). See also Remand Opinion, Findings of Fact (1aE 116), as to what Harrelson's testimony would have been at the trial if called to testify.

Respondents suggest that the assertion by petitioners, accepted as a viable proposition by the district court (1aD 52), that they would have introduced this testimony of Harrelson at the trial should be viewed skeptically (10aC 2353-57; 11aC 2612).

The jury would thereby have been made aware that an eminent polygraphist had tested Bello and was of the opinion that Bello was truthful in identifying petitioners Carter and Artis as the armed killers at the Lafayette Grill, and the only two persons involved there.

It is difficult to conceive of evidence more favorable to the prosecution and damaging to the defense, than to have its eyewitness, who had been belabored on cross-examination as to prior inconsistent statements, and various other credibility problems,

found by an expert polygrapher to be truthful in identifying petitioners as the perpetrators. This would have resulted in restoring any loss of credibility to the witness, who as the trial court noted, had been cross-examined extensively from every conceivable angle by skilled counsel utilizing voluminous discovery material (1aE 99-103).

In return for admission of the damning evidence of a polygraph-supported identification, the defense would only have revealed to the jury the information that at most, the polygrapher believed Bello was in the bar at the time of the shootings. This was the same information which Bello had already stated in various of his prior versions, and upon which he had been cross-examined. Thus, while the jury might speculate whether Harrelson was confused as to whether Bello was on the street or in the bar, one conclusive fact made clear would be the truth of Bello's identification of petitioners as the triggermen.

Petitioners suggested in their brief in the district court that as far as they were concerned, the alleged "validity" of the polygraph results were not in issue (DB 129). The fallacy of this argument is that they would have had to convince the jury to disregard the validity of Harrelson's findings regarding the truth of the identification of petitioners as the killers, something the jury might choose not to do. The further danger to their cause would be that by opening the polygraph issue before the jury, the evidence relating to the conclusive Arther polygraph tests incriminating petitioner Carter, and thereby Artis as well, would likewise be brought before the jury.

The dilemma of petitioners in this regard is further exemplified by the perceived need of the petitioners in their brief in the district court to argue that Harrelson could not have testified at the trial as to what he clearly said he would testify to (DB 178).

Since Harrelson concluded that Bello identified only Carter and Artis as the assailants and as the only ones present at the shootings, petitioners would only compound their problem by attempting at the trial to contradict Harrelson as to reasons for his conclusion.

Petitioners had also argued that had they known that Harrelson had given a preliminary report to the prosecution, they could have used that information before the jury to show that the prosecution had manipulated or coerced Bello to return to his 1967 testimony.

This argument is flawed because there is no evidence that the prosecution used the polygraph test to coerce or manipulate Bello, and the petitioners therefore could not make any such showing. Importantly, the trial court at the remand hearing made specific findings, and ultimately conclusions of law, based upon the extensive testimony and other evidence at the hearing that in fact no such conduct was employed by the prosecution regarding the polygraph test (1aE 115).

Likewise, there was substantial evidence at the remand hearing to support the trial court's finding (1aE 114) that the oral report given by Harrelson to Chief DeSimone following his test of Bello was considered preliminary by the prosecution, and the written report which followed was accepted by the prosecution as being accurate as to the conclusion stated. Testimony to this effect was given by former Prosecutor Humphreys and Assistant Prosecutors Marmo and Kayne, and was supported by other evidence, including the written report itself.

There is, therefore, no basis and no finding to support the petitioners' assertions that the polygraph report was used to coerce or manipulate Bello to return to his 1967 testimony.

Without any such basis, the petitioners' suggestion, noted by the district court (1aD 52-53), that they could have used the oral report of Harrelson to argue

prosecutorial misconduct before the jury, must fall. Yet this very argument has been urged by petitioners and mentioned by the district court as a factor to bolster a claim of “materiality” within the Brady purview.

To substantiate this argument, petitioners would have had to show that the prosecution knew that the polygraph report was erroneous, and make a showing of deceptive use, which they failed to do. In fact, the evidence and the trial court findings at the remand hearing are the opposite.

There was testimony at the remand hearing to support the prosecution position that the polygraph test process begun by Harrelson was instrumental in Bello returning to his 1967 trial testimony. The polygraph test interview conducted by Professor Harrelson was the first and a primary step in that direction.

As detailed previously, Bello in 1974 had departed from his 1967 testimony and had recanted his identification of petitioners as the armed men he had seen leaving the Lafayette Grill at the time of the murders, saying he was unable to identify the men he saw.

In 1975, during the Hawkins investigation and the Essex County Grand Jury inquiry which followed, Bello gave statements and testimony which included several variations of a four-man involvement in the shootings, the so-called Essex County version. The common ingredient of these versions was that two men, not Carter and Artis, were the triggermen. In one version Carter and Artis were armed, in another they were unarmed. There were other detail variants, such as the location where Bello was at various times, the position of the car or cars, etc...

At the time Assistant Prosecutor DeVesa interviewed Bello on June 21, 1976, Bello was still reciting one of these “Essex County” versions.

Thus, up to the time Prosecutor Humphreys had Bello tested by Harrelson, Bello was adhering to that version. Further, up to that point, the prosecution had not

obtained any information from Bello, nor from anyone else, as to why Bello had recanted in 1974 or as to why he had come up with the various “Essex County” versions.

It was during the Harrelson pretest interview that Bello disclosed, for the first time, why he had recanted in 1974. He disclosed the participation of Fred Hogan, Hal Levenson and Selwyn Raab in an enterprise to get him to recant, and gave details, DC-1202 (4aE 624-25).

Further details about the 1974 recantation as well as the origination of the “Essex County” versions were developed in later interviews of Bello. However, the initial breakthrough was the Harrelson pretest interview and test questions on August 7, 1976. Former Prosecutor Humphreys in his testimony at the remand hearing noted his opinion that the pretest interview and Bello’s disclosures about the reasons for his recantation were the first step in having Bello return to his 1967 testimony (5aC 1150-51).

Four days later, Bello was shown the 1967 trial transcripts, with the questions and answers as to his testimony being read to him. At that time Bello indicated that this was the first time he had a chance to look at that and as he was reading the testimony, it was coming back to him (1aC 160-61; 8aC 1866-70). Following upon the polygraph pre-test interview and a test with Harrelson, this reading of the 1967 trial transcript was a further step toward Bello returning to the on-the-street testimony included there.

Further details concerning the 1974 recantation, as well as a fairly complete recitation of the origin of the “Essex County” versions were obtained from Bello when Chief DeSimone and Assistant Prosecutor Kayne interviewed him in New Mexico on September 14-15, 1976.

From the above, it is evident that the polygraph test process and the interviews which followed it were instrumental in getting from Bello the complete picture, to include his 1967 trial testimony, which the prosecution always believed was truthful and corroborated, as well as the background for the recantation and subsequent “Essex County” version.

Respondents submit that for this reason, it was appropriate for the prosecution at the 1976 trial to advise the trial court that in the event the defense questioned Bello as to why he returned to the 1967 testimony, the role of the Harrelson and the Arther polygraph test process might come into play.

This advisement by the prosecution was intended, not as an effort to block defense cross-examination of Bello or other State witnesses, but to alert the trial court and the defense that the polygraph test process implications would have to be addressed in order to get the complete picture of why Bello had discarded the “Essex County” version.

The trial court at the remand hearing noted that it was not the prosecution which persuaded or coerced Bello to recant his recantation, but Bello himself did so during the Harrelson pretest interview (1aE 133). This was made a specific finding of fact by the trial court (1aE 115).

This finding and the significant fact finding that further cross-examination of Bello through use of the oral polygraph report would have been only cumulative and repetitious (1aE 116-117) impact directly upon the assessment of the materiality of that withheld information as it might have been used by the defense at the trial.

The trial court, which had presided over the lengthy trial of petitioners and was familiar with all of the evidence adduced there, as well as with the lengthy cross-examination of Bello conducted by the defense over a period of five days and some

600 pages of trial transcript, and which heard the additional testimony related at the extensive remand hearing, made a considered finding of fact that this information would only have been cumulative.

This finding, which respondents submit is not surprising in the context of the record, was similar to that made by the trial court in another case reviewed by the Court of Appeals for the Third Circuit, also involving a witness whose credibility, like that of Bello, was subject to numerous attacks.

In United States v. Adams, 759 F. 1099 (3 Cir. 1985) evidence came to light after the trial of a jewel robbery in which the witness had participated. In view of the witness's other problems, the court found that the evidence of one more misdeed was "merely impeaching and almost certainly would not produce an acquittal." Id. at 1108. The court went on to describe that the witness

admitted to a minimum of twenty instances of unsavory conduct, ranging from infidelity to his wife to a conviction of misconduct in office while a public official....If this evidence did not convince the jury to doubt...[witness'] credibility, evidence of another relatively mundane crime would not be the "straw that broke the camel's back." Ibid.

H.

Presumption of Correctness

The findings of fact by the trial court are, of course, entitled to a presumption of correctness upon federal habeas corpus review. 28 U.S.C. §2254(d).

Federal courts must afford a "high measure of deference" to the state courts' factual findings. As stated in Marshall v. Lonberger, 459 U.S. 422, 103 S. Ct. 843, 850, 74 L. Ed.2d 646 (1983):

This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual

determinations. Instead, it must conclude that the state court's findings lacked even "fair support" in the record.

The Supreme Court in Marshall continued:

28 U.S.C. §2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. 103 S.Ct. at 851.

Citing Boyd v. Boyd, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930), the Supreme Court quoted a classic definition of the superior status of the trial judge as the fact finder:

Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.... How can we say the judge is wrong? We never saw the witnesses....To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. Ibid.

See Sumner v. Mata, 449 U.S. 539, 10 U.S. 764, 66 L.Ed.2d 722 (1981): Sullivan v. Cuyler, 723 F.2d 1077, 1084 (3 Cir. 1983).

"[T]he federal habeas court, should, of course, give great weight to the considered conclusion of a coequal state judiciary." (Emphasis added).

This statement by the United States Supreme Court in Miller v. Fenton, 474 U.S._____, 106 S. Ct. 445, 88 L.Ed.2d 405, 412 (1985), citing Culombe v. Connecticut, 367 U.S. 568, 605, 6 L. Ed.2d 1037, 81 S.Ct. 1860 (1961), is highly appropriate in the instant case. Respondents assert that the district court in its habeas review obviously did not accord the state trial court that level of deference, as clearly appears from the perfunctory references to the trial court's findings and conclusions in the district court opinion granting the writs.

Miller v. Fenton was concerned with the question of whether the voluntariness of a confession is an issue of fact entitled to the §2254(d) presumption of correctness.

The Supreme Court had taken this question up because of a disparity of views among the various Court of Appeals on this issue. 88 L. Ed.2d at 410. Tracing a long line of precedents indicating that in considering the unique status of confession cases, the ultimate issue of voluntariness was always treated as a legal question, the High Court in Miller v. Fenton reaffirmed that

the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination. 88 L.Ed. at 410-411, 412.

In reversing this Court, which had found that the voluntariness of a confession is a factual issue within the meaning of 28 U.S.C. §2254(d), see Miller v. Fenton, 741 F.2d 1456 (3 Cir. 1984), the Supreme Court acknowledged that it has “not charted an entirely clear course...” in the area of the scope of the §2254(d) presumption of correctness. 88 L. Ed.2d at 412. It referred to four of its recent decisions in which the presumption of correctness was found to apply in “case-specific” situations, but cautioned that these holdings did not “tacitly” overturn the long-standing rule that the voluntariness of a confession is a matter for independent federal review. Id. at 412-413.

The instant case presents an appropriate example of the difficulties noted by the court in Miller v. Fenton in determining what are questions of law or questions of fact for purposes of the §2254(d) presumption of correctness.

For example, the trial court clearly designated as a finding of fact its determination that any additional cross-examination of Alfred Bello by means of the information relating to the Harrelson oral polygraph report would have been cumulative and repetitious (1aE 116-117).

This fact finding was, in turn, the essential ingredient of the trial court's determination, labelled a conclusion of law and accepted as such by the district court as the basis for its independent review of the state court trial and appellate proceedings, that the prosecution's non-disclosure of the oral report "in no way would or could have affected the outcome" of the trial (1aE 129-134).

The problems in sorting out these definitions are recognized in Justice O'Connor's opinion in Miller v. Fenton:

In the §2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.

....

[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.

....

But beyond....[two enumerated] elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

....

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. 88 L.Ed.2d 413.

In the instant case, the state trial court conducted a remand hearing involving many witnesses and evidentiary exhibits, which encompassed fourteen court days. The court necessarily made numerous fact findings derived from the testimony and related evidence before it. In this context, despite the designations in the remand opinion of specific factual findings or legal conclusions, respondents submit that it is inherently

impractical to determine that the ultimate conclusions of the trial court relating to the materiality of the oral polygraph report information are merely legal conclusions, rather than actual findings of fact based upon the trial court's assessment of the evidence.

As the court in Miller v. Fenton has recognized, certain

[C]onsiderations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. 88 L. Ed.2d at 413-414.

Miller v. Fenton is clear that the federal courts retain independent review of the voluntariness of confessions, primarily because of the traditional "parallel" role the federal courts have played in protecting the rights of a defendant when the prosecution secures a conviction through the defendant's confession. 88 L. Ed.2d at 416. The court in Miller v. Fenton traced this special concern in confession cases as far back as Brown v. Mississippi, 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461 (1936).

One of the questions posed to this court by the instant appeal is whether a claimed Brady violation should be considered in the same category as an involuntary confession for purposes of determining the extent of independent federal determination, vis-a-vis the deference to be accorded to the trial court's fact findings as being an ingredient of, or fully constituting, the ultimate "conclusion of law."

Assuming that independent federal review of the perceived Brady violation is warranted, the next pertinent question is whether the district court accorded a "high measure of deference" to the trial court's factual findings, Marshall v. Lonberger, supra,

at 103 S.Ct. 850, and “great weight” to the “considered conclusions” of the state court assuming those conclusions were determinations of law. Miller v. Fenton, supra, at 88 L.Ed.2d 412.

The nub question involved in the Brady issue considered by the trial court on the remand hearing, and independently reviewed by the district court is what effect, if any, the information contained in the Harrelson oral polygraph report would have ultimately had upon the credibility of eyewitness Alfred Bello before the jury.

The trial court determined that this information would have been only cumulative and repetitive to the other impeachment material available and utilized by the defense in cross-examination of Bello, and “in no way could [it] have affected the outcome of the trial” (1aE 116-117, 134). The state trial court, after all, was in a unique position both to assess the quality of the Brady evidence and to weigh it as to the effect that information might have had in the trial of petitioners, encompassing 46 trial dates totalling 11,000 pages of transcript.

In United States v. Oxman, 740 F.2d 1298, 1313 (3 Cir. 1984), vacated and remanded sub. nom. United States v. Pflaumer, _____, U.S. _____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985), the test for materiality was stated to be whether “the impeaching evidence significantly impairs the incriminating quality” of the testimony of a witness who incriminates the defendant. The court noted that this quality of impeachment might affect the jury’s assessment of reasonable doubt and thereby affect the outcome of the trial.

The court in Oxman added that “any doubt about whether impeaching evidence significantly impairs the believability of an incriminating witness should be resolved by the trial court.” 740 F.2d at 1313.

In the instant case, this question was resolved conclusively by the trial court, which found that the new information could only have been cumulative.

The dubious value of the Harrelson oral report to petitioners for impeachment purposes, particularly when viewed in the light of the damage to petitioners which would have been occasioned by the admission of the testimony of Harrelson that Bello was truthful in identifying Carter and Artis as the gunmen, should be contrasted to the quality of impeachment material available in other cases involving non-disclosure of Brady material. United States v. Oxman, *supra*; United States v. McCrane, 547 F.2d 204, 205 (3 Cir. 1976); DeMartino v. Weidenburner, 616 F.2d 708 (3 Cir. 1980), Zeigler v. Callahan, 659 F.2d 254 (1 Cir. 1981).

As painstakingly set out previously in this brief, a comprehensive review of the evidence presented at petitioners' 1976 trial demonstrates that the evidence of guilt was very substantial and multi-faceted.

The record also discloses that the material available and utilized by the defense in an obviously unsuccessful attempt to discredit eyewitness Bello's testimony was extensive and included several categories of impeachment ammunition.

The undisclosed Harrelson oral report, both in its intrinsic value and in conjunction with the other evidence in the case, at most could only be "cumulative" and "repetitious" to the plethora of other impeachment materials, as found by the trial court.

Respondents submit that this degree of additional impeachment material should not be the basis for the vacating of convictions entered in a state trial court which are supported by the overwhelming weight of evidence of guilt, as in this case.

Respondents further submit that the district court's opinion and the orders granting writs of habeas corpus to petitioners Rubin Carter and John Artis, respectively, do not have a substantial basis in the record of the state court proceedings, do not

reflect a correct application of the standard of materiality of Brady material set out by the United States Supreme Court in United States v. Bagley, supra, do not accord the requisite degree of deference which is due from the federal habeas court to the state trial court, and raise serious comity concerns, Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783 (1982).

CONCLUSION

For All Of The Reasons Stated In This Brief And In The State Court Opinions On Review, As Well As Upon A Comprehensive Review Of The Entire Record Of The State Court Trial Proceedings Relating To Petitioners' Convictions, This Court Should Find That The District Court's Grant Of The Respective Writs Of Habeas Corpus Was In Error And Should Be Reversed.

Dated: March 25, 1986

Respectfully submitted,

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