IN THE
SUPREME COURT OF THE UNITED STATES

No. 18-8276

DEREK SAMPLE

Petitioner,

VS.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUBMITTED BY:

Derek Sample #506647/714575B
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

QUESTIONS PRESENTED

1.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that the State Court Violated the United States Supreme Court Ruling in Duncan v. Louisiana, Lewis v. United States and Illinois v. Allen in Failing to Protect Petitioner's Right to be Present at All Critical Phases of His Trial.

2.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that the State Court Violated His Constitutional Rights to a Fair Trial by an Impartial Jury by the Admission of Inflammatory and Unduly Prejudicial Evidence.

3.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that the Trial's Judge Failure to Instruct the Jury on Reckless Manslaughter as a Lesser-Included Offense of Murder, and Failure to Instruct the Jury on Theft as a Lesser-Included Offense to Robbery was Plain Error.

4.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that the Trial Counsel's Failure to Object to Evidence of Prior Wrongs Violated His Right to Effective Assistance of Counsel.

TABLE OF CONTENTS

LIST OF PARTIES

The Petitioner is Mr. Derek Sample, acting pro se, and is a prisoner presently confined at New Jersey State Prison in Trenton, New Jersey.

The respondents are Stephen D'Ilio former Administrator of New Jersey State Prison, and the Burlington County Prosecutor's Office.

TABLE OF AUTHORITIES

Cases **Page No**

TABLE OF AUTHORITIES

Page No

Cases con't

Statutes

OPINIONS BELOW

The United States District Court for the District of New Jersey denied petitioner's petition for a writ of habeas corpus in an opinion on June 14, 2018. **(See Appendix - Ex-1)**

The United States Court Of Appeals for the Third Circuit filed an order on November 14, 2018, denying petitioner's petition for a Certificate of Appealability. **(See Appendix - Ex-27)**

The United States Court Of Appeals for the Third Circuit filed an order on December 14, 2018, denying petitioner's petition for a rehearing En Banc. **(See Appendix - Ex-28)**

STATEMENT OF JURISDICTION

The United States District Court For the District Of New Jersey denied petitioner's petition for writ of habeas corpus on June 14, 2018, and on the United States Court of Appeals for the Third Circuit filed an order on November 14, 2018, denying petitioner's petition for a Certificate of Appealability and a petition for a rehearing En Banc were denied on December 14, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decisions on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **VI Amendment** which states, "that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The **XIV Amendment** which states, "that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Miranda Hearing

At a Miranda hearing before trial, the Court heard testimony from Sergeant Frederick D'Ascentis of the Burlington County Prosecutor's Office, Major Crimes Unit, who had taken an oral statement and an audio tape-recorded statement from Petitioner following his arrest on the morning of October 26, 2001. D'Ascentis testified that he brought Petitioner from the holding cell, where he had been asleep, to the interview room, and advised him of his Miranda rights. D'Ascentis informed Petitioner that Picket Durham was in the hospital and that in a 911 call Durham had named Petitioner as the assailant that had stabbed him in the back. D'Ascentis asked the Petitioner if he had any response, and the Petitioner gave an oral account of what had happened in the apartment the previous evening.

Petitioner stated he had gotten home from work early, and had two or three beers and five or six shots of liquor at his brother's house before goingback to the apartment that he shared with Durham.Once home, Petitioner decided he wanted to buy some crack and went out and bought $80 worth. After using the drug, he decided he wanted to buy more and was able to obtain a ride back to his apartment from his friend, Mike. When Petitioner entered the apartment, he thought Durham would be asleep, but he was not. Petitioner and Durham argued. Petitioner went to the kitchen, picked up a knife, and returned to the bedroom where he stabbed Durham in the left side. Petitioner took Durham's pants, looking for his wallet, and went back outside to the car. Once outside,

Petitioner threw away the knife, told the guys in the car to leave, and walked around to the back of the building where he threw the wallet down as well.

After taking this oral statement, D'Ascentis told Petitioner he wanted to make a recorded statement and Petitioner agreed to do so. Petitioner repeated his account of the evening, which was recorded by D'Ascentis. Although Petitioner told D'Ascentis during the interview that he had been drinking and smoking crack, Petitioner did not appear incoherent to D'Ascentis, who stated that Petitioner "was able to articulate the entire time that I was with him. He was very cooperative."

After hearing D'Ascentis's testimony, the trial court found that Petitioner had been advised of his Miranda rights, that he waived them, and that the statements he gave would be admissible at trial. Another statement which Petitioner later gave to Detective Anthony DiLoroeto of the Lumberton Police Department on November 5, 2001, was also found to be admissible.

The Trial

A summary of the relevant facts was presented through testimony at trial as set forth below:

Petitioner killed Pickett Durham, who was fifty-seven years old and medically fragile. Durham suffered from heart disease, diabetes, successfully treated prostate cancer, and a transplanted kidney. Just prior to Durham's death, Petitioner was living in an apartment with him and his niece, who was Petitioner's girlfriend. On October 25, 2001, Petitioner had been out drinking and smoking crack cocaine. He returned to the

apartment hoping to steal Durham's money to purchase more crack. A verbal altercation ensued, and Petitioner stabbed Durham in the back with a ten-inch kitchen knife. Petitioner then stole Durham's jeans, because he believed that Durham's wallet, containing the money he was looking for, was in them.

Durham called 911 and told the dispatcher that Petitioner had stabbed him. Paramedics and police officers from Mount Holly and Lumberton responded. After Durham was stabilized, paramedics transported him to Cooper Hospital Trama Center. As one of the Officers was leaving the scene, he noticed Petitioner in the back of the building attempting to hide. Petitioner was arrested and brought to headquarters.

Later, a sergeant and detective awoke Petitioner and brought him from his cell to the interview room in order to talk with him. As the sergeant escorted Petitioner, he noticed that Petitioner was able to walk without assistance and that his eyes were not bloodshot or glassy. He did not appear to be drunk or under the influence of any substance. The officers provided Petitioner with a blanket and coffee.

The sergeant advised Petitioner of his constitutional rights and Petitioner signed the Miranda card waiving those rights. Petitioner articulately answered all questions and admitted stabbing Durham in the back. Petitioner also disclosed the location of the wallet, knife, and jeans. Petitioner then agreed to have his statement audio taped. At no time during the interview did Petitioner request the assistance of counsel or request that the interview be discontinued.

Meanwhile, a doctor in the hospital performed surgery on Durham to stop the bleeding, repair the holes in his colon and diaphragm, re-expand his lung, and wash his abdomen in an attempt to remove fecal material from the area. The next day, Durham experienced breathing problems which required that he be placed on a respirator. That evening, Durham suffered a heart attack. The doctors suspected that Durham had a blood clot on his lung. The hospital moved him to Intensive Care where he began to suffer from peritonitis, which was caused by the "spillage" of fecal matter from his colon into the abdominal cavity. Durham's condition deteriorated and several days later, pursuant to his wishes, the hospital removed him from life-support. He died within forty minutes.

With respect to the sequence of events, it should be noted that, as stated by the Court, "[a] verbal altercation ensued, and Petitioner stabbed Durham in the back with a ten-inch kitchen knife. Petitioner then stole Durham's jeans.." In other words, the theft of the wallet and pants followed the argument and stabbing. The evidence did not necessarily reflect that Petitioner used the knife in the course of robbing Durham of his property.

Lieutenant Nagle of the Lumberton Police Department testified at trial that he was the shift commander on the night of October 26, 2001, when he responded to the reported stabbing at the Lumberton Independent Living Campus. Upon arriving at the scene, he was updated by the other officers who were already there, and then entered the apartment and spoke with the victim.

Nagle said that Durham was seated in a chair, covered in blood and in obvious pain. According to Nagle, he asked Durham what happened and Durham "struggled as he spoke to me and he had been robbed." Nagle did not question Durham further in view of his injury. Defense counsel did not object to Nagle's statement "he had been robbed" as based on hearsay.

During the trial testimony of Delores Durham, the victim's sister-in-law, the court allowed the prosecutor over defense counsel's objection to elicit hearsay testimony in which Ms. Durham imitated Picket Durham's gasping voice as he spoke his last words to her on his hospital bed:

Redirect by Prosecutor:

> **Q.** One thing you did indicate, there was a time when Russell was there in his bed and he was gasping and - talking to you.
>
> **A.** Yes.
>
> **Q.** What did he say to you?
>
> **[Defense Counsel]:** Objection. Your Honor, with regard to the scope of redirect. This is with regard -
>
> **The Court:** Mr. Gerrow?
>
> **[The Prosecutor]:** Judge, she brought it up. I have, I believe, the right to inquire as to what he said to her.
>
> **The Court:** I - I agree with you. She - that was in response to a direct question on cross-examination. Objection is overruled.
>
> **Q.** What did he say to you?
>
> **A.** He - I went in and I said, Russell? And he looked around and - very distant, and he said, Dee Dee? And I said, Russell, I'm here. It's okay. And I took his hand and I said who

> - what Happened? And he said (imitating gasping voice) he - he - he stabbed me, as he said (imitating gasping voice) D - D - Derek. And I said Derek Sample? And he said, (imitating gasping voice) yes - yes - yeah. And he was - I said, Russell, it's okay. Stop, because I want you to just - relax. Just relax. I said, Russell, you concentrate on getting better. And I was rubbing his hand and the nurse was there and I was trying to relax him and I said, I'll handle this. He said (imitating gasping voice) o - o - okay. And that's the last he spoke to me.

Although defense counsel objected to this testimony, the trial court overruled her objection on the grounds that during cross-examination defense counsel had first asked a question about what the victim said to the witness. The issue was not raised by appellate counsel on appeal, and was therefore not addressed in the Appellate Division's opinion.

In other significant testimony, Michael Covington, the acquaintance who drove Petitioner back to his apartment where the stabbing occurred, testified that he was asked by a friend, Mike Gaston, to give Petitioner a ride to his apartment and that he asked for a few dollars for gas money. He drove Petitioner to the apartment and expected him to come back out with a few dollars for taking him there, and when Petitioner returned to the car, he was searching through the wallet, Petitioner "was frustrated or annoyed, that there was no money in the wallet." On cross-examination, the court precluded defense counsel from inquiring of Covington as to Petitioner's apparent emotional state, on the grounds that it called for speculation. Nevertheless, in his closing statement, the prosecutor pointed to Covington's

speculative testimony to show that Petitioner was angry because he did not find any money in the wallet.

The prosecution also introduced evidence of prior wrongs committed by Petitioner through the testimony of Sergeant D'Ascentis and the tape-recorded statement of Petitioner. In the statement, Petitioner related that there had been a prior occasion, about two months before the stabbing, when he had taken money from Durham to use for drugs and had paid Durham back:

> **Q.** Had you taken money before?
>
> **A.** We had an incident I guess maybe two months ago. And I that was my first real downfall messin with crack again and I had taken three hundred and something dollars, one night. And you know the next day we talked about it. And I paid him back the money, you know, I apologized to him. But at times he gave me a rough way to go about it. I don't know, I guess I had a little bit of animosity towards that. Because I felt that rather then treat someone like that he could've just, he could've told me that I couldn't stay there. You know, and not just want to take his frustration out sometimes on me. But yeah I had taken money from him before.
>
> **Q.** And the money that you took before was it because of your addiction?
>
> **A.** Yes.

Although the court had ruled the statement admissible in that there had been no violation of Petitioner's Miranda rights in taking it, defense counsel did not seek redaction of those parts of the statement which related to prior wrongs or other crimes of Petitioner.

In addition to this testimony with respect to prior drug use and prior incident in which Petitioner had taken money from Durham, there was also testimony that indicated Petitioner had prior involvement with the police. Sergeant Thomas Mastrangelo testified that when he was on patrol and received a dispatch concerning a stabbing in Lumberton, he responded to provide assistance. While he was driving around the apartment building, he saw a person standing in the shadows close to the back of the building. When he exited his vehicle and approached with his flashlight, he realized that he recognized the individual, but was not sure who he was. Petitioner looked at Mastrangelo and said, "Strang, you know me, it's Derek, Derek Sample." Recognizing Petitioner's name as the suspect identified in the dispatch, Mastrangelo drew his gun, ordered Petitioner to the ground, and placed him under arrest. This testimony by Mastrangelo reflected that Petitioner had occasion to know the officer by his "street" name.

At the conclusion of the testimony at trial, the court held a charge conference. However, due to an apparent mix-up in setting up transportation for Petition, who was in the State's custody, Petitioner was not produced. Defense counsel waived Petitioner's appearance. Accordingly, the court conducted the charge conference without Petitioner present.

In charging the jury, the court provided an instruction on first and second degree robbery, but did not provide an instruction on theft as a lesser included offense of robbery, despite evidence from which the jury could have conducted that

the stabbing and the theft of the wallet and pants were separate events. The court gave an instruction on first degree aggravated manslaughter, but did not give an instruction on second degree reckless manslaughter. Among other charges, the jury found Petitioner guilty of first degree armed robbery.

In support of his arguments with respect to sentencing, defense counsel presented the court with the expert report of Dr. Robert L. Sadoff, M.D., a psychiatrist who had examined Petitioner before trial. In his report, Dr. Sadoff concluded that although Petitioner was not legally insane at the timezs of the offense, he "lacked substantial capacity to control his behavior because of the intoxication with cocaine and alcohol." Despite having offered this opinion prior to trial, Dr. Sadoff was not called by defense counsel to testify at trial in support of a diminished capacity defense.

The jury, however, found petitioner guilty of all charged offenses. Thereafter on December 3, 2004, petitioner was sentenced to an aggregate sentence of 45 years with an 85% parole disqualifier pursuant to the No Early Release Act.

On July 15, 2015, Petitioner filed a petition for a writ of habeas corpus. The petition raised seven grounds: **GROUND ONE:** PETITIONER'S TRIAL WAS WRONGFULLY TAINTED BY THE ADMISSION OF INFLAMMATORY AND UNDULY PREJUDICIAL EVIDENCE, IN VIOLATION OF HIS RIGHTS TO A FAIR TRIAL A GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, **(a)** Error in Admission of Hearsay Statements and Manner in Which it was Presented, **(b)** Error in Admission of Hearsay Through

Lieutenant Alfred Nagle, **(c)** Error In Admission of Other-Crimes Evidence, **(1)** Alleged Prior Theft from Russell Durham, **(2)** Prior Drug Use, **(d)** Error in Admission of Hearsay and Conclusion by Michael Covington; **GROUND TWO:** THE TRIAL JUDGE'S FAILURE TO INSTRUCT THE JURY ON RECKLESS MANSLAUGHTER AS A LESSER-INCLUDED OFFENSE OF MURDER, AND FAILURE TO INSTRUCT THE JURY ON THEFT AS A LESSER-INCLUDED OFFENSES TO ROBBERY WAS PLAIN ERROR, **(a)** The Trial Judge's Failure to Instruct the Jury on Reckless Manslaughter as a Lesser Included Offense of Murder was Reversible Plain Error in Light of the Clear Mandate from the New Jersey Supreme Court in State v. Jenkins, 178 N.J. 347 (2004), **(b)** The Trial Judge's Failure to Instruct the Jury on Theft as a Lesser Included Offense of Robbery was Plain Error; **GROUND THREE:** PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS RESULT OF HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF PRIOR WRONGS THAT WAS INCLUDED IN PETITIONER'S STATEMENT TO THE POLICE; **GROUND FOUR:** PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS RESULT OF HIS DEFENSE COUNSEL'S FAILURE TO PROTECT PETITIONER'S RIGHT TO BE PRESENT AT ALL CRITICAL PHASES OF HIS TRIAL; **GROUND FIVE:** PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AS RESULT OF HIS TRIAL COUNSEL'S FAILURE TO PURSUE A DEFENSE OF DIMINISHED CAPACITY AS SUPPORTED BY THE EXPERT REPORT OF DR. SADOFF; **GROUND SIX:** PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS VIOLATED; **GROUND SEVEN:** THE CUMULATION OF ERRORS DEPRIVED PETITIONER OF DUE PROCESS.

The district court denied the petition for a writ of habeas corpus. Sample v. D'Ilio, No. 15-05487 (RBK), slip opinion (June 14, 2018). Petitioner filed a timely notice of appeal and a petition for a certificate of appealability (COA). On November 14, 2018, the Third Circuit denied the petition for a COA. On December 14, 2018, the Third Circuit denied a petition for rehearing and rehearing en banc.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Point I

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Trial Counsel was Ineffective, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

In order to obtain a certificate of appealability (COA), a petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The well-known standard of Strickland v. Washington governs this claim. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, petitioner must show that trial counsel's performance was deficient and the deficient performance prejudiced the defense.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; (2) the defect in performance prejudiced petitioner's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068. See also, State v. Loftin, 191 N.J. 172, 198 (2007); accord State v. Allegro, 193 N.J. 352, 366-67 (2008); State v. Castagna, 187 N.J. 293, 314-15 (2006).

The benchmark for judging ineffective assistance of counsel claims is whether counsel's conduct changed the outcome of the trial. Strickland, supra; United States v. Cronic, 466 U.S. 648 (1984); Fritz, supra, adopting the Strickland and Cronic standard.

The Petitioner contended that counsel was ineffective for failing to challenge the admissibility of the statement under the proper legal standards and principles of law by failing to object or having the statement redacted as it presented other-crimes from the Petitioner through the testimony of Sgt. D'Ascentis and Sgt. Mastrangelo.

In Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct 2574, 91 L.Ed.2d 305 (1986), the Court reviewed defendant's Sixth Amendment claim of ineffective assistance of counsel by failing to assert a Constitutional Amendment claim. Referring to its opinion in Strickland v. Washington, the Court noted that:

> In order to prevail the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 688, 80 L.Ed.2d 674, 104 S.Ct 2052, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id., at 694, 80 L.Ed.2d 674, 104 S.Ct 2052. Where defense counsel's failure to litigate a Fourth Amendment claim is

> meritorious and that the 'verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. [Emphasis supplied.]

In the Petitioner's case the information presented had no relevance to any issue in the trial and any reasonably competent counsel would have moved to suppress the statement or have any incriminating parts unrelated to the trial redacted as being prejudicial and a violation of the Petitioner's due process.

Such a Motion to Suppress based on the above grounds, which was clearly revealed on the record "would have been successful and there is no conceivable strategy that would justify failing to file a Motion to suppress. Thus, the first prong of the Strickland test is satisfied. State v. Allah, 334 N.J. Super 516, 528-529 (App. Div. 2000).

The U.S. Constitution, and counsel's failure to move for suppression based on those claims resulted in a deficient performance. Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) Prejudice is a foregoing conclusion.

The second prong requires proof that the attorney's failure deprived defendant of a fair trial in the sense that the result was unreliable. In Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305, 319 (1986), the Court held that a conviction would be considered unreliable under Strickland if there was an unjustifiable failure to litigate a meritorious Amendment claim and "there is a reasonable probability that the verdict would have been different absent the excludable evidence. . . ." The Supreme Court of New Jersey reached the same

conclusion in State v. Fisher, supra, [State v. Allah, 334 N.J. Super 516, 528-529 (App. Div. 2000) and as such, a reasonable jurists could disagree with the district court's decision on this issue and as such a petition for a writ of certiorari should be granted in the interest of justice.

The district court offered no analysis to support its ultimate conclusion that petitioner had failed to demonstrate that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. The district court simply noted there was substantial evidence of Petitioner's guilt. Sample v. D'Ilio, supra, at 12. But the district court failed to offer any analysis of its own on the merits of petitioner's claim and failed to offer its reasons for concluding that the state court had rejected petitioner's claim on the merits.

Point II

Reasonable Jurists Could Disagree with the District Court's Ruling that the Petitioner Right to Effective Assistance of Counsel was Violated as Result of His Trial Counsel's Failure to Protect His Right to be Present at All Critical Phases of Trial.

The Sixth Amendment guarantees an accused the assistance of counsel not just at trial, but whenever it is necessary to assure a meaningful defense. United States v. Wade, 388 U.S. 218, 225, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149 (1967). As the Supreme Court has stated:

> A person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him," Powell v. Alabama, 287 U.S. 45, 69 [53 S.Ct. 55, 64, 77 L.Ed. 158] (1932), and . . . that constitutional principle is not limited to the presence of counsel at trial. "It is central to the principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, supra, at 226, 87 S.Ct. at 1932.

Coleman v. Alabama, 399 U.S. 1, 7, 90 S.Ct 1999, 2002, 26 L.Ed.2d 387 (1970). Thus, recognizing that "the period from arraignment to trial [is] perhaps the most critical period of the proceedings," Wade, 388 U.S. at 225, 87 S.Ct at 1931, involving "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused fate and reduce the trial itself to a mere formality," Id. at 224, 87 S.Ct at 1931, the Court has held that the Sixth Amendment right to counsel applies to all such

"critical" stages. Coleman, 399 U.S. at 7, 90 S.Ct at 2002; Wade, 388 U.S. at 224, 87 S.Ct at 1930.

A critical stage is one where potential substantial prejudice to defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice. Coleman, 399 U.S. at 9, 90 S.Ct. at 2003. Such confrontations include, for example, the indictment, arraignment, and [suppression hearing], Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972).

The Petitioner in the case at bar, was denied his Sixth Amendment right to effective assistance of counsel at a critical stage of the proceedings, when trial counsel improperly waived the Petitioner's presence at the charge conference. As explained in Rule 2:10-2 (1948) (current version at R. 3:16 states:

> The defendant shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule. Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a knowing, voluntary, and unjustified absence after (1) the defendant has received actual notice in court or has signed a written acknowledgment of the trial date, or (2) trial has commenced in defendant's presence. Ibid.

In the case at bar, the State rested its case and defense counsel moved to dismiss the "charges" pursuant to R. 3:18-1. Following the denial of the motion to dismiss, the trial judge informed, both the State and defense, that he wanted counsel to

submit all requests for "any of the non-substantive offense charges that are requested." The judge further instructed counsel: "I'll need those tomorrow morning."

Prior to receiving testimony for the defense, the trial judge placed on the record that: "counsel and the Court have met this morning first to go over possible jury instructions. And we will probably be doing the charge conference tomorrow afternoon on the record."

On September 24, 2004, the trial judge did, in fact, hold a charge conference. However, the Petitioner still in the custody of the State for his inability to post bail, was not produced in court for this scheduled event. Apparently there was some mix up between transportation and scheduling. Then, for unexplained reasons, defense counsel waived Petitioner's appearance.

There is no indication in the record of any finding by the trial judge of good cause for Petitioner's absence, nor a valid waiver by the Petitioner. Instead, immediately before closing arguments, presented on September 28, 2004, the court had defense counsel restate her waiver of Petitioner's rights.

> **THE COURT:** Okay. There is one matter that, Ms. Pacheco, you need to take care of, and then we'll go through the -- anything further on the charges.
>
> **MS. PACHECO:** Thank you, Your Honor. As the Court will recall, we had a charge conference on the record last Friday, and for whatever reason, my client wasn't able to be in attendance. I waived my client's appearance for the purpose of that charge conference. (11T 3 to 19).

There is no question, Petitioner was not produced for this scheduled event and critical stage of the trial. Petitioner did not waive his right to be present and, neither defense counsel nor the trial judge had the right to abrogate Petitioner's right to be present, simply because the State failed to produce Petitioner on time.

The prejudice to Petitioner was twofold: **First**, Petitioner was denied the opportunity to request, or secure, instructions on the lesser-included offenses were given to the jury; and **Second**, Petitioner was denied the right to have the trial judge state his findings and reasons on the record, for not giving lesser-included offense instructions for meaningful appellate review.

Petitioner's failure to raise his objection is attributed to the fact that defense counsel assured him that "the judge was charging lesser-included offenses."

Also in State v. Whaley, 168 N.J. 94, 99-100 (2001) the New Jersey Supreme Court held:

> "The United States and New Jersey Constitutions guarantee criminal defendants the right to confront witnesses against them. U.S. Const. Amend. VI; N.J. Const. Art. I, ¶10. An essential of the guarantee is the right of the accused to be present in the courtroom at every stage of the trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct 1057, 1058, 2 L.Ed.2d 353, 356 (1970) (citing Lewis v. United States, 146 U.S. 370, 13 S.Ct 136, 36 L.Ed 1011 (1892); State v. Hudson, 119 N.J. 165, 171, 574 A.2d 434 (1990); State v. Smith, 29 N.J. 561, 578, 150 A.2d 769, cert. denied, 361 U.S. 861, 8 S.Ct 120, 4 L.Ed.2d 103 (1959). A criminal defendant's right to be present at trial also is a condition of the Due Process Clause of the Fourteenth Amendment to the extent that a defendant's absence would hinder a fair and

> just hearing. Hudson, supra, 119 N.J. at 171, 574 A.2d 434 (citing Snyder v. Massachusetts, 291 U.S. 97, 107-08, 54 S.Ct 330, 333, 78 L.Ed 674, 679 (1934), overruled on other grounds, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct 1444, 20 L.Ed.2d 491 (1968).

Therefore, the State Court's and the District Court's rulings was contrary to Supreme Court rulings and the Petitioner's constitutional right to be present at every stage, which denied him the opportunity to request the lesser-included offense to be charged and violated his right to Due process and a Fair Trial and as such, reasonable jurists could disagree with the district court's decision.

Point III

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial Court did not Wrongfully Taint the Petitioner's Trial by the Admission of Inflammatory and Unduly Prejudicial Evidence that did not Violated His Constitutional Rights to a Fair Trial by an Impartial Jury.

In order to be admissible under Fed. R. Evid. 404(b), (1) the evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Fed. R. Evid. 402; (3) its probative value must outweigh its potential for unfair prejudicial effect under Fed. R. Evid. 403; and (4) the court must charge the jury to consider the evidence only for the limited purpose for which it is admitted.

Under Fed. R. Evid. 404(b), the admission of other acts evidence for the purpose of showing that an individual has a propensity or disposition to act in a particular manner is prohibited and the Federal Rules of Evidence are clear and unambiguous: irrelevant and prejudicial evidence is inadmissible and the Petitioner's due process rights were violated when the trial court allowed: **(1)** the victim's sister-in-law to take the witness stand and re-enact the victim's dramatic last words to her, as she imitated the victim's gasping voice.

In State v. Kelly, 97 N.J. 178 (1984) it states: evidence may be excluded as unduly prejudicial when its "'probative value is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in the case.

This aspect of testimony was entirety gratuitous and should not have been permitted by the trial court.

It is also argued that inadmissible evidence and highly inflammatory statements came rolling in unimpeded at Petitioner's trial, without any hesitation by the prosecutor, complaint by defense counsel, or correction by the District Court. Indeed, at only one point when irrelevant but enormously prejudicial evidence and wholly inappropriate statements came before the jury did defense counsel object, and that objection was not at all specific. His failure to object, of course, did not relieve the prosecutor of his duty to comply with the Federal Rules of Evidence and, even more importantly, rules of fundamental fairness.

In Himelwright, although operating under an abuse of discretion standard of review, the conviction was reversed due to concerns that the government's emphasis on 404(b) evidence in its closing argument tainted the trial in two regards: "First, it had the potential for frightening the jury into ignoring evidence that otherwise might have raised a reasonable doubt . . . . Second, if the jury was persuaded that [the defendant] was violence-prone by character, it might have inferred that he intended violence in this particular instance. That inference is precisely what Rule 404(b) prohibits." Himelwright, 42 F.3d at 786 n.8. See also United States v. Morley, 199 F.3d 129, 137-38 (3d Cir. 1999) ("This frontal assault upon the defendant's character is simply not appropriate under our system of laws, and

the trial court abused its discretion in admitting it."). Plain error was committed here in the Petitioner's case as well.

(2) Petitioner also argued before the district court that the admission of Hearsay testimony through Lieutenant Alfred Nagle was prejudicial and violated his right to fair trial.

The trial court's admission of the testimony Lt. Nagle under the excited utterance exception was an abuse of discretion when N.J.R.E. 803 (c)(2) states, "[a]n excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate."

In the Petitioner's case Lt. Nagle, who at the time of the incident was a Sergeant and night shift commander with the Lumberton Township Police Department testified that he "responded to a call of a stabbing at 509 Independence Drive." Upon his arrival, he was approached by one of his officers and told "that a stabbing had taken place and that a suspect had been taken into custody and was secured in one of the patrol cars[,]" and that a "wallet had been secured behind the 500 building." At trial, Lt. Nagle recounted his observations upon entering the residence, the following colloquy took place:

> **Q.** and what were your observations when you -- when you went inside?
>
> **A.** I located the victim who was seated in a chair just outside the kitchen. He was covered with blood on his back, his chest, his arms, hands. His t-shirt, which looked

> like it had been cut off his body by paramedics was draped across his right thigh and was blood soaked. He was in obvious pain. There was a transparent patch on his back on his left side that I could see through and I could see it looked like to be a stab wound. I did ask him what happened and he struggled as he spoke to me and he had been robbed.
>
> **Q.** And after he had indicated that to you, by the way, this was Pickett Russell Durham; was it not?
>
> **A.** Yes, sir, Mr. Durham.
>
> **Q.** After Mr. Durham indicated that to you, that he was robbed, what -- what did you do then? What was your --
>
> **A.** He -- he appeared to be in such shape that didn't want to continue questioning him. I just -- I said, "okay, sir. We'll get you some medical attention and get you some help." But I didn't question him after that. (7T 57-1 to 23).

The statement by Lt. Nagle, "he had been robbed," is clearly hearsay and was offered to prove the truth of the matter asserted. The prosecutor argued as much in closing:

> "And you know Sergeant Nagle, now Lieutenant Nagle, come in and, well, he had to put words in Russell Durham's mouth. He doesn't have to put words in Russell Durham's mouth. Forget about what Russell Durham said to Sergeant Nagle, that he was robbed. Robbery, right there." (11T 43-17 to 22).

Therefore, the trial court erred because the testimony does not fit within the scope of this exception. See State v. Long, 173 N.J. 138, 152 (2002); see also State v. Cotto, 182 N.J. 316, 328 (2005).

(3) Petitioner also argued before the district court that the trial court violated his due process by admitting several instances of prior bad acts.

The State's Court has frequently enunciated the general rule that evidence of a defendant's prior criminal acts may not be introduced to prove guilt of the offense for which the defendant is on trial.

Therefore, "in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is ... inadmissible."

Clearly, in the Petitioner's case the testimony by Frederick D'Ascentis, a State's witness presented a prior instance of other-crimes-evidence, which prejudiced the defendant's rights to a fair trial and a reliable verdict.

The State through its witness D'Ascentis, was allowed to introduce a prior instance of inadmissible and highly prejudicial other-crimes-evidence that the defendant possessed and used drugs.

These instances of other-crimes-evidence were unrelated to the offenses for which the defendant was on trial, nor was there any independent proof of D'Ascentis' word that these other crimes instances actually happened as D'Ascentis alleged.

The other-crimes-evidence was clearly inadmissible under New Jersey State Court precedent, and the United States Constitution, and there is no justifiable explanation that could excuse trial

counsel's failure to move to bar the numerous instances of other-crimes-evidence.

Whether the other-crimes-evidence be viewed individually, or together, the prejudicial enormity of the cumulative effect of this otherwise inadmissible evidence cannot be denied.

The reasons for this general exclusionary rule [of other-crimes-evidence, is] well documented:

> "There are two reasons for the rule. First, if a jury considers a defendant's prior criminal activity, it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the defendant has committed crimes in the past, he is more likely to have committed the crime for which he is being tried."

See also Terry, supra, 332 Md. at 334, 631 A.2d 424 (other crimes evidence "is excluded because it may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant").

Not only did trial judge fail in his duty to exclude the other-crimes-evidence, but the trial judge also failed to give a special jury instruction to disregard the said evidence or how best to deal with such evidence.

There was no evidentiary hearing had before the introduction of any of the instances of the other-crimes-evidence, for the possession and use of drugs, in the stabbing incident at Russell's. There also was no corroborative evidence that any of these incidents even occurred except for the word of the State's own witness, D'Ascentis, himself.

Trial counsel also failed to bring to the trial court's attention, the fact that the trial court equally erred by failing to hold an evidentiary hearing before allowing the State to introduce the other-crimes-evidence. As a result of trial counsel's deficient representation, the State was able to utilize this otherwise inadmissible evidence in its closing summations to the jury, thereby, prejudicing the defendant enormously.

The State did not seek to introduce this other-crimes-evidence for any possible legitimate purposes, other than to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant.

The prejudice the defendant suffered from the other-crimes-evidence is inescapable, and there is no justifiable explanation that could explain away trial counsel's woefully deficient acts.

Because the other-crimes-evidence would not have been admissible under the above standard, since the other-crimes could not be established to have even happened, by clear and convincing evidence.

The probative value was clearly outweighed by the prejudicial nature of the admission of the other-crimes-evidence. It is highly unlikely that the other-crimes-evidence would have been admissible whether as individual acts or the multiple acts that were however introduced into the trial of the Petitioner.

Also, during the Petitioner's trial Sergeant Mastrangelo was permitted to testify "Hey strange, it's me Derek, Derek Sample."

By implication even this testimony was truthful, the jury was permitted to hear not only was the Petitioner familiar with law enforcement officers, he knew them by their "street names," and thus he must be guilty.

In the Petitioner's case, there was no limiting instruction after Sgt. Mastrangelo was permitted to testify as to his familiarity with the Petitioner. As stated, other-crime evidence is only admissible if relevant t prove some other fact genuinely in issue. State v. Marrero, 148 N.J. 469, 691 A.2d 293 (1997).

A four-part test has been distilled and designed to "avoid the over-use of extrinsic evidence of other crimes or wrongs."

That test is:

> **1.** The evidence of the other crime must be admissible as relevant to a material issue;
>
> **2.** It must be similar in kind an reasonably close in time to the offense charged;
>
> **3.** The evidence of the other crime must be clear and convincing; and
>
> **4.** The probative value of the evidence must not be outweighed by its apparent prejudice.

The trial court's allowance of the Sgt. Mastrangelo's testimony before the jury as to the mutual-awareness of Sgt. Mastrangelo and the Petitioner does not remotely pass this test.

Therefore, the Petitioner's due process and a fair trial was violated; due to there is no way to determine whether the jury placed weight on the "other crimes" testimony. As such, the State Court's and the District Court's rulings was contrary to

Supreme Court rulings and reasonable jurists could disagree with the district court's decision.

Point IV

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial's Judge Failure to Instruct the Jury on Reckless Manslaughter as a Lesser-Included Offense of Murder, and Failure to Instruct the Jury on Theft as a Lesser-Included Offense to Robbery was Plain Error.

The Petitioner argued before the district court that it is well established that a trial judge is required to instruct the jury on a lesser-included offense if "the-evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant on the lesser." State v. Brent, 137 N.J. 107, 117 (1994).

In Jenkins, the evidence showed that the defendant struck the victim in the head with a brick, which caused him to fall down a flight of stairs, hit his head on the pavement and die. The Court ruled that the jury could have concluded that the defendant hit the victim without conscious knowledge that death was a high probability, but with reckless disregard of whether death was a possibility or probability. 178 N.J. at 363. The Court further held: "expert testimony that it was not defendant's blow but rather the subsequent fall to pavement that caused victim's death provided significant support for a conclusion that defendant consciously disregarded a known risk that created possibility or probability that death would occur from his conduct." Id. "That being the case, the trial court was obligated to instruct on manslaughter and aggravated manslaughter as well as murder." Id. at 364.

Just as in Jenkins, all the experts in the Petitioner's case at bar, agreed "that it was not the Petitioner's blow but rather the subsequent [heart attack] that caused Russell's death providing significant support for that conclusion inasmuch as the jury need not have concluded that Petitioner struck Russell intending or knowing that the blow would cause him to have a heart attack." That being the case, the trial judge was obligated to instruct the jury on manslaughter as well.

Further support on the necessity for a charge on manslaughter is found in the trial court's agreeing with defense counsel to give instructions on aggravated assault. (10T 17-9 to 25).

Also, in Jenkins, the Court pointed out that "the proper inquiry in distinguishing murder from the two degrees of manslaughter relates to defendant's state of mind as to the risk of death." Id. Since the jury could have "reasonably garnered from the testimony that the cause of death is not attributed to" Petitioner.

However, the jury was not given that opportunity and therefore, the Petitioner's due process and a fair trial was violated; due to the jury could have convicted the Petitioner on a lesser-degree of murder if charged. As such, the State Court's and the District Court's rulings was contrary to well established law and reasonable jurists could disagree with the district court's decision.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should grant the petition for a writ of certiorari to determine whether Petitioner's constitutional rights were violated.

Respectfully submitted,

DATE: Feb. 8, 2019

Derek Sample