18-8946 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

No. USCA3 #18-2583

WILLIE PETERSON

Petitioner,

V.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL,

Respondent.

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

SUBMITTED BY:

Willie Peterson #452630/732981A
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.

3.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claims.

TABLE OF CONTENTS

LIST OF PARTIES

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

The respondents are Charles Warren former Administrator of New Jersey State Prison, and the Essex County Prosecutor's Office.

TABLE OF AUTHORITIES

Cases — **Page No**

TABLE OF AUTHORITIES

OPINIONS BELOW

The United States Court Of Appeals for the Third Circuit filed an order on December 17, 2018, denying petitioner's petition for a Certificate of Appealability. **(See Appendix - Ex-1)**

The United States Court Of Appeals for the Third Circuit filed an order on January 15, 2019, denying petitioner's petition for a rehearing En Banc. **(See Appendix - Ex-3)**

STATEMENT OF JURISDICTION

The United States District Court For the District Of New Jersey denied petitioner's petition for writ of habeas corpus and on the United States Court of Appeals for the Third Circuit filed an order on December 17, 2018, denying petitioner's petition for a Certificate of Appealability and a petition for a rehearing En Banc were denied on January 15, 2019. 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

Debbie Belle and Twanna Floyd met in 1995 at the same housing complex. They became friends. Debbie told Floyd that she was seeing somebody. On or about September 1998, Debbie introduced Floyd to the Petitioner, the man she was dating. A few months after this. Debbie discussed with Floyd the possibility of the Petitioner moving in with her. Floyd said this was not a good idea and told Debbie that she did not know him long enough. Floyd realized that the Petitioner had moved in with Debbie in February 1999. She realized they lived together, when she saw him on several occasions exit a car parked in Debbie's assigned parking space in the complex. Floyd perceived that Debbie's demeanor changed once she and the Petitioner started living together. Debbie was not happy and became quiet because she was upset. On or about the middle of February 1999, Debbie entered Floyd's apartment. She was very angry and screamed to Floyd, "I don't know what his problem is. Why would he steal from me?" Debbie then told Floyd that the Petitioner had taken some jewelry and petty cash from her apartment. She told Floyd that she wanted him out because this was not the kind of life she desired. During February or March 1999, Debbie, again upset entered Floyd's apartment. She told her the Petitioner had taken her television and stereo and pawned hem. She found pawn receipts on her kitchen table. Floyd recalled having seen the Petitioner carrying a television and a stereo a placing it in the back seat of his car. She assumed that he was moving out of the apartment because Debbie had told him to leave.

On or about April 29, 1999, Floyd was preparing to move from the complex. As Floyd concluded a phone conversation with a locksmith regarding the installation of locks for her new apartment, Debbie entered Floyd's apartment and screamed, "I want him out." She asked Floyd if she would recommend a locksmith. Floyd called her locksmith and requested that he change the locks to Debbie's apartment. Awaiting the locksmith's arrival, Debbie told Floyd that the Petitioner was different from when she had first met him. She did not want the type of life that she was beginning to live. While the locks were being installed, Floyd questioned Debbie as to why the locks were being changed. Floyd said she would allow the Petitioner back in the apartment. Debbie told Floyd that she was not going to let him back in the apartment.

On or about May 1, Floyd was sitting on the porch of her old apartment when she saw Debbie and the Petitioner in a car. As Debbie left the car with the Petitioner. Floyd and Debbie said hello from a distance. The following day Floyd, stopped by Debbie's apartment. As they spoke, Floyd realized the Petitioner was in the bedroom. Debbie gestured to Floyd that she would call her. That was the last Floyd heard from Debbie. During their numerous conversations, Debbie never told Floyd that the Petitioner physically or emotionally hurt her.

Debbie worked at the federal probation office in Manhattan. She was last seen at work on or about May 17, 1999. In the early morning of May 18, 1999, the Petitioner drove his car into a divider on Route 1 and 9. Police and an ambulance responded to

the scene. As ambulance workers placed the Petitioner into the ambulance, he said he wanted to kill himself. He did not want to be treated so that he could bleed to death.

On or about May 24, 1999, at approximately 7:45 p.m. Officer Mendez of the Newark Police Department went to Debbie's apartment. Mendez went to the side of the building, after not receiving a response by ringing the doorbell and knocking on the door. He saw one of the windows half open. Mendez was unable to see much but did detect a foul odor. After locating the building's superintendent, Mendez entered the apartment.

Debbie's decomposed clothed body was discovered in the bathroom face down, with one of her feet sticking out from the tub. A bloody six or seven inches long knife was on a comforter in the bathroom, near the body. A pocketbook's contents were on the floor of the master bedroom. The handle was ripped off. It appeared Debbie had been killed in the bedroom before being placed in the bathroom. The telephone cords in the bedroom were torn from the wall. There was a gallon water container smeared with blood in the bedroom. This gave the appearance as if someone had attempted to clean up the blood. There was no evidence of forced entry into the apartment. Fingerprints were analyzed and determined to be the Petitioner's prints. No prints were lifted from the knife. DNA analysis of the bloodstains on the knife determined that it was the Petitioner's blood. Bloodstains found on the jacket, which attired the body, and pants and a wallet discovered in the apartment was the Petitioner's.

A toolbox in the apartment, containing the Petitioner's

personal paper was found. Among the papers was a note the Petitioner apparently wrote regarding Debbie, which read:

> Debbie, shit! The first time I realized you just lie for no reason at all, Ginger ale soda. Then I tell you to send my mother $100.00 back as soon as the check cleared, in fact, I said put $100.00 cash! in the mail - She did not. But instead she optioned to take Mom Two Forty-dollar money orders & $20 in cash, I still ain't figured out what that was about shyster, very shysty. $600.00 Fake phone bill, shit fake-ass uncle in New York who just happened to have a car for $600.

Another note in the toolbox, dated May 17, 1998, read:

> Debbie, let's not forget how many times I ask for a 2-dollar watch, shit, to wear it. I ask you. Now, she thinks she's "cute," yeah! and I always wanted to tell you to "just sit the fuck up" Lovely-be-Doubbee-Fronten. Day after Mother's Day - my orders never got to Mom let not forget about - you couldn't make the calls I ask you too make, but you found the time - the strength - yeah! I'm tired. To call the office just how much I owed them! When they took my check for $60. I never asked! May 16th after talking to Mom, I asked her, how much is the collection agency looking for, she said about $1,000 dollars, but there's no bill - Nor has there ever been any notice. I've ask again for the old "phone Bill" & Pawn shop ticket!! set the record straight! bitch and walked the fuck out.

A letter from Debbie to the Petitioner was in the toolbox. It read:

> Willie, you embarrassed me Sunday, July 26, you also said horrible words to me. Don't know who you are. You totally acted like an ignorant nigger. No respect. A street low life, I will never in my life forget that abuse in my life. The worst woman you had, no, it was the best. You acted horrible, very ignorant, no class, you embarrassed me. Your mouth is filthy. You're a very evil ignorant man, no respect. I don't want to be with you. Don't ask me about my bills, you don't pay them. No, I don't want no car with you. I will mail your $48.00 back. You're horrible very ignorant low life street wise evil. Who are you? Said I was an animal. You are a very nasty evil man. You said some horrible things to me. Don't ask me, I repeat, about my money. I don't ask you about yours. Get your own place an car. God will take care of me. You killed

everything in me. Words you say to people are very horrible, very hurtful. I cannot forget that your mouth is a weapon. I really don't know you. Debbie.

In response to this letter, the Petitioner wrote a letter to Debbie, also found in the toolbox:

I have your letter. When you send my $48.00 and all other people, an all other property, Send my check for $200.00 Back also. Like I Said, you're a Very Sick Bitch . . . So Don't Fuck With Me. Get all My Shit to Mom, I mean it, Bitch. Fuck you - you're Just a big liar . . . Sorry ass Nigga-Ho.

Prior to this exchange of letters, Debbie wrote to the Petitioner:

June 24th, 1998. Hi, Mr. Hots. Enjoy with the fur blind girls. Miss you and need you, can't wait for you to have some. Boo, do you want some (smile). July 4th we are going to cook out at Mom Duke's house an have fun. Baby, pls stay off salt and try and eat some veggies for your health sake, okay. Don't let yourself get to fat. Hang in there. Okay, Be good. Miss you. Boo will mail telephone bill to you. Don't have any more film for camera and I will not buy more. Cannot aim at Fluffy Jr. Hope that you can aim better with Peter, Jr. Love U, Fluffy.

Investigator Nicole Berrian of the Essex County Prosecutor's Office believed that all of the aforementioned notes and letters found in the Petitioner's toolbox were written no later than late 1998.

An autopsy of Debbie's body disclosed that she died of multiple stab wounds of the face. They are the wound to the eye an entering the brain; the second stab wound to her lip and entering the jaw; and the third wound to the right corner cheek and entering the mandible. The wounds were about three inches in depth, and the wound to the eye, entering the brain, was caused by

moderate amount of force. There were no defensive wounds on the body. It appeared she did not attempt to defend herself. A toxicological exam determined that her brain tissue had a 0.193 percent alcohol level. Due to the body decomposition, no blood was able to be analyzed for alcohol. Petitioner crashed a car, which had been impounded by the police. On or about May 28, 1999, a gold bracelet that was Debbie's was discovered in the car.

On May 29, 1999, in the morning, Petitioner waved down police officer in Queens, New York, and said, "You have to take me in." One of the officers, Carlos Clintron, asked why. Petitioner replied, "I just killed my wife." Officer Clintron questioned how he had done it. He said he had used his hands. He was put in cuffs and taken to a Newark police station. The police wanted to question him regarding the death of Debbie Belle. Investigator Berrian, noted superficial "knife wounds" on Petitioner's neck and stomach, and "injuries" to his knuckles.

While Petitioner was in the Essex County Jail for Debbie Belle's homicide, Eric Wiltshire also was incarcerated there. He was convicted in New York in 1985 of assault and in 1986 of aggravated assault. He was in the Essex County Jail for first-degree kidnapping, second-degree aggravated assault, four counts of terroristic threats, two counts of unlawful possession of a weapon and two counts of possession of a weapon for an unlawful purpose.

Wiltshire stated that, on or about October 14, 2000, he conversed with the Petitioner in the jail's dayroom. During their conversation Petitioner told Wiltshire that he had "stabbed his

wife," or fiancee, regarding an "argument over money." He stated to Wiltshire that his car crashed on Route 1 and 9. He turned himself in to a police officer. He wrote a letter to the Essex County Prosecutor on October 14, 1999, recounting Petitioner's stating that he had killed a woman over money. Wiltshire also included in his letter that Petitioner and the woman had gotten into a physical altercation and the Petitioner had displayed to him marks on his right knuckles. Petitioner alluded to having unsuccessfully attempted to provide information to the prosecutor's office on another occasion. Wiltshire told the prosecutor that "I will not let you down" and asked that his bail be reduced. He was interviewed by Investigator Berrian on October 24, 1999, and provided a signed statement regarding Petitioner's matter.

On or about November 6, 2002, Wiltshire entered into a plea agreement with the Essex County Prosecutor's Office, whereby he pleaded guilty to second-degree aggravated assault an the kidnapping charge would be reduced to criminal restraint in exchange fore the State's recommendation that any custodial term would not exceed 12 years of which he must serve 85 percent before being eligible for parole. Wiltshire's attorney indicated at the plea hearing that, because Wiltshire had cancer and was willing to cooperate with the State regarding Petitioner's homicide trial. He would requesting time served at Petitioner's sentencing. The judge agreed that if there was no new development that had any negative impact upon Wiltshire, time served, which was 18 months at the time of Petitioner's trial, would be imposed. Wiltshire

testified at the Petitioner's trial that he was really concerned" about his own case; that "I don't know" whether the kidnapping charge was "serious or not," an that the reason he had come forward on Petitioner's matter was because "there's a matter of right and wrong."

On November 28, 2000, December 5, 2000, June 6, 2001, December 2, 2002, December 11, 2002, and January 7-9, 2003, pretrial motions were conducted before Honorable F. Michael Giles, J.S.C.

On January 29, 2003, the Petitioner's trial began before the Honorable F. Michael Giles, J.S.C. and a jury. The jury acquitted the Petitioner on March 4, 2003, as to the murder, felony murder and robbery charges. He was convicted of aggravated manslaughter (a lesser-included offense of murder), theft, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose.

Thereafter on May 9, 2003, Petitioner was sentenced to an extended sentence of 60 years with an 85% parole disqualifier of the first 30 years.

On July 10, 2013, Petitioner filed a petition for a writ of habeas corpus. The petition raised sixteen grounds: **Ground One:** The Prosecutor's Remarks In Summation To The Jury, Regarding Defendant's Not Having Presented A Self-Defense Theory Prior To Jury Summations, Violated Petitioner's Constitutional Right Against Self-Incrimination; **Ground Two:** The Introduction Of Hearsay Which Arguably Provided Petitioner's Alleged Motive And/Or Intent, Violated Petitioner's Constitutional Right Of Confrontation, **(a)** Debbie Belle's Statements To Twanna Floyd Were

Admitted, **(b)** Debbie Belle's Letter To Petitioner; **Ground Three:** The Admission Of Petitioner's "Bad Conduct" Letters To The Victim Was Unduly Prejudicial; **Ground Four:** The Trial Court's Instruction To The Jury That It Could Infer That Petitioner's Attempted Suicide, Indicated Proof Of Consciousness Or Guilt, Was Unsupported By Reasonable Inferences; **Ground Five:** Trial Counsel Was Ineffective For Failure To Adequately Prepare And Exercise Normal Customary Skills In Establishing Petitioner's Innocence, And The Lack Of Adequate Client Consultation, Which Resulted In Gross Ignorance Of Petitioner's Specific Instructions For Defense Tactics; **Ground Six:** The Trial Court Erred In Not Assigning A New Counsel In Light Of A Conflict Of Interest Between The Petitioner And His Present Counsel; **Ground Seven:** The Trial Court Abused Its Discretion In Admitting Evidence Of Discord In The Relationship Because The Probative Value Of The Evidence Was Substantially Outweighed By The Prejudice; **Ground Eight:** The Trial Court Failure To Instruct The Jurors Regarding The Effect Of A Witness' Actual Or Perceived Expectation Of Favorable Treatment By The State Deprived Petitioner Of His Right To A Fair Trial And Due Process; **Ground Nine:** Trial Counsel Were Ineffective For Failing To File A Motion To Suppress Petitioner's Statement As Excited Utterance; **Ground Ten:** Trial Counsel Was Ineffective For Failing To Prepare A Diminished Capacity Defense; **Ground Eleven:** Trial Counsel Was Ineffective For Failing To File A Motion To Suppress Testimony That Lacked Of Scientific Testing; **Ground Twelve:** Trial Counsel Was Ineffective For Failing To Communicate With The Petitioner And To Initiate Plea Negotiations; **Ground Thirteen:** Petitioner's Pcr

Attorney Failed To Obtain Either An Affidavit Or Certification From Trial Counsel, State Counsel Or The Trial Judge As To Why The Petitioner Was Not Allowed To Be Present In Court On Separate Occasions, Despite There Were No-Waiver From The Petitioner, Denied The Petitioner His Right To Due Process; **Ground Fourteen:** Petitioner's Trial Attorney Failed To Advise Him Of The Existence Of The Trial Memorandum And Failed To Procure Petitioner's Presence During The Signing Of This Crucial Document; **Ground Fifteen:** Trial Counsel Failed To Consult With The Petitioner Regarding The Sentencing Exposure, Therefore Depriving Him Of His Constitutional Rights To Effective Assistance Of Counsel; **Ground Sixteen:** The Pcr Court Erred In Denying Petitioner's Petition As He Established A Prima Facie Case Of Ineffective Assistance Of Counsel When All Counsels Below Failed To Raise The Trial Court's Violations Of Petitioner's Right To Due Process When It Failed To Arraign Petitioner Or Conduct A Pre-Trial Conference On The Superseding Indictment As Required By 3:9-1(A) And (E).

The district court denied the petition for a writ of habeas corpus. Peterson v. Warren, No. 13-4250 (JLL), slip opinion.

Thereafter, on or about July 21, 2018, petitioner filed a timely notice of appeal and moved for a petition for a COA.

On December 17, 2018, the Third Circuit denied the petition for a COA. On January 15, 2019, the Third Circuit denied a petition for rehearing and rehearing en banc.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Point I

Reasonable Jurists Could Disagree with the District Court's Ruling that the Prosecutor's Remarks in Summation to the Jury, Regarding Petitioner's not having presented a Self-Defense Theory prior to the Jury, Summations, Violated Petitioner's Constitutional Right Against Self-Incrimination and His Constitutional Rights to a Fair Trial by an Impartial Jury.

At the charge conference prior to jury summations, the court ruled that self-defense would be included in the final instructions for the jury's consideration.

Consequently, defense counsel's summation to the jury dealt solely, and at considerable length, with a self-defense scenario. It reads, in pertinent part:

> What was causing problems in the relationship? Money and arguments over money. And, and that really started to be destructive? That Willie Peterson would take thing from Debbie; take things, right? And sneakily do it; right?
>
> This pawning of things from the apartment is what is driving Debbie crazy. It's what she can't stand. It's destructive to this relationship. It's getting her angry. It gets her angry. Her best friend [Twanna Floyd] tells you angrier than she's ever seen her, so angry that she can't be controlled.
>
> On May 17th, we know that Debbie goes to work, right? That' a Monday. Right? Debbie goes to work. Remember we're told by Investigator Berrian that she signs out of her computer about 4:45 or 4:50, and she leaves at 5:00. You know, she works for the federal government. She's, I think a clerical worker in a parole office -- parole office in New York; right? Federal courthouse in New York. And she leaves work.
>
> What do we also know is happening on that same day of May 17th? What else is happening? Do you remember what else is happening on a May 17th? On May 17th (displaying item), as Debbie is getting ready to leave from work -- and, again, this one of theses documents you're going to have in evidence, S129 in evidence. These are photocopies of the document that man brought in from

Rich's Pawn Shop. At 3:42 P.M., that very same day this VCR is being pawned; okay? It's being pawned.

What does Debbie do? She goes home, she goes into her bedroom top what? To change her clothes. And what does she see, or rather what does she not see? There's no VCR there anymore. Jesus, there's no VCR there any more. Again? Again this crap again? After commuting from work in New York City, again we're going to start this?

There's no [Twanna Floyd] across the street to go and vent with anymore. [Twanna Floyd] moved. She's not there. And maybe he doesn't want to hear it even. Right? I told you so or whatever. She's just pissed off. How can this keep happening? Mad at herself, and mad at him. And should be mad at him.

What does she do? She does what many people do when things aren't going right, when just it' been too much, and that is, Ladies and Gentlemen, that she starts to drink. I'm looking in here, and you'll have in there with you, the Medical Examiner's report. [The prosecutor] told us in her opening statement that we'd be hearing this, and we heard it from the medical examiner. She started to drink.

She wasn't drinking at work; right? She's not drinking on her way home from work; right? She going home, the ethanol, the alcohol level in her brain as .193. .193.

Willie Peterson never used violence. We know that.

All the blood on this knife was Willie Peterson's blood. That's the knife, Ladies and Gentlemen, that Debbie took because she was fed up, and she waited there with that knife for Willie to get home.

[T]he medical examiner, what did he tell us? That during the autopsy she was examined and displayed no defensive wounds. What's a defensive wound? I put up my hands to stop an attack. Where do we usually put up our hands (demonstrating)? Right? To protect our face a lot of times; right? We know that's, in fact, where Debbie was stabbed.

And Debbie had the knife, but no defensive wounds? Well, quite clearly because you were on the offensive for the attack, you were the attacker; right? That's why you wouldn't have any defensive wounds.

But also what you'll see when you look at these photographs is -- Nicole Berrian, the prosecutor's investigator, she takes pictures of Willie Peterson in

areas where you can look and you can draw your conclusions, but which would constitute defensive wounds on Mr. Peterson, that initially Mr. Peterson was being attacked and attempted to thwart the attack.

We have a picture here of stab wounds that Mr. Peterson -- or cuts that he received on his neck. All right? You'll see those. Nicole Berrian took those. She said she took them because they were obviously stab wounds. And the one that he had on his belly that she took. I mean and that's exactly where you would imagine a bigger man would be stabbed by a smaller person, in the belly. Those are facts for you to look at.

[W]hat does that mean, acting in self-defense? It means that the State, the Judge will tell you, has to disprove self-defense beyond a reasonable doubt. They have that burden. It's not whether you find beyond a reasonable doubt he was acting in self-defense. No.

If you have a reasonable doubt as to that issue, I can't decide, I don't know, I'm not firmly convinced one way or the other, it's an unknown to me, the Judge will tell you that's reasonable doubt, the defendant gets the benefit of that doubt, and unless the State has disproved -- listen to that -- disproved self-defense beyond a reasonable doubt, you must find that it applies, and you must acquit -- find Mr. Peterson not guilty based on self-defense.

Near the close of the summation, the prosecutor stated:

It wasn't self-defense.

The first time you heard self-defense, Ladies and Gentlemen, was today, and you you've heard no evidence of it from the witness stand.

Defense counsel immediately objected, and the following exchange occurred at side bar:

[DEFENSE COUNSEL]: Judge, I have no recourse but to ask for a mistrial at this point in time. The prosecutor just said that, "The first time I herd anything about self-defense was today, and I didn't hear anything from witness stand." That is a clear, clear comment on the fact that Mr. Peterson did not testify in this case. There is no remedy under the case law for such gross, unfortunately, malfeasance except for the Court to order a mistrial, and that's the remedy I'm requesting at this time.

THE COURT: Any comments, Ms. [Prosecutor]?

[PROSECUTOR]: Yes, Judge. Counsel did not open to self-defense, There was no evidence presented with regard to self-defense, and if counsel had let me continue, I would have commented on the fact that defendant made statements to both Wiltshire and Cintron and never indicated that there was any evidence or that there s any existence of self-defense or any type of attack.

[DEFENSE COUNSEL]: Judge, it's up to the Court to protect the defendant from what can only be termed gamesmanship and that's clearly what this was. It was a direct -- I mean, how much more direct could you be a comment on Mr. Peterson's failure to testify in this case? That's what it said, and that's why I ask for the remedy I ask for.

THE COURT: Well, I don't necessarily agree, [defense counsel], that the implication would suggest that the defendant's testimony has anything to do with that point is involved. I will remind the jury that they will be instructed with regard to the defense of self because the testimony supports or supplies a reason for that and their recollection should control with regard to their recall about that testimony.

I will deny your application for a mistrial because, as I've said, the comment does not point to the defendant or the defendant's election not to testify in this trial. Anything else.

[PROSECUTOR]: No.

THE COURT: You plan to continue with your presentation in the manner that you suggested?

[PROSECUTOR]: I'm almost done.

THE COURT: No. In the manner that you suggested?

[PROSECUTOR]: Yes.

THE COURT: Anything else that you intend to say with regard to that?

[PROSECUTOR]: No.

[DEFENSE COUNSEL]: I'd ask for a curative.

THE COURT: That's what I intend to tell this jury.

[DEFENSE COUNSEL]: Even though it does not impact on my

motion for a mistrial -- I'm not abandoning my motion. I know you've ruled on it. I'd ask you to remind this jury Mr. Peterson has no obligation to testify, that it should not enter into their deliberations whatsoever.

THE COURT: I'm going to think about that. I think that would unnecessarily highlight the comment, and what I've indicated to you, the comment, in the context it was made, [defense counsel] does not point in any way to the defendant's election not to testify in this trial.

[DEFENSE COUNSEL]: I'd ask you to have it red back then, Judge, because that is the only inference that could be drawn from it.

THE COURT: I heard what she said. She said you haven't heard anything about self-defense until today. Is that essentially --

[DEFENSE COUNSEL]: And then she commented on the fact that there was no evidence of it from the witness stand. I mean how is that not directly basically saying to them Mr. Peterson didn't take the stand to tell you, he didn't have self-defense?

[PROSECUTOR]: That's exactly -- because where I was going, Cintron didn't hear anything about self-defense and neither did Wiltshire.

[DEFENSE COUNSEL]: Then she wanted to comment on the fact my client didn't say more to officer Cintron? That Fifth Amendment right.

[PROSECUTOR]: That's not --

THE COURT: Hold on. Hold it. We can't all talk at the same time, can we? Now, are you finished?

[DEFENSE COUNSEL]: Yes, Judge.

THE COURT: What would you like to say?

[PROSECUTOR]: That was a voluntary statement. He walked up Cintron. Cintron wasn't interrogating him. The point is that he turned himself in. At that point did he say I did it in self-defense?

THE COURT: In that regard, I had no problem with your indication previously about what you meant to continue about in that area.

[PROSECUTOR]: Fine.

THE COURT: If you re going to use certain witnesses in order to, in effect, allow the jury to analyze it back to the defendant's election not to testify, I won't allow that. All right? So you don't need to talk about what Officer Cintron didn't tell us with regard to self-defense because he wasn't told by Mr. Peterson on that day.

You can talk about what Mr. Peterson did not say to Mr. Wiltshire in the jail, which they heard about, may have heard about here or didn't hear about here, which in effect, will create the implication that [defense counsel] has a problem with. That implication does not -- is not a problem right now.

[PROSECUTOR]: So what can I say?

THE COURT: What did you say, suggest you were going to say before?

[PROSECUTOR]: What I suggested I was going to say is that we heard no testimony from either Officer Cintron or Eric Wiltshire that indicated that the defendant -- that there was any level of attack or self-protection defense.

THE COURT: I think you've said enough with regard to that, said there's no testimony, no evidence in this case about self-defense. You've made the comment that we're here at side bar about. I'm going to indicate to them what I said before, that the evidence, certainly I've ruled that there is the evidence testimony which may provide a basis for them to be instructed on self-defense, and I'm going to leave it at that.

[PROSECUTOR]: Okay.

[DEFENSE COUNSEL]: Is the prosecutor -- Judge. I don't mean to inquire of you, but is the prosecutor going to ask -- comment any further in this area? If she is, I have some other things I'd like to put on the record.

[PROSECUTOR]: Well, I think I'm being told not to; right?

THE COURT: Yes, that would solve any problems so e don't have to keep coming back to side bar, and the further we go, the more the implication may be created that [defense counsel] was initially concerned about; all right?

[PROSECUTOR]: Okay.

THE COURT: All right.
The Court then addressed the jury:

> All right, before [the prosecutor] continues, I have something, an instruction I want to give you. I decided, outside of your presence, that somewhere in the evidence, in all the evidence, the testimony that you heard, that there was a basis to instruct you in the law of self-defense.
>
> It is your recall of the testimony and evidence that controls. Because the testimony of certain witnesses in this case may give you a basis to decide, along with everything else you are required to decide in this case, whether the defendant acted in self-defense, that's why you'll be instructed when I give my instructions to you tomorrow about that.

The prosecutor then concluded her summation without providing any clarification to the comment, "the first time you heard self-defense, Ladies Gentlemen, was today, and you've heard no evidence of it from the witness stand."

The prosecutor is accorded considerable latitude in summing up the State's case forcefully and graphically and to pursue to prosecutorial duty with earnestness and vigor. See e.g. State v. Frost, 158 N.J. 76 (1999); State v. Harvey, 151 N.J. 117 (1997). Nevertheless, prosecutor also have overriding obligation to see that justice is fairly done. The classic statement of that obligation by the United States Supreme Court in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct 629, 633, 79 L.Ed. 1314, 1321 (1935), explains that:

> The *** [prosecuting] attorney is the representative not of an ordinary party in a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which

> is hat guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he is not at liberty to strike foul ones. It is an much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, to a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

For example, prosecutorial suggestion on Petitioner's failure to testify - as was the case in the instant matter - violates the self-incrimination clause of the Fifth Amendment to the United States Constitution, which is made applicable to the States by the Fourteenth Amendment. Griffin v. California, 380 U.S. 609, 85 S.Ct 1229, 14 L.Ed.2d 106 (1965); see also State v. Irizarry, 270 N.J. Super 669 (App. Div. 1994).

Moreover, because the error deprived the Petitioner of a federal constitutional right, it may not be considered harmless unless it was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 708, 711 (1967).

In the Petitioner's case the prosecutor comments blunted, if not eviscerated the Petitioner's self-defense theory.

As such, reasonable jurists could disagree with the district court's decision. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Point II

Reasonable Jurists Could Disagree with the District Court's Ruling that the Introduction of Hearsay which Arguably Provided Petitioner's Alleged Motive and/or Intent, Violated Petitioner's Constitutional Right of Confrontation, and Due Process.

Admission of a hearsay declaration implicates concerns reflected in the Sixth Amendment's Confrontation Clause, U.S. Const. amend. VI, which is mirrored in the New Jersey Constitution. N.J. Const. art. I, par. 10. As this Court has noted, if read literally, the Clause would preclude admission of "any statements made by a declarant not present at trial." Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct 2531, 2537, 65 L.Ed.2d 597, 605 (1980). In contrast, the admission under the exception in the New Jersey Rules of Evidence has been recognized and approved notwithstanding the fact that the right to confrontation is effectively denied.

In the Petitioner's case, hearsay statements were admitted, despite their not falling within any of the exception to the hearsay rule and, therefore, should have been deemed inadmissible.

(a) Debbie Belle's statements to Twanna Floyd were admitted.

At a pretrial hearing, Twanna Floyd testified, inter alia, one evening in March 1999, Debbie Belle, screaming and crying, entered her apartment and complained that petitioner had stolen jewelry and petty cash from her. Floyd did not know when Debbie first discovered the items missing.

Floyd also testified at the hearing that Debbie, again upset, subsequently told her that she was "through" and "just had it" because of her having discovered pawn tickets, indicating that

[petitioner] had pawned her television and stereo.

Over defense counsel's objection that Debbie's statements to Floyd were inadmissible hearsay, the State proffered the statements as falling within either the excited utterance exception or the present sense impression exception to the hearsay rule.

The court deemed the statements admissible under the present sense impression exception, stating, "it does not appear that we're talking about the [petitioner's] state of mind. We're talking about the witness' [sic] present sense impression."

Debbie Belle's statements to Twanna Floyd did not fall within either hearsay exception.

Here, where no time was established as to the time of the alleged incidents and Debbie's reporting them to Floyd, the court correctly did not allow the statements under the excited utterance exception, because "a reasonable proximity in time between the event and the declarant's subsequent description of it, and whether there was a lack of opportunity to deliberate or fabricate the circumstances" had not been satisfied.

(b) Debbie's Belle's Letter to Petitioner

A letter from Debbie to petitioner, found in a toolbox in Debbie's apartment, was read to the jury:

> Willie, you embarrassed me Sunday, July 26, you also said some horrible words to me. Don't know who you are. You totally acted like an ignorant nigger. No respect. A street low life, I will never in my life forget that abuse in my life. The worst woman you had, no, it was the best. You acted horrible, very ignorant no class, you embarrassed me. Your mouth is filthy. You're a very evil ignorant man, no respect. I don't want to be with you. Don't ask me about my bills, you

> don't pay them. No, I don't want no car with you. I will mail your $48.00 back. You're horrible very ignorant low life street wise evil. Who are you? Said I was an animal. You are a very nasty evil man. You said some horrible things to me. Don't ask me, I repeat, about my money. I don't ask about yours. Get your own place and car. God will take care of me. You killed everything in me. Words you say to people are very horrible, very hurtful. I cannot forget that your mouth is a weapon. I really don't know you. Debbie.

At a pretrial hearing, the State proffered the letter as being "relevant as to intent." Defense counsel objected, inter alia, that the letter should be excluded as being inadmissible hearsay. Without addressing the hearsay issue, the court deemed the letter admissible because of its being "relevant, probative."

There was no showing that Debbie feared the petitioner. In fact, Twanna Floyd testified before the jury that, never once during their numerous conversations, had Debbie told her that petitioner physically or emotionally hurt her.

Therefore, because the erroneous admission of Debbie Belle's statement to Twanna Floyd and her letter to the Petitioner deprived the Petitioner of his federal Constitutional right, it should not be considered harmless unless it was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct 824, 828, 17 L.Ed.2d 705, 711 (1967). The error committed in the Petitioner's case was harmless, as the alleged motive and/or intent by the Petitioner illustrated by Debbie's statements to Floyd and her letter to Petitioner -- an highlighted in the prosecutor's jury summation -- significantly diminished the Petitioner's self-defense claim.

As such, reasonable jurists could disagree with the district

court's decision. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Point III

Reasonable Jurists Could Disagree with the District Court's Ruling that the Trial Counsel was Ineffective for Failing to Adequately Prepare and Exercise Normal Customary Skills in Establishing Petitioner's Innocence, and the Lack of Adequate Client Consultation, which denied the Petitioner the right to a Fair Trial.

The constitution guarantee of counsel can not be satisfied by mere formal appointment, the right to counsel is the right to effective assistance of counsel. Wiggins v. Smith, 123 S.Ct 2527, 2538 (2003).

It is beyond dispute that the Sixth Amendment not only provides defendants in criminal proceedings with the right to assistance of counsel, but also guarantees that such assistance be effective. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct 170, 864 L.Ed.2d 333 (1980); United States v. Swinehart, 617 F.2d 336, 340 (3rd Cir. 1980).

In the Petitioner's case, trial counsel was ill prepared to properly defend his client's rights as a direct result of his conflict an his subsequent failure to properly an adequately prepare for trial. Had counsel thoroughly interviewed the witnesses against his client, he would been far better prepared to cross-examine an thus discredit the State's witnesses, especially Twanna Floyd, an Eric Wiltshire and show how Investigator Nicole Berrian played a verbal gymnastics game by giving selective and misleading responses to questions where the answer greatly prejudiced the Petitioner an restricted his ability to properly present a defense.

As stated in Justice Black's dissent in Betts v. Brady, 316 U.S. 455, 476, 63 S.Ct 1252, 86 L.Ed 1595 (1942), "whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty that the defendant's case was adequately presented."

In the Petitioner's case, the Petitioner contends that he was denied the effective assistance of counsel due to a pretrial conflict between him and trial counsel. In that defense counsel did not prepare himself to defend his client properly, and he did not aggressively put forth a defense to protect his client's trial, and/or appellate rights versed in the nuances of New Jersey criminal procedures.

As such, reasonable jurists could disagree with the district court's decision. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Point IV

The Trial Court's Failure to Instruct the Jurors Regarding the Effect of a Witness' Actual or Perceived Expectation of Favorable Treatment by the State Deprived Petitioner of His Right to a Fair Trial and Due Process.

The State presented the testimony of Eric Wiltshire, Jr... Wiltshire was on the same cell block when both were incarcerated at the Essex County Jail in October of 2001. Mr. Wiltshire claimed that the Petitioner Willie Peterson confessed to him that he had killed the victim Deborah Belle over a money dispute. Mr. Wiltshire was in jail on unrelated matter pending against him for second degree aggravated assault, first degree kidnapping, four counts of terroristic threats, and two counts of possession of a weapon for an unlawful purpose.

In the Petitioner's case, while Mr. Wiltshire remained in jail unable to post bail he seized the opportunity under the pretense of assisting Petitioner to understand what he was being charged with and taking copies of all the Petitioner's discovery material to read and discuss with him during their dayroom recreation periods. Due to his incarceration and inability to make bail Mr. Wiltshire after reading much of the Petitioner's discovery material contacted the Essex County Prosecutor's Office and concocted plan with Investigator Berrian who draft a statement about his alleged conversations with the Petitioner. After providing Investigator Berrian with a statement the State's key witness Eric Wiltshire did not sign that statement pending the confirmation of a plea offer by the Essex County Prosecutor's Office. And, that offer to Mr. Wiltshire was in fact confirmed and

thereafter Mr. Wiltshire signed his October 24, 2001, statement on November 5, 2001.

A formal promise or agreement had been made between the State and the witness in exchange for his testimony Mr. Wiltshire would receive a custodial sentence not exceeding 12 years with 85 months of parole -- or eighty-five percent of that to be served as a parole ineligibility.

Despite the obvious effect that any hope or expectation of benefits Wiltshire must have had in exchange for his statement and his trial testimony, which implied that the Petitioner killed Deborah Belle for money, the judge failed to instruct the jury on how to evaluate the hopes or expectations of Eric Wiltshire. The only charge the court gave the jury with respect to Wiltshire concerned his conviction and how the jury should evaluate his credibility and believability in light of that conviction. There was absolutely no instruction on how the jury should evaluate the hopes and expectations Eric Wiltshire may have had for giving the statement and testimony he did.

Federal court have long recognized the special credibility problems created by informants who have a strong motivation to fabricate. As was noted in Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct 1105, 1110 (1974), the partiality of a witness, as a result of bias, is "always relevant as discrediting the witness and affecting the weight of his testimony." Citing 3A J. Wig more, Evidence §940, p. 775 (Chadbourn rev. 1970). The Court added that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of

cross-examination." Id. at 316-17, 94 S.Ct at 1110. Thus, specifically in cases involving confidential informant who are paid contingent fees, federal trial judges are required to provide the jury with an instruction tailored to the problems relating to the credibility of informant. E.g., Hoffa v. United States, 385 U.S. 293, 311-12, 87 S.Ct 408, 418-19 (1966); United States v. Cervantes-Pacheco, 826 F.2d 310, 316 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). In the Petitioner's case, Wiltshire was not a paid informant. However, given his strong motivation to fabricate and work with a plan with law enforcement authorities based on his hope or expectation of benefits, a specific credibility instruction akin to the informant credibility instruction mandated in the above-cited federal cases was required here.

The instruction in United States v. Goff, 847 F.2d 149, 161 n.13 (5th Cir.) cert. denied sub nom Kuntze v. United States, 488 U.S. 932 (1988), (emphasis added), is illustrative of the type of instruction which should have been supplied to the jury in the instant case:

> The testimony ... of one who provides evidence against a defendant as an informer for pay ... or for personal advantage ... must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by any of those circumstances, or by his interest in the outcome of the case..., or by the benefits that he has received ... financially ...; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should never convict any defendant upon the unsupported testimony of a such a witness unless you believe that testimony beyond a reasonable doubt.

The credibility of the State's witness was a crucial issue. His testimony that the Petitioner had confessed the killing to Wiltshire for money was devastating to the defense. Wiltshire's testimony portrayed the Petitioner as a cold-blooded killer. Without an instruction on how to evaluate Wiltshire's testimony in light of his expectations for a favorable plea agreement, for his alleged cooperation with law enforcement authorities the jury was left without guidance.

Therefore, because the jury was not charged on his issue, the Petitioner was denied a fair trial and as such, reasonable jurists could disagree with the district court's decision. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Point V

Reasonable Jurists Could Disagree with the District Court's Ruling that the Petitioner's 14th Amendment Right to Due Process was Violated when He was Denied Presence at the Initial Pretrial Memorandum Hearing/ Aswell as Trial Court's Failure to Prepare a New Trial Memo or Status Conference.

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).

In the Petitioner's case at bar, on June 27, 2001, a status conference was scheduled, however, the Promis/Gavel event details for this first indictment #99-07-2632I clearly shows that it was Judge Giles that had the Petitioner's presence postponed for that status conference. However, on this same day of June 27, 2001, Judge Giles engaged in an improper exparte off-the-record communication with the prosecutor and defense attorney "in chambers," where the pretrial memorandum was discussed and signed - only by themselves. Without the Petitioner or a Court Reporter. A trial date of November 26, 2001, was also discussed and set at this same time. This is also called structural error. The mere existence of the one and only pretrial "memorandum" was made known to the Petitioner some 8 years later by Judge Peter V. Ryan, it was hidden from the Petitioner and that is why it is not signed by the Petitioner.

The record clearly shows, Prosecutor's misconduct, trial court failure to establish a record and ineffective assistance of trial counsel, all denying the Petitioner His Due Process of law by not allowing Him to aid and participate in His own defense and

there is no way that trial counsel was not aware of his obligation to the Petitioner, to file a motion pursuant to R. 3:20-2, which is required by law for a new trial based on alleged Non-Waiver to be made prior to sentencing.

The Petitioner 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 a pretrial plea negotiation, nor was he present when a pretrial memorandum was signed at a status 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 Petitioner's case, he contends that he was never formally arraigned on the charges contained in the superseding indictment before he was tried and convicted of those charges. The Petitioner, who was at all times deemed indigent by the New Jersey Courts, and represented by court appointed counsels; all who failed to identify and raise this error.

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, which violated his due process under the Constitution of the United States and the New Jersey Constitution.

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 and input on what was taking place; and **Second**, Petitioner was denied the right to have the trial judge state his findings and reasons on the record, for not giving the superseding indictment for meaningful appellate review.

Petitioner's failure to raise his objection is attributed to the fact that defense counsel never informed him of the conference being.

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 Petitioner's failure to be present at every stage, denied him the opportunity to enter a plea as required under Rule 3:9, which states:

> **(a)** Post-Indictment Procedure. When an indictment is returned, or an indictment sealed pursuant to R. 3:6-8 is unsealed, a copy of the indictment, together with all available discovery as provided for in R. 3:13-3(b)(1) for each defendant named therein, shall be either delivered to the criminal division managers office, or be available through the prosecutors office. If a plea offer is tendered, it must be in writing and should be included in the discovery package. Upon the return or unsealing of the indictment, the defendant shall be notified in writing by the criminal division manager's office of the date, time and location to appear for arraignment, which shall occur within 14 days of the return or unsealing of the indictment. The criminal division manager's office shall ascertain whether the defendant is represented by counsel and that an appearance has been filed pursuant to Rule 3:8-1. Upon receipt of the indictment by the criminal division manager's office, counsel for the defendant shall immediately be notified electronically of the return or unsealing of the indictment and the date, time and location of the arraignment. If the defendant is unrepresented, the criminal division managers office shall ascertain whether the defendant has completed an application form for public defender services and the status of that application.
>
> **(b)** Arraignment; In Open Court.
>
> (1) The arraignment shall be conducted in open court no later than 14 days after the return or unsealing of the indictment. If the defendant is unrepresented at arraignment, upon completion of an application for services of the Public Defender, the court may assign the Office of the Public Defender to represent the defendant for purposes of the arraignment.
>
> (2) At the arraignment, the judge shall (i) advise

the defendant of the substance of the charge; (ii) confirm that if the defendant is represented by the public defender, discovery has been obtained, or if the defendant has retained private counsel, discovery has been requested pursuant to R. 3:13-3(b)(1), or counsel has affirmatively stated that discovery will not be requested; (iii) confirm that the defendant has reviewed with counsel the indictment and, if obtained, the discovery; (iv) if so requested, allow the defendant to apply for pretrial intervention; and (v) inform all parties of their obligation to redact confidential personal identifiers from any documents submitted to the court in accordance with Rule 1:38-7(b).

(3) The defendant shall enter a plea to the charges. If the plea is not guilty, counsel shall report on the results of plea negotiations and such other matters discussed by the parties which shall promote a fair and expeditious disposition of the case. Unless otherwise instructed by the court, at the arraignment counsel shall advise the court of their intention to make motions pursuant to R. 3:10-2(a).

(c) Meet and Confer Requirement; Plea Offer. Prior to the Initial Case Disposition Conference, the prosecutor and the defense attorney shall discuss the case, including any plea offer and any outstanding or anticipated motions, and shall report thereon at the Initial Case Disposition Conference. The parties shall discuss any other matters as instructed by the court. The prosecutor and defense counsel shall also confer and attempt to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means. Any plea offer to be made by the prosecutor shall be in writing and shall be included in the post-indictment discovery package.

(d) Disposition Conferences. After arraignment, the court shall conduct the Initial Case Disposition Conference, the Final Case Disposition Conference and the Pretrial Conference, as described in paragraph (f) of this rule. At the Initial Case Disposition Conference, if not filed consistent with R. 3:10-2(a), the court shall set date(s) for submission of briefs, the hearing of pretrial motions, and schedule a Final Case Disposition Conference, if necessary, according to the differentiated needs of each case. For good cause, prior to the Pretrial Conference, the court may schedule a Discretionary Case Disposition Conference. In advance of any scheduled disposition conference, the prosecutor and the defense attorney shall discuss the

case, including any plea offer and any outstanding or anticipated motions, and shall report thereon at the conference. The prosecutor and defense counsel shall also confer and attempt to reach an agreement as to any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, email, internet or other electronic means. Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendants attorney. At the conclusion of either the Final Case Disposition Conference or the granted Discretionary Case Disposition Conference, the court may in its discretion set a trial date, schedule any necessary pretrial hearings, or schedule another conference. Each of these conferences shall be held in open court with the defendant present.

(e) Pretrial Hearings. Hearings to resolve issues relating to the admissibility of statements by defendant, pretrial identifications of defendant, sound recordings, and motions to suppress shall be held prior to the Pretrial Conference, unless upon request of the movant at the time the motion is filed, the court orders that the motion be reserved for the time of trial. Upon a showing of good cause, hearings as to admissibility of other evidence may also be held pretrial.

(f) Pretrial Conference. If the court determines that discovery is complete; that all motions have been decided or scheduled in accordance with paragraph (e); and that all reasonable efforts to dispose of the case without trial have been made and it appears that further negotiations or an additional conference will not result in disposition of the case, or progress toward disposition of the case, the judge shall conduct a pretrial conference. The conference shall be conducted in open court with the prosecutor, defense counsel and the defendant present. Unless objected to by a party, the court shall ask the prosecutor to describe, without prejudice, the case including the salient facts and anticipated proofs and shall address the defendant to determine that the defendant understands: (1) the States final plea offer, if one exists; (2) the sentencing exposure for the offenses charged, if convicted; (3) that ordinarily a negotiated plea should not be accepted after the pretrial conference and a trial date has been set; (4) the nature, meaning and consequences of the fact that a negotiated plea may not be accepted after the pretrial conference has been conducted and a trial date has been set; and (5) that the defendant has a right to reject the plea offer and go to trial and that if the defendant goes to trial the State must prove the case

> beyond a reasonable doubt. If the case is not otherwise disposed of, a pretrial memorandum shall be prepared in a form prescribed by the Administrative Director of the Courts. The pretrial memorandum shall be reviewed on the record with counsel and the defendant present and shall be signed by the judge who, in consultation with counsel, shall fix the trial date. No admissions made by the defendant or defendants attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and defendant's attorney. The court shall also inform the defendant of the right to be present at trial, the trial date set, and the consequences of a failure to appear for trial, including the possibility that the trial will take place in defendant's absence.

Therefore, the Petitioner's right to Due process and a Fair Trial and as such, reasonable jurists could disagree with the district court's decision.

Point VI

Reasonable Jurists Could Disagree with the District Court's Ruling that Trial Counsel was Ineffective for Failing to explain to The petitioner His Sentence Exposure.

The Promis/Gavel for the superseding indictment #02-08-3082I was founded on August 16, 2002, and an arraignment date for September 16, 2002, which he was present for. Clearly the Promis/Gavel shows that there was not even one (status conference) held or scheduled for the preparing of a new pretrial memorandum in accordance with R. 3:9-1(e) and also R. 3:16(a) held in open-court. Despite, the fact that on January 29, 2003, the initial indictment #99-07-2632I was in-fact dismissed by the Hon. Giles. So, where is the plea offer that trial counsel is recalling in his May 1, 2013, letter head in response to Petitioner's request for his affidavit.

Under R. 3:16(a) the Petitioner has clearly shown that he was (absolutely) prejudiced by the Judge's failure to have not prepared a new pretrial memorandum or records as mandated by R. 3:9-1(e) 1 thru 4 and the Judge shall ask the defendant to determine that the defendant understand his full sentencing exposure for the offenses charged.

The Petitioner also contends that where there is structural error found a reversal is required without the need for a showing by the Petitioner of specific prejudice. State v. Brown, 362 N.J. Super 180 (2003). Whereas here, the N.E.R.A was never submitted to the jury in the verdict sheet, nor was a written notice to the Petitioner ever given as was the law in 1999. The year of the

crime. See State v. Paralin, 171 N.J. 223 (2002) Pg. 230 Section (e). Also, Allen v. United States, No. 11-9335 decided June 17, 2013. Holding because mandatory minimum sentences increases the penalty for a crime. Any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

Therefore, the Petitioner's right to Due process and a Fair Trial and as such, reasonable jurists could disagree with the district court's decision.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

Dated: April 9th, 2019

Willie Peterson
Willie Peterson