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After the Hurricane: The Legacy of the Rubin Carter Case

JUDITH L. RITTER*

Introduction

Rubin "Hurricane" Carter was a top middleweight boxing contender in the early 1960s. Carter, twice convicted of a triple homicide in New Jersey and sentenced to three life sentences, was released after almost nineteen years in prison when a federal court found that his convictions were obtained in violation of his constitutional rights. After his release and ultimate exoneration, Rubin Carter devoted himself to assisting others who were falsely accused and unjustly incarcerated. This past spring he died of...
cancer at the age of seventy-six.\textsuperscript{5}

Just two months before his death, Carter wrote an opinion piece published by the \textit{New York Daily News}, in which he asked the Brooklyn District Attorney to review and reconsider the conviction of David McCallum, an inmate incarcerated since 1985 for a crime Carter and others maintained he did not commit.\textsuperscript{6} Writing about Carter's death in \textit{The Nation}, columnist David Zirin proposed that the best tribute to Carter would be for his supporters to call the Brooklyn District Attorney to advocate for David McCallum's release.\textsuperscript{7}

In this essay, I suggest that Hurricane's legacy should have broad implications. A federal court set aside Rubin Carter's conviction in 1985,\textsuperscript{8} eleven years before the passage of the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA").\textsuperscript{9} Had AEDPA been the law in 1985, Carter would not have been freed. He would have died in prison after serving nearly forty-eight years for a crime he did not commit. Because of AEDPA, there is a grave risk that individuals wrongfully convicted in state courts—the Rubin Carters of today—have little hope for meaningful review by a federal court.

After a brief description of Rubin Carter's life before he was accused of murder, a synopsis of the Carter prosecution, and a

\textsuperscript{5} See Almasy & McLaughlin, \textit{supra} note 4.


\textsuperscript{8} Carter v. Dietz, 621 F. Supp. at 559.

discussion of the court opinion that led to his freedom, this essay will explain the harsh truth that Carter could never have been released under current federal habeas corpus law. In this essay I argue that it is the perfect time to reformulate habeas law. As the Supreme Court’s interpretation of the right to habeas corpus relief grows increasingly narrow, the death of Rubin Carter and the memories of his life story call to mind the human impact of unjust criminal convictions.10

I. Rubin Carter, Before June 17, 1966

Rubin Carter’s contacts with the criminal justice system began well before he was wrongfully accused of murder. Carter was twenty-nine years old when he was indicted for the triple homicide.11 Up to that point, he had spent a significant part of his life in juvenile or adult criminal detention centers.12 He was the fourth child of six, within a stable family unit.13 His father was strict, however, and viciously beat Carter on more than one occasion.14 The family moved to Paterson, New Jersey, when Rubin was six years old.15 Paterson was a rough area and Carter and a few of his siblings joined a local street gang.16 He was a stutterer from an early age, which caused Carter to confront those who teased and ridiculed him and also caused him to talk as little as possible.17 His fellow gang members quickly noted his aptitude for fighting, leading to his election as war counselor for the group.18 The position presented him with more opportunities to fight, frequently reminding Carter that he had a knack for it.

10. While perhaps not universally familiar to more recent generations, Rubin “Hurricane” Carter’s ordeal was widely publicized as it was unfolding, due at least in part to his notoriety as a serious boxing contender. He published his autobiography from prison after losing his first round of appeals. See Rubin “Hurricane” Carter, The Sixteenth Round: From Number 1 Contender to Number 45472 (1974). Many years before the Hollywood film The Hurricane (Universal Studios 1999), Bob Dylan wrote and recorded a song about Carter’s trial and conviction. See Bob Dylan, Hurricane, on Desire (Columbia Records 1975) (describing Carter as “an innocent man in a living hell”).
11. He was born on May 6, 1937. See Carter, supra note 10, at 4–5.
12. Id. at 41–184.
13. Id. at 11. Carter’s parents were together and his father, Lloyd Carter, was employed and supported the family. Id. at 12.
14. Id. at 18.
15. Id. at 12.
16. Id. at 13–14.
17. Id. at 15. Carter’s stutter was so severe that on many occasions he could not formulate words at all.
18. Id.
By age eleven, Carter was placed in a New Jersey state home for delinquents after being accused of assaulting a white man. Although there was evidence that the man forcibly tried to sexually molest Rubin Carter and his friends, it seemed to make no difference. The detention facility was strictly segregated. Racist remarks from guards, administrators and inmates were commonplace. Carter was frustrated by this treatment. In response, he began forming what would become a lifetime inclination toward combating unfairness. In his autobiography, he poignantly commented that the community of incarcerated juveniles was a group of "mentally abused products of a morally abusing environment, shamelessly vicious, corrupt, and depraved. To make matters worse, these were contagious qualities." Confrontations in jail frequently resulted in disciplinary measures against him. After six years at the detention facility, the warden promised to release Carter upon a showing of good behavior. However, when the warden failed to follow through, Carter took matters into his own hands and successfully managed to escape.

Out on his own, Rubin Carter joined the Army and became a
paratrooper. While stationed in Germany, he boxed regularly and became the European Light Welterweight Champion. At the same time, he was introduced to the teachings of Islam, which gave him new insight into his life and conduct. However, this period of freedom was short-lived. After being discharged from the Army in 1956 and returning to New Jersey, he was locked up again as a consequence of his escape from the juvenile detention center. This time around, Carter was sent to a facility even more dismal than the first. He remained there for ten months, but was re-incarcerated shortly after his release when he committed two robberies. These offenses led to his being sent to Trenton State Prison, an old, large, dilapidated institution, where he would remain for more than four years. At Trenton State, Carter spent his days reading and intensely training for the boxing ring. With an improved sense of self-worth, an increased knowledge of the world, and an adoption of many of the tenets of Islam, Rubin Carter left prison in 1961, determined to be self-sufficient and never return.

After prison, Carter ramped up efforts to start a boxing career but was met with a number of obstacles such as incompetent and dishonest managers. Nevertheless, by the spring of 1964, Carter had moved from hastily arranged small-purse bouts to televised matches in New York's Madison Square Garden, Hawai'i, South America, and even as far away as South Africa. Soon, he was the number one middleweight challenger. With all of this newfound

29. Id. at 133.
30. Id. at 131. He learned about Islamic teachings from an army friend, Ali Hasson Muhammad. Much of what he and Muhammad discussed resonated with Carter and gave him new insights into coping with anger and frustration.
31. Id. at 140.
32. Id. at 153.
33. Id. at 157–59.
34. Id. at 158–63.
35. Id. at 165–68; Wice, supra note 1, at 32–33.
36. After winning numerous boxing matches against other prisoners, Carter started receiving offers from prize fighting managers all over the world. Carter supra note 10, at 184. Carter's response to each offer was the same: "If you can get me out, I'm yours." Id. Even a prison employee offered to manage Carter when he got out. Id.
37. See Wice, supra note 1, at 31.
38. See Carter, supra note 10, at 202, 221–22. During this period, despite the fact that Carter fought regularly, he made almost no money. He had shelter, but no heat and no money for food. Id. at 197. Because of his determination to make something of his life, he refused his father's offer to return home. Id.
39. Id. at 197; supra note 1 and accompanying text. During this period Carter met and married Mae Thelma Bosket and together they had a daughter, Theodora. Carter, supra note 10, at 220.
exposure, Rubin Carter began to draw the ire and hostility of local and federal law enforcement.\textsuperscript{40} This stemmed at least in part from statements attributed to him in the press calling for a militant response to police oppression of African Americans.\textsuperscript{41} After this, he was regularly harassed by resentful members of law enforcement.\textsuperscript{42}

II. A Triple Homicide, Two Trials and Appellate Review

For the purposes of this Article, there is no value in comprehensively laying out details of the triple homicide that took place in a Paterson, New Jersey, bar in the early morning hours of June 17, 1966. Nor will I list the witnesses, pieces of evidence or the many and varying accounts of that night. There are books\textsuperscript{43} and a Hollywood movie\textsuperscript{44} that cover this territory. In this section of the Article, I will summarize the events and emphasize the pieces most pertinent to the habeas corpus litigation that led to Carter’s freedom.

Three people died\textsuperscript{45} and a fourth was badly injured\textsuperscript{46} when two gunmen burst into the Lafayette Bar and Grill and started shooting on June 17, 1966, at 2:25 a.m.\textsuperscript{47} Neither of the two surviving victims was able to identify the perpetrators.\textsuperscript{48} All of the victims were white.\textsuperscript{49} Because no money was taken and neither gunman said anything before shooting, there was no apparent motive for the crime.\textsuperscript{50} Law enforcement officers investigating the shootings detained Rubin Carter and his codefendant John Artis, both African American, later that night, mostly because they were seen riding in a car that loosely fit the description of the getaway vehicle.\textsuperscript{51}

\begin{footnotes}
\item[40] CARTER, supra note 10, at 238–39.
\item[41] Id. at 226 (quoting news coverage of an interview with Carter about ongoing riots, in which he acknowledged saying to a close friend in jest, "Let’s get our guns and go up there and get us some of those cops. I know I can get four or five before they get me. How many can you get?").
\item[42] Id. at 238–39.
\item[44] THE HURRICANE (Universal Studios, 1999).
\item[45] Carter v. Dietz, 621 F. Supp. at 535. Bartender Jim Oliver and patron Fred Nauyoks died at the scene and patron Hazel Tanis who survived that night, died one month later from her injuries. Id.
\item[46] Another patron, Bill Marins, was shot in the eye and partially blinded. Id.
\item[47] Id. at 534–35.
\item[48] WICE, supra note 1, at 14–16.
\item[49] Id. at 129.
\item[50] Id. at 66.
\item[51] Id. at 7–9.
\end{footnotes}
However, they were both released shortly thereafter, following a show-up at the hospital bed of one of the victims, at which time the victim told the police that Carter and Artis were not the shooters. An investigation and grand jury inquiry followed, culminating in the re-arrest of both Carter and Artis in October 1966. The newly obtained evidence against Carter and Artis primarily consisted of the statements of two men, Al Bello and Arthur Bradley, who were attempting to burglarize an establishment up the street from the bar on the night of the shootings. They told the police that they saw Carter and Artis with firearms, running from The Lafayette. The grand jury indicted Rubin Carter and John Artis for the murders on October 30, 1966, and both were held in custody to await trial.

Rubin Carter and John Artis stood trial twice for the killings, once in the spring of 1967 and then again in the fall of 1976. Their first convictions were set aside and a retrial ordered after it was revealed that the prosecution had failed to disclose to the defendants that both Bello and Bradley, the only eyewitnesses, were offered leniency for their own crimes in exchange for their testimony. At the second

52. WICE, supra note 1, at 16. If the victim had made a positive identification, it would have been highly unreliable. Bill Marins had been shot in the face and was missing his left eye. When Carter and Artis were brought to him at the hospital, Carter remembers that Marins was “weak, pale, and seemed nearly dead.” Id. Yet, when asked, he told a police detective that he was able to see clearly. He then indicated that neither Carter nor Artis were the gunmen. Id.
53. Id. at 44.
54. Id. at 41–44.
55. Id. at 43.
56. Id. at 44.
57. Carter v. Dietz, 621 F. Supp. at 536. Jury selection was completed on May 9, 1967. WICE, supra note 1, at 46. As was the custom, fourteen jurors were selected. Id. at 44. Just prior to deliberations, two would be randomly eliminated. Id. Of the original fourteen, only one was black. Id. That juror was one of the two eliminated. Id. The verdicts came from an all-white jury. Id.
58. WICE, supra note 1, at 44. Jury selection for this trial concluded on November 5, 1976. Id. at 110. This time, two black jurors were placed on the panel. Id. Prior to deliberations, one black juror was eliminated, leaving one black member of the deciding jury. Id. at 144.
59. Carter v. Dietz, 621 F. Supp. at 536. Pursuant to Brady v. Maryland, prosecutors were obligated under the Due Process Clause to disclose material exculpatory evidence to the defense. 373 U.S. 83, 87 (1963). The promise of government leniency to both eyewitnesses could have been significant evidence with which to impeach their credibility. The retrial was ordered by the New Jersey Supreme Court. See State v. Carter, 354 A.2d 627 (N.J. 1976). That same court had rejected Carter’s first appeal. See State v. Carter, 255 A.2d 746 (N.J. 1969). Both Carter and Artis were released on bail, pending a new trial. WICE, supra note 1, at 101. A number of events between the two reviews by the New Jersey Supreme Court may or may not have had an impact: A former police officer took an interest in the case and voluntarily launched his own investigation. Id. at 75–77. An autobiography that Carter wrote in prison was published
trial, the defendants were convicted once again, receiving life sentences. For a second time Rubin Carter was sentenced to two consecutive life terms with a third life term to run concurrently.

In a widely publicized sequence of events, Rubin Carter was released on bail in November 1985 after a federal judge granted his and Artis's petitions for writs of habeas corpus. However, it took until February 1988 for the Passaic County prosecutor's office to decide not to seek a third trial.

The writ was granted on two constitutional grounds: (1) the prosecution's unlawful insertion of race and racial tensions into the trial; and (2) the prosecution's failure to accurately disclose results of a polygraph test administered to one of the eyewitnesses. A bit of background on each issue follows.

A. Making Race an Issue

Earlier on the night of the shooting, another shooting occurred at a different bar in Paterson. At the Waltz Inn, the bar's new African-American owner was shot and killed by the white man who sold it to him, ostensibly over an argument about the purchase payments. Shortly thereafter, African-American neighborhood residents gathered near the Waltz Inn to express their anger over the killing and demand that the killer be brought to justice. A few drove

by Viking. CARTER, supra note 10. Bello and Bradley gave statements recanting their trial testimony. WICE, supra note 1, at 79–82. Carter's new lawyers launched a serious publicity campaign that spurred press coverage, including the New York Times. Id. at 89. After spending a day talking with Carter in prison, singer Bob Dylan wrote and released a song describing his plight. See BOB DYLAN, Hurricane, on DESIRE (Columbia Records 1975). The Hurricane Defense Fund was created with Muhammad Ali as its co-chair. WICE, supra note 1, at 90. Celebrities sponsored a fundraising concert in Madison Square Garden in December 1975. Id. New Jersey Governor Brendan Byrne authorized an investigation into the case. Id. at 92.

60. Carter v. Dietz, 621 F. Supp. at 536. The jury rejected the option of the death penalty and recommended mercy. Id.

61. Id. John Artis' life sentences were all to run concurrently making him eligible for parole in 1981. Id.; WICE, supra note 1, at 148.

62. Carter v. Dietz, 621 F. Supp. at 560. By this time John Artis had already been released on parole. Id. at 536. State court appeals following the second trial took many years and included remands to the trial court for evidentiary hearings on newly discovered evidence. Id. at 536–37. Nevertheless, in the end the New Jersey Supreme Court denied all appellate claims. State v. Carter, 449 A.2d 1280 (N.J. 1982).

63. WICE, supra note 1, at 188. For an account of the state's efforts to have the granting of the writ overturned, see supra note 3.

64. Both pertain to a criminal defendant's right to due process. See U.S. CONST. amend. V.

to the police station to get answers. There was evidence that Rubin Carter had spoken with the son-in-law of the Waltz Inn shooting victim in the hours before the Lafayette incident.

Despite the fact that the prosecution secured a conviction in Carter and Artis' first trial without establishing a motive for the murders, it apparently did not want to take that risk a second time. Thus, during the second trial, the prosecutors urged the jury to find that the white victims killed at the Lafayette were killed by African Americans as "racial" revenge for a white man killing an African American at the Waltz Inn. In his closing argument, the prosecutor told the jurors that "things like race prejudice and anger and hate for people because of the different color of their skin exists in this world. [In 1966] it was a world filled with people who hate."

B. Polygraph Results

Over the course of the nearly ten years between the first and second trials, Al Bello, who testified against Carter and Artis as an eyewitness at the first trial, had changed his story more than once. He had recanted his trial testimony and then recanted the recantation. Needless to say, the government had grounds to distrust Bello and question whether he would make a credible witness. Shortly before the second trial, the prosecutor retained a polygraphist in an effort to get to the truth. After administering a polygraph test to Bello, the examiner told the government attorneys that Bello was being truthful when he said he was inside the Lafayette Bar during the shooting. Of course, Bello had already testified at the first trial that he was outside the bar that night. Confusingly, when the polygraphist submitted a written report of the Bello test he stated, "It is the opinion of the examiner that

66. WICE supra note 1, at 3-4 (stressing that, "as the evening progressed, the neighborhood emotional state evolved toward sadness rather than bitterness").
67. Carter v. Dietz, 621 F. Supp. at 538. Carter knew Eddie Rawls, the son-in-law, because at one time Rawls was a member of Carter’s training crew. See WICE, supra note 1, at 4.
68. Id.
69. Id. at 539-40. At the start of his summation, the prosecutor told the jury that the racial revenge motive was one of six strands of evidence that formed a "rope strong enough to bring the two murderers to justice." WICE supra note 1, at 143.
71. Id. Professor Leonard H. Harrelson was the polygraphist retained by the District Attorney. Id. The exam was performed on August 7, 1976. Id.
72. Id.
73. WICE, supra note 1, at 53.
testimony at the trial was true."  

Whether the examiner realized it or not, this conflicted with his oral report. The oral report was not disclosed to defense counsel before the second trial. This formed the basis for the second due process violation found by the federal habeas corpus court.

III. Access to Federal Relief—Then and Now

Carter and Artis' habeas corpus petitions were heard by United States District Court Judge H. Lee Sarokin. He granted them relief in November 1985. At the time, Judge Sarokin was required by law to review the petitioners' constitutional claims about their state court convictions, de novo. In other words, he was to independently apply federal law to the facts and decide if, in his view, there was a constitutional violation. Many aspects of habeas corpus law changed when the Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law by President Clinton in 1996. One of, if not the most significant change was the elimination of de novo review. Today, federal courts must give a measure of deference to the state court's resolution of federal issues. Fearing the difficulties of retrials, which often occur many years after a crime was committed, states' rights champions in Congress pushed AEDPA through partly due to concerns that federal judges were too eager to

74. WiCE, supra note 1, at 157; See also State v. Carter, 449 A.2d 1280, 1306 (1982) (Clifford J., dissenting).
80. Id. (providing "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). For an explanation of how this provision has been interpreted by the Supreme Court, see infra notes 92-97 and accompanying text.
upset a state court’s judgment.\textsuperscript{81} Ironically, in the Carter case, Judge Sarokin began his decision lamenting the fact that he could not simply defer to the state court. He said, “It is tempting to presume the correctness of those [reviews by state courts] rulings, but this court is charged to resist such temptation lest it fail in its duty to independently analyze the constitutional violations asserted in the petitions for habeas relief.”\textsuperscript{82} Judge Sarokin’s independent review led to Rubin Carter’s freedom. Today, even with the same facts, such a result would likely be prohibited under AEDPA.

First, consider the claim that the prosecution’s insertion of a “racial tension theme” was misconduct serious enough to violate the defendants’ rights to due process of law. In his analysis, Judge Sarokin began by simply noting that the New Jersey Supreme Court rejected the claim.\textsuperscript{83} He then independently analyzed it. Noting that while racially motivated revenge could in theory motivate murder, there must be sufficient evidence that it occurred because of this claim’s potentially inflammatory effect on a jury.\textsuperscript{84} Then Judge Sarokin painstakingly examined the record and highlighted all of the evidence that arguably linked Carter and Artis with a possible racial revenge motive.\textsuperscript{85} He went on to question the prosecutors’ assumptions about racial tension and hostility.\textsuperscript{86} Applying federal legal precedent\textsuperscript{87} to the facts, Judge Sarokin ruled that the due


\textsuperscript{82} Carter v. Dietz, 621 F. Supp. at 534. Consistent with his implication in Carter’s case that federal judges have no true incentive to free state prisoners for no good reason, Judge Sarokin later commented that “the charge that a number of federal judges infiltrated the judiciary and are willy-nilly freeing criminals is reminiscent of the McCarthy-era charges that vast numbers of Communists had invaded the executive branch of our government and were plotting against it. It is a myth created by politicians for political purposes and is ludicrous.” H. Lee Sarokin, Thwarting the Will of the Majority, 20 WHITTIER L. REV. 171, 176 (1998).

\textsuperscript{83} Carter v. Dietz, 621 F. Supp. at 539 (stating “The New Jersey Supreme Court also rejected petitioner’s claims that the interjection of the racial revenge motive, and the state’s summation of that motive, was an unacceptable appeal to racial prejudice, and as such violated their due process rights to a fair trial.”).

\textsuperscript{84} Id. at 540.

\textsuperscript{85} Id. at 541-42.

\textsuperscript{86} Id. at 543-44.

\textsuperscript{87} Then and now, the law regarding when prosecutorial misconduct establishes a due process violation, places a heavy burden on the claimant. See Donnelley vs.
process claim should have been sustained and that the error was not harmless. He wrote, "An appeal to racial prejudice and bias must be deplored in any jury trial and certainly where charges of murder are involved."

Today, under AEDPA and case law interpreting its provisions, both the analysis and result would look very different. Habeas corpus law currently requires a federal court to start its review with deference to the state court's resolution of the federal question. Section 2254(d)(1) of the United States Code prohibits the granting of relief unless the state court's decision was "contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." To establish the point of this Article, it is unnecessary to lay out the evolution of the jurisprudence regarding the meanings and the difference between meanings of the "contrary to" and "the unreasonable application" clauses. Suffice it to say that today Rubin Carter would have to convince a federal court not only that the New Jersey Supreme Court was wrong in its application of federal law—which is what Judge Sarokin found—but that beyond wrong, it was unreasonable in its application of Supreme Court case

DeChristoforo, 416 U.S. 637, 642 (1974) (stating "Not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'"). See generally James Joseph Duane, What Message Are We Sending Criminal Trial Jurors When We Ask Them to "Send a Message" With Their Verdict?, 22 AM. J. CRIM. L. 565, 634–35 (1995) (writing of high standard that must be met to show a due process violation).

89. Id. at 546.
90. Id. at 547. Judge Sarokin dismissed the prosecution's justification for using this theme by saying, "The death of the stepfather of the petitioners' friend, standing alone, would never explain why petitioners would shoot four innocent persons who were strangers to them. Notwithstanding the lack of any evidence that petitioners had a background of racial animosity against whites or had any such feelings after the specific death involved, the prosecutor was permitted to render the illogical logical by relying upon petitioners' blackness and the victims' whiteness." Id. at 546–47.
91. AEDPA's statute of limitations would likely have prevented Carter and Artis from filing a petition in federal court at all, much less prevailed. See generally 28 U.S.C. § 2244(d)(1) (1996) (requiring the filing of habeas corpus petitions within one year of the date upon which the conviction became final and post-conviction challenges in state court have been exhausted). Unless Carter could successfully argue that the statute should have been tolled, his petition filed in 1985 was well outside of the one-year limitations period. See Stephen B. Bright, Does The Bill of Rights Apply Here Any More? Evisceration of Habeas Corpus and Denial of Counsel To Those Under Sentence of Death, 20 NOV. CHAMPION 25, 25 (1996). See also Anthony Lewis, Why The Courts, 22 CARDOZO L. REV. 133, 146 (2000).
93. See Williams v. Taylor, 529 U.S. 362, 405–09 (2000); Ritter, supra note 81, at 60–70.
law. Breaking it down, the review would go as follows:

(1) What did the New Jersey Supreme Court decide and what was its rationale?

(2) Even if I (federal district court judge) disagree with the state’s legal conclusion, I must decide if that holding was unreasonable.

(3) A state court’s ruling is only unreasonable if no fair-minded jurist could agree with it.

(4) In assessing the unreasonableness of the state court’s application of law, I may only utilize clearly established United States Supreme Court (as opposed to all federal courts) precedent as it existed at the time of the state court’s consideration of the case.

(5) Was the constitutional error harmless?

There is little or no chance that Carter and Artis could win relief under current standards. The New Jersey Supreme Court denied their constitutional claims by a vote of 4-3. This means that a favorable decision by a federal court would imply that the four New Jersey Supreme Court Justices that rejected the claims were not fair-minded jurists.

The same would be true for the Brady due process claim. Ever since Brady v. Maryland was decided in 1963, prosecutors must disclose exculpatory material evidence within the state’s control. The polygraphist’s oral report that Al Bello’s statement to him that...
he was inside the Lafayette Bar during the shootings was true qualifies as Brady material because it bears on Bello's credibility as a witness. Prior to their second trial, the defendants had specifically requested all information relating to the polygraph testing, but the oral report had not been disclosed. Despite this, a majority of the New Jersey Supreme Court found no Brady violation based on its opinion that while exculpatory, the report was not material in that defendants failed to show that its disclosure might have affected the outcome of the trial. Judge Sarokin disagreed with the state court's materiality analysis. Finding that "materiality" was a mixed question of law and fact, Judge Sarokin reviewed the question de novo. His opinion that the state court got it wrong was a sufficient basis upon which to grant habeas relief. That would not be the case today. Unless Judge Sarokin went so far as to find that it was not a question upon which fair-minded jurists could disagree, the Brady error he found would bring no remedy. As was the case for the racial revenge claim, the state court split 4-3 on the Brady issue. Again, relief could not be granted absent an implication that the four justices in the majority with whom Judge Sarokin disagreed were not fair-minded jurists.

The probable result for the Brady question under current law is especially alarming. By the time the issue was heard in federal court, the United States Supreme Court's definition of "material" for Brady purposes had been refined. In fact, the newer standard made it somewhat more difficult for a defendant to establish that the withheld evidence was material. Judge Sarokin applied the new, tougher standard but found the evidence to be sufficiently material

104. State v. Carter, 449 A.2d at 1297. At that time, the United States Supreme Court's standard for materiality under Brady, when the defense has made a specific request for non-disclosed evidence was that "material" meant the evidence might have affected the outcome. See Agurs, 427 U.S. 97 (1976).
106. Id. at 551.
107. It was unnecessary for Judge Sarokin to undertake a harmless error analysis. The materiality standard in effect when Judge Sarokin decided the Carter case meant that if the withheld evidence was material, its non-disclosure could not, by definition, be harmless. See infra note 109 and accompanying text.
108. See supra note 87 and accompanying text.
109. Shortly before Judge Sarokin ruled in Carter, the United States Supreme Court refined the Brady materiality standard. In United States v. Bagley, the Court decided that regardless of the nature of the request for exculpatory evidence (whether specific, general or no request), non-disclosed evidence would be considered material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985).
to warrant relief nevertheless.110 Thus, if Rubin Carter’s habeas petition were decided today, he would likely be denied relief even though a federal court judge agreed his rights were violated using a standard even more stringent than the one used by the state court. In other words, Carter might overcome the high standard set to prove a due process violation which in theory signifies a serious deprivation, yet still remain imprisoned if a single fair-minded jurist could agree with the state court’s conclusion.111

Another significant change brought by AEDPA raises an additional reason that Rubin Carter would likely have lost in court, had that been the governing law. Under AEDPA, a federal habeas court may only look to United States Supreme Court precedent when adjudging the correctness and reasonableness of a state court’s decision.112 For both of the due process claims—improper appeal to racial prejudice and withholding of exculpatory evidence—Judge Sarokin applied case law from several United States Circuit Courts of Appeals in addition to the Supreme Court.113 He would not be permitted to do that today.

IV. Why the Comparison is Significant

Rubin Carter won his freedom in federal court, but not because the court found he was innocent.114 Some, therefore, may not be disturbed by the fact that he would likely not get relief under current
law. After all, prior to his litigating in federal court, Carter's due process claims were heard and rejected by state trial and appellate courts. Many argue that our system does not need to provide multiple avenues to reargue claims of criminal procedure error at the expense of the perceived benefits of finality. This perspective misses an important point. When errors of criminal procedure invalidate a conviction, it means that the trial was unfair. This is not a mere technicality. A verdict following an unfair trial is an unreliable one. The trial is where facts are found and witnesses' credibilities are evaluated, ostensibly causing the truth to come out. When rules of criminal procedure are violated, such as those barring unfair prejudice or guaranteeing the right to counsel and due process of law, the jury's decision and/or the public's impression about guilt cannot be presumed correct.

Rubin Carter's victory in federal court provides a concrete example. According to the court, his due process rights were violated in two ways. Once, the prosecutor improperly urged the jury to find that the black defendants committed three murders in order to seek revenge against white people in general. This made the trial unfair as a matter of law because an appeal to racial prejudice and fears can cause jurors to be distracted to the extent that they cannot be impartial. If they cannot impartially judge facts, the criminal procedure violation is much more than a technical error. On the contrary, the error casts serious doubt on the correctness of the jury's verdict. Secondly, the federal court found that the prosecution unconstitutionally withheld exculpatory evidence: the oral polygraph results. Again, this bears on the reliability of the jury's fact-finding ability. Purported eyewitness Al Bello's credibility was a key issue in the Carter-Artis trial. Bello told the jury that he was outside the Lafayette Bar on the night of the murders. The prosecution's violation meant that the defense counsel was deprived of ammunition with which to attack this testimony. If not for the Brady violation, the jury could have learned that Bello's trial testimony was suspect. As with the racial motive due process violation, this error interfered with the jury's access to fact-finding related evidence. Thus,


the criminal procedure violation casts doubt on the correctness of the guilty verdicts.

The same concerns regarding verdict accuracy arise with regard to any number of constitution-based criminal procedure violations. It may be obvious that when false evidence is introduced or exculpatory evidence suppressed, a jury has been misinformed and thus its verdict is untrustworthy. However, there are less direct ways in which trial procedure can taint the results. For example, improprieties during jury selection impact the correctness of a verdict. The law prohibits racial, ethnic and gender discrimination in the use of peremptory challenges. When this rule is violated, the composition of the jury may be unfairly balanced for or against a particular population group. This in turn creates a risk that prejudice may influence fact-finding, which creates a risk of the jury reaching an unreliable verdict. Thus, when current federal habeas corpus law cuts off a state prisoner’s access to federal court, this is far more significant than it might seem. Beyond cutting off the ability for a constitutional issue to be correctly resolved, it can and does create a risk of punishing or even executing the innocent. If Rubin Carter was innocent, which is widely believed to be the case, and current law would have barred an independent review by the federal courts, rather than being freed after nineteen years he would have died in prison in his seventies. This is deeply troubling.

The seismic changes to federal habeas corpus law brought by

118. The only exception is for situations in which the improperly admitted or excluded evidence is deemed harmless in light of all of the evidence at trial.


120. For the results of an empirical study documenting the high percentage of federal habeas corpus petitions in which the federal court found reversible constitutional error, see generally James S. Liebman, Jeffrey Fagan, and Valerie West, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (Columbia University School of Law 2000).

121. See Bright, supra note 91.

122. While in the early years of AEDPA, it did not appear that it would have the impact that many feared, after a time the decreased availability of habeas corpus relief was noticeable. See Justin F. Marceau, Challenging the Habeas Process Rather Than The Result, 69 WASH. & LEE L. REV. 85, 87-105 (2012) (presenting data that subsequent to a study completed in 2006, AEDPA’s “bite” has gotten much worse and referring to the earlier post-AEDPA years as “a sort of AEDPA grace period”); Lynn Adelman, The Great Writ Diminished, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6 (2009) (noting that “the grant rate is now so low that it can no longer be reasonably asserted that habeas corpus functions as ‘the greatest of the safeguards of personal liberty embodied in the common law’”). Much of the change can be attributed to the Supreme Court’s interpretations of ambiguous statutory language regarding the standard of review. See Ritter, supra note 81, at 56-57, 65-70.
AEDPA are not widely known, much less, understood, by the public. AEDPA contained significant amendments to the Judiciary Act of 1867, which extended the remedy of a federal writ of habeas corpus to inmates convicted in state courts. The Supreme Court has recognized that in passing the Judiciary Act of 1867, Congress designated the federal courts as insurers of the constitutional rights of state court detainees. AEDPA’s curtailment of habeas corpus passed through Congress in the wake of the 1995 bombing of the Alfred P. Murrah federal building in Oklahoma City. It is not uncommon for legislators to recognize politically opportune moments for pushing through what would at other times be highly controversial changes to the law. Members of Congress who might otherwise vigorously oppose these measures would understandably be less likely to do so while the country was contemplating the swiftness and effectiveness of punishment for those responsible for the Oklahoma City terrorist bombing. Now,

123. Lewis, supra note 91, at 149 (noting that “when Congress crippled federal habeas corpus, there were few meaningful reports in the press, much less on television”). Rubin Carter himself expressed astonishment at the lack of pushback to AEDPA. When speaking at a symposium nearly fifteen years after his release, in referring to AEDPA he lamented, “Why don’t we realize that by taking away our access to habeas corpus we are being robbed of something as real as money and far more valuable? Why aren’t the burglar alarms sounding?” See Symposium, Gideon — A Generation Later, 58 MD. L. REV. 1333, 1390 (1999).


125. Reed v. Ross, 468 U.S. 1, 10 (1984) (citing Mitchum v. Foster, 407 U.S. 225, 242 (1972)) (stating that “there can be no doubt that in enacting § 2254, [extending federal habeas corpus to state court prisoners] Congress sought to ‘interpose the federal courts between the States and the people, as guardians of the people’s federal rights - to protect the people from unconstitutional action’”). The reasons this safeguard was deemed necessary fit loosely into two categories: (1) the federal judiciary has superior knowledge of and experience with federal constitutional law; and (2) state court jurists may be more susceptible to political influences and/or prejudice.


128. See 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Gekas) (remarking, “It took us a generation to convince the people on the left that we ought to have a workable, reassuringly, predictable death penalty that would inexorably exact the punishment that was intended”).

129. See generally 141 CONG. REC. S7821 (daily ed. June 7, 1996) (statements of Sen. Nickles) (mentioning that one of his constituents whose husband was killed in the Oklahoma City bombing told him that her pain would “be much greater if the perpetrators were allowed to sit on death row for many years”); 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statements of Rep. Gekas) (stressing that the bill is necessary to ensure that death sentences handed down by juries in cases like the Oklahoma City bombing case will not be set aside or delayed by frivolous appeals). Notwithstanding
almost twenty years after AEDPA was enacted, it is difficult to imagine anyone persuasively arguing that the habeas corpus restrictions have made us safer from violent acts, much less from acts of terrorism. They have, however, made us much less safe from the danger of wrongful convictions.

It is time to engage in a new dialogue concerning the injustice of curtailing federal habeas corpus. I can think of no better legacy for Rubin "Hurricane" Carter than his ordeal and his work on behalf of others spurring the restoration of access to meaningful federal review. Moreover, the need for the reform or repeal of AEDPA's section 2254 provisions is urgent. Last year, this author wrote that the latest Supreme Court interpretations of 2254(d)(1) have nearly "obliterated the Great Writ in the arena of federal review of state court convictions." It is not simply that it is more difficult to win relief in federal court, but rather, it is nearly impossible. Now is the time to "sound the... alarm," as Rubin Carter urged. Carter fought for change from his deathbed. He feared that people would "forget that laws critically affect human lives." Perhaps upon his death, the "story of the Hurricane" will be a call to revitalize federal oversight of the rights of all criminal defendants.

political pressures, there were members of Congress who did voice opposition to AEDPA's habeas provisions. See e.g. 142 CONG. REC. H3601 (statement of Rep. Kennedy) (stating, "Habeas corpus has nothing to do with an antiterrorism bill"). See also remarks of Congressman Watt of North Carolina that, "we cannot sacrifice our constitutional principles because we are angry at people for bombing"; 142 CONG. REC. H3602 (statement of Rep. Watt); 141 Cong. Rec. S7808-09 (daily ed. June 7, 1995) (statement of Sen. Kennedy) (complaining that AEDPA, "goes far beyond terrorism and far beyond Federal prisoners. It is wrong to try to sneak [limits on access to habeas writs by state prisoners] into an antiterrorism bill that we all want to pass as quickly as possible").

130. See Ritter, supra note 81, at 56.
131. Id. at 77–80.
132. See supra, note 123 and accompanying text.
133. See supra, note 6 and accompanying text.
135. See Dylan, supra note 10.