

18-8955  
IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

ORIGINAL

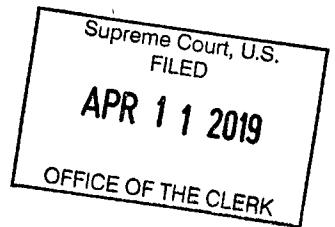
GREGORY BUTLER,

Petitioner;

v.

ADMINISTRATOR NEW JERSEY STATE, ET AL.,

Respondent.



On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Third Circuit

**PETITION FOR A WRIT OF CERTIORARI**

Gregory Butler #489849/669915C  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625

**QUESTIONS PRESENTED**

1. Whether the district court and the third circuit erred in refusing to issue a certificate of appealability when it determined the admission of the other crimes evidence did not violate the Petitioner's due process right under the Fourteenth Amendment?
2. Whether the jury instructions was so erroneous that it violated Petitioner's due process and render the trial fundamentally unfair?
3. Whether the district court and the third circuit erred when it determined that limiting defense counsel cross-examination in an effort-to impeach the State's witness did not violate Petitioner's Sixth Amendment to confront the witness against him?

## TABLE OF CONTENTS

	<u>Page No.</u>
QUESTIONS PRESENTED.....	ii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	2
STATEMENT OF FACTS.....	3
REASONS FOR GRANTING THE PETITION:	
<u>POINT I:</u> THE DISTRICT COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM THAT THE TRIAL COURT PERMITTED THE JURY TO HEAR THAT PETITIONER WAS INVOLVED IN ANOTHER CRIME, WHICH VIOLATED RULE 404(B) AND THE THIRD CIRCUIT'S DECISION TO AFFIRM IS LIKEWISE ERRONEOUS.....	13
<u>POINT II:</u> THE DISTRICT COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM THAT HIS RIGHT TO DUE PROCESS AND HIS CONFRONTATION RIGHTS WAS VIOLATED BY THE TRIAL COURT FORECLOSING DEFENSE COUNSEL FROM IMPEACHING THE ALLEGED ACCOMPLICE KEITH MERCER, ABOUT HIS INVOLVEMENT WITH DRUGS AT THE TIME OF THE BARNEGAT SHOOTING, AND THE THIRD CIRCUIT'S DECISION TO AFFIRM IS LIKEWISE ERRONEOUS.....	16
<u>POINT III:</u> THE DISTRICT COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM THAT HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS VIOLATED BY THE TRIAL COURT WHEN THE TRIAL COURT PROVIDED AN INSUFFICIENT ACCOMPLICE LIABILITY CHARGE TO THE JURY, AND THE THIRD CIRCUIT'S DECISION TO AFFIRM IS LIKEWISE ERRONEOUS.....	22
CONCLUSION.....	24

## TABLE OF AUTHORITIES

	<u>Page No.</u>
<b><u>CASES</u></b>	
<u>Alford v. United States</u> , 282 U.S. 687, 51 S.Ct 218, 75 L.Ed 624 (1931).....	18
<u>Butler v. Johnson</u> , No. 16-8258 (BRM) (May 11, 2018)....	10
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S.Ct 1105 (1974).....	19, 18
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 16 S.Ct 1431, 89 L.Ed.2d 674 (1986).....	19
<u>Henry v. Speckard</u> , 22 F.3d 1209 (2nd Cir.).....	20
<u>Slack v. McDaniel</u> , 529 U.S. 473, 146 L Ed 2d 542, 120 S.Ct 1595.....	15, 21
<u>State v. Bielkiewicz</u> , 267 N.J. Super 520 (App. Div. 1993). .	22
<u>State v. Fortin</u> , 162 N.J. 517 (2000).....	13
<u>State v. Garfole</u> , 76 N.J. 445 (1978).....	16
<u>State v. Harris</u> , 156 N.J. 122 (1998).....	16
<u>State v. Reldan</u> , 185 N.J. Super 494 (App. Div.), certif. denied 91 N.J. 543 (1982).....	13
<u>State v. Savage</u> , 72 N.J. 374 (2002).....	22
<u>State v. Stevens</u> , 115 N.J. 289 (1989).....	13
<u>United States v. Foster</u> , 986 F.2d 541 (D.C. Cir. 1993). .	20
<u>United States v. Lo</u> , 231 F.3d 471 (9th Cir. 2000).....	19
<u>United States v. Phillips</u> , 599 F.2d 134 (6th Cir. 1979). .	14
<u>Wilkerson v. Cain</u> , 233 F.3d 886 (5th Cir. 2000).....	19
<b><u>STATUTES</u></b>	
<u>28 U.S.C. §1254(1)</u> .....	1

**OPINIONS BELOW**

The United States District Court of New Jersey denied petitioner's habeas corpus in an opinion on May 11, 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 January 22, 2019, denying petitioner's petition for a rehearing En Banc. (**See Appendix - Ex-29**)

**JURISDICTION**

The Third Circuit entered its order denying an application for a certificate of appealability, which served as the court's judgment, on November 14, 2018. Thereafter, on January 22, 2019, the Third Circuit denied a timely petition for rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

## CONSTITUTIONAL PROVISION INVOLVED

### Amendment 6

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 been 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 defence.

### STATEMENT OF FACTS

The Petitioner was charged by an Ocean County, New Jersey, grand jury with the following offenses: conspiracy to commit murder (Count 1), conspiracy (Count 2), (two counts) of murder (Counts 3 & 4), (two counts) of felony murder (Counts 7 & 8), (two counts) of robbery (Counts 9 & 10), possession of a weapon for an unlawful purpose (Count 11), possession of a weapon (Count 13), (two counts) of 2nd degree burglary (Counts 15 & 16), burglary (Count 17), certain persons (Count 18).

The killings of the two victims in this matter were discovered the morning after they allegedly occurred. Christine Staton, a long-time employee of Jersey Central Power & Light, failed to appear for work. Fellow Employees became concerned and drove to Staton's condominium to check on her. They found the condominium ransacked and upstairs, found Ms. Staton and her son found dead.

The crime scene was dusted for fingerprints and other physical evidence that might identify the killer, but no suspects were identified. Mr. Michael was a known drug dealer in the area, but several stashes of cocaine were about the condominium.

The police interviewed Heather Ballman, Mr. Michael's long-time girlfriend and the mother of his children. On the day in question, Ballman saw Michael speaking on his cell phone in the morning. Later, Michael was hanging out with his friend in Ballman's apartment. Around 10:00 p.m., Michael was again speaking on his cell phone, discussing meeting somebody. Michael then asked Ballman to drive him to Country Farms around 10:45

p.m. Michael beeped the horn and exited the car to meet somebody who had pulled up in another car. Ballman observed a black man, somewhat shorter than Michael wearing a black scull or ski cap and was driving a dark colored car with Virginia plates. Michael then told Ballman to leave.

The police obtained subscriber information from Michael's cell phone had traced the last call to a phone owned by Shawnta Watkins in New York. Two detectives then traveled to the Bronx where Watkins lived and within five minutes, they observed a black Lexus with Virginia plates driving by. At trial Detective Hayes claimed that the Petitioner was the driver of the vehicle.

The police then interviewed Watkins and learned that she had purchased the cell phone for her sister Janyce Watkins. The police then sought out Janyce and arranged for her to come to a Bronx police station. While waiting for Watkins to arrive, police again observed the black Lexus pulling around the corner from the precinct. Police then stopped the Lexus and approached the driver who was identified as the Petitioner. The Petitioner could not produce a license so he was arrested and brought into the station for questioning.

The Petitioner said that he was Janyce Watkins' boyfriend and that he resided in the Bronx with members of his family. The Lexus was registered to a Courtney Grierson. The Petitioner could not account for his whereabouts on the night of the Barnegat shootings but he denied any involvement in the crimes.

However, the State's theory of this matter was that not only was the Petitioner involved in the crimes but had masterminded

them. The State claimed that the Petitioner, as the mastermind, an codefendant Gillespie, as the actual shooter, had committed the robbery and murders of Michael and his mother as part of Petitioner's larger plan to rob drug dealers.

Law enforcement obtained information from Janyce that implicated the Petitioner an Gillespie and the police also obtained an engagement ring that Janyce claimed the Petitioner had given her on the night in question. The State claimed that the ring had been taken from the victim Staton on the night of her murder.

The State relied heavily on the testimony of Keith Mercer, a.k.a. Shlomo, at trial because there was little physical evidence to support a conviction against the Petitioner. Mercer admitted to participating in the offenses but agreed to testify against the Petitioner an Gillespie in exchange for a lesser sentence. Mercer was a former drug dealer who had a long criminal history dating back to 1982.

In 2000, after Mercer was released from prison, he claimed that he began working construction. In May or June of 2000, Mercer came in contact with the Petitioner who he described as an associate he knew as "Shaft." Mercer claimed that he and the Petitioner had a few meetings over the next few months but did not discuss illegal activity. By August of that year, Mercer claimed that he met again with the Petitioner who asked Mercer if he knew any drug dealers whom Petitioner could rob. Mercer claimed to have provided no targets. A couple of months later,

Mercer told the Petitioner of a possible target in North Carolina, but Mercer later claimed that it was a false lead.

Mercer and the Petitioner were alleged to have met again that same month an the Petitioner was driving a black Lexus and was with a girl named Janyce. During the meeting, Mercer claimed that the Petitioner continued to ask for possible targets.

At a subsequent meeting, Mercer claimed that the Petitioner told him about a planned robbery in a Bronx barbershop where marijuana was being sold. Mercer agreed to participate. Mercer alleged that the Petitioner picked him up in Brooklyn and drove to the area of the barbershop. They then met up with Mr. Gillispie an discussed the heist while in the Petitioner's Lexus. Mercer and Gillespie were provided guns an then the two entered the barbershop and began the robbery. Mercer described the Petitioner as the mastermind of the crime and claimed that the Petitioner was outside while observing the robbery.

While in the barbershop, Mercer said that gunshots rang out an he saw Gillespie shooting people. Gillespie an Mercer then ran from the barbershop and were picked up in the Lexus around the corner. The Petitioner then allegedly was angry at Gillespie for shooting.

Between November 9 and November 28, Mercer did not see the Petitioner but said he spoke on the phone with the Petitioner and Janyce Watkins.

On November 28, Mercer claimed to have met the Petitioner in Brooklyn. The Petitioner then asked Mercer to drive him to New

Jersey in order to sell weapons there. Mercer claims that the Petitioner talked Gillespie an Mercer into going.

They then proceeded to New Jersey in the Petitioner's Lexus. Gillespie allegedly rode in a second vehicle with a fourth individual who Mercer did not know an was not identified at any point. Once in Barnegat, a car pule up next to the Lexus and a "white kid" emerged. They then proceeded to Country Farms an met up with Lonnell Michael. Michael then got into the Lexus an they proceeded to Michael's residence so that Michael could retrieve money for the weapons.

Michael then allegedly entered his residence and the Petitioner loaded the guns they had brought with them and gave one to Gillespie and kept one for himself. Once Michael emerged again, the men jumped him an held him at gunpoint.

They then entered the condominium and saw Michael's mother on the staircase. Once in the upstairs, the Petitioner and Gillespie demanded to know where Michael kept his money. Michael pleaded for them to take his money and leave. Mercer then was directed to tie up the victims. At some point during the incident, Gillespie and the Petitioner got into an argument and began pointing guns at each other. Once this incident calmed down Gillespie retrieved a knife. Gillespie then told Michael that if he did not want to disclose the location of the money, then Michael was going to sit there an watch his mother die. Gillespie then slit Christine Staton's throat while the Petitioner turned Michael's head an forced him to watch.

The Petitioner and Mercer prepared to leave when Gillespie said that they cannot the victims in that manner. Gillespie was about to shoot the victims when the Petitioner allegedly told Gillespie to use a pillow to muffle the sound of the gunshots. Gillespie then use a pillow and shot and killed both Michael an Staton.

Mercer claimed that he, the Petitioner, and Gillespie split the money and the Petitioner and Gillespie each received one or two rings.

During his testimony, Mercer portrayed the Petitioner as the mastermind but admitted to down playing his role and having lied about main things, including failing to tell the police that he had stuck a gun in Michael's back. Mercer also admitted that the first time he spoke with police he told bold-face lies.

New Jersey authorities were not aware of Mercer's involvement in the Bronx shooting. Based on Mercer's initial statements about the Barnegat crime, the State accepted his agreement to plead guilty to only conspiracy to commit robbery for a maximum sentence of 20 years. It was only when the State learned of his involvement in the Bronx shootings that Mercer's deal was renegotiated to aggravated manslaughter and he then was exposed to a maximum exposure of thirty years. Mercer was never charged for his alleged role in the Bronx shooting.

Mercer's credibility was suspect. He had admitted to telling the truth because he was facing murder charges is he had not. Mercer was seeking a deal when he gave a statement to the detectives. Mercer also understood his testimony at the

Petitioner's trial might play a part in the sentence he ultimately receive. Mercer's credibility in this matter was dependent upon his portrayal of himself as a "third man" in the crimes and that the Petitioner was the mastermind. In order to bolster this view to the jury, Mercer claimed that he was not involved in drug dealing after his release from prison in March 2000 up until the time of the Barnegat shootings. Mercer also claimed to know little about South Jersey where the shooting took place.

In attempting to attack the credibility of Mercer, defense counsel contended that Mercer's assertions were lies. Defense counsel attempted to confront Mercer that at the time of the Barnegat shooting, he was involved in drug dealing and discredit his assertions that he was merely a "third man" in the crimes.

To support the defense theory and impeach the State's primary witness, defense counsel asked on cross-examination if Mercer knew someone name "Shaka" in Lakewood who was dealing marijuana. Mercer admitted knowing Shaka but denied Shaka had been selling pot for him. However, before defense counsel could pursue this line of questioning in this area, the State objected and the trial court sustained the objection. The trial court then precluded the defense from any further inquiry into this issue. Defense counsel then advised the court that the questioning was part of the impeachment of Mercer's claim that he was not involved in drug activity at the time of the shootings. It was part of exposing Mercer's apparent comment to Petitioner that "Shaka" had been dealing drugs for Mercer in Lakewood and

had "ripped off" Mercer. Defense counsel told the court that its good faith basis was also base on information receive from the Petitioner regarding this issue.

The Petitioner had told defense counsel that on the day in question, he had loaned his car to Mercer to visit his friend "Shaka" in Lakewood to collect money. The Petitioner also advised counsel that Janyce Watkins and her two friends were connected to Shaka an that they were strip dancers and Mr. Mercer would protect them and take them to strip clubs.

Defense counsel never effectively brought out this information in cross-examination, because there was no further basis to ask question in the area, the court prohibited defense counsel from pursuing this line of questioning.

In addition to Mercer, the State also produced other witnesses including Janyce Watkins. Ms. Watkins also had holes in her story including the fact that she never initially mentioned Mercer's involvement in the Bronx barbershop shootings.

The State also attempted to bolster the testimony of Mercer with the testimony of Mr. Johnson. However, Johnson never identified the Petitioner.

The State also was permitted to introduce evidence, through Mercer, that the Petitioner participated in the Bronx shootings.

This evidence was introduced pursuant to Rule 404(b) and was later the subject of appeals in the courts. In this regard, Gillespie admitted to committing both the Bronx an Barnegat shootings an even requested the death penalty. However, he only claimed to have committed the Bronx shooting with an "associate."

The only other major witness called by the State was Kreybig. Kreybig was an admitted drug dealer. However, like the other witnesses, his testimony was suspect. He admitted telling the police "total lies" about his knowledge of the events in question. Notably, shortly before the shootings, three phone calls had been placed from Kreybig's cell phone to Michael's cell phone. Kreybig lied about these calls to the police, initially claiming he had called Michael to get beer. This was a "huge lie" Kreybig admitted at trial.

Defense counsel argued that the lack of credibility of the State's witnesses undercut the State's case and created reasonable doubt. Despite defense counsel's assertions, the limited confrontation of the witnesses on cross-examination did not convince the jury and the jury found the Petitioner guilty.

Thereafter on September 16, 2005, the petitioner was sentenced to two consecutive life terms each with a thirty years of parole ineligibility.

On October 26, 2016, petitioner filed a petition for a writ of habeas corpus. The petition raised six grounds: **GROUND ONE:** Permitting the Jury to Hear that Petitioner was Involved in a Bronx Barbershop Robbery Violated Evidence Rule 404(b) an Deprived Petitioner of His Right to a Fair Trial on the Charges Below; **GROUND TWO:** Even if the Other-Crimes Evidence was Admissible the Jury Instruction on How to Use Evidence was Insufficient and Prejudicial; **GROUND THREE:** The Accomplice Liability Charge was Insufficient because if Failed to Tell the jury How the Concept related to the Lesser-Included Offenses of

Aggravated and Reckless Manslaughter; **GROUND FOUR:** The Trial Court Erred and Violated Petitioner's State and Federal Confrontation Rights in Foreclosing Defense Counsel from Impeaching Keith Mercer, the Alleged Accomplice an Primary State Witness about His Involvement with Drugs at the Time of the Barnegat Shooting; **GROUND FIVE:** Petitioner was Denied His Constitutional Right to Effective Assistance of Counsel Due to the Failure of Trial Counsel to Effective Confront and Cross-Examine the State's Primary Witnesses; **GROUND SIX:** Petitioner was Denied His Constitutional Right to Effective Assistance of Counsel Due to the Failure of Trial Counsel to File a Motion to Prohibit the Use of or Request a Limiting Instruction on the State's Prodigious Use of the Defendant's Alleged Street Name "Shaft."

On May 11, 2018, the district court denied the petition for a writ of habeas corpus. Butler v. Johnson, No. 16-8258 (BRM), slip opinion (May 11, 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 January 22, 2019, 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 the Trial Court Permitted the Jury to Hear that Petitioner was Involved in Another Crime, which Violated Rule 404(b) and the Third Circuit's Decision to Affirm is Likewise Erroneous.

Evidence of defendant's prior crimes or wrongdoing is generally inadmissible. Such evidence is likely to impair the defendant's right to have the jury decide his guilt or innocence based solely on the relevant evidence presented at trial, free of the prejudice that proof of prior wrongdoing would likely inject into the proceeding. State v. Stevens, 115 N.J. 289, 302 (1989); State v. Reldan, 185 N.J. Super 494, 501-02 (App. Div.), certif. denied 91 N.J. 543 (1982).

In the Petitioner's case, the trial court erred in permitting the jury to hear that the Petitioner was allegedly involved in the Bronx barbershop robbery and shooting. The trial court admitted the evidence primarily as relevant to identity. However, In State v. Fortin, 162 N.J. 517, 532 (2000) it states:

"[T]he prior criminal activity with which defendant is identified must be so nearly identical in method as to earmark the crime as defendant handiwork. The conduct in question must be unusual and distinctive so as to be like sufficient, and there must be proof of sufficient facts in both crimes to establish an unusual pattern."

The Bronx barbershop robbery and shooting did not satisfy that rigorous standard because it did not uniquely match the Barnegat incident. The only match was Mercer's claim that both

crimes arose from the attempted robbery of drug dealers, but they really shared no similar objective features. There was not proof of sufficient objective facts in both crimes to establish an unusual pattern identifying the Petitioner:

Police claimed that both crimes involved targeting drug dealers, but several cocaine stashes were found remaining inside Michael's condominium in Barnegat, and the Bronx incident occurred inside a public barbershop, not a place obviously connected to a drug dealer; the State introduced insufficient evidence to make any further connection between the crimes other than to show the Petitioner may also have been involved in this prior Bronx incident;

The Bronx incident involved two actors; the Barnegat crime involved three;

The Bronx crime occurred in New York; the Barnegat crime occurred miles away in New Jersey.

The Bronx crime appeared to involve (even according to Mercer's portrayal of events unplanned, random shooting of the persons inside the shop; the Barnegat crime (again according to Mercer involved planned, deliberate, execution-style killings.

Therefore, there was insufficient objective characteristics of the two crimes that bore the earmark of signature crimes committed by the Petitioner.

In United States v. Phillips, 599 F.2d 134 (6th Cir. 1979), the jury had to decide whether defendant was the third man involved in a bank robbery. The trial court permitted an unindicted accomplice to testify that the defendant had also participated in three other bank robberies. The Court of Appeals

held this was error and had deprived the defendant of a fair trial on the specific robbery at issue:

Something more than repeated performance of the same class of crimes is required in evidencing a "design" or "plan" which, if proved, may raise the inference that the accused was the perpetrator of the crime in question . . . Here there was only general testimony that defendant had committed other bank robberies . . . [there was] no common plan or distinctive pattern, no "signature," not even a similarity.

In the Present case, the Bronx barbershop evidence did not contain any of those signature characteristics. It amounted to nothing more than general testimony that petitioner may have committed other robberies and that he therefore must also be guilty of the Barnegat crimes at issue.

Admitting the evidence violated the Petitioner's right to a fair trial. In rejecting this claim, the district court gave no analysis for its conclusion that petitioner had failed to establish that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. As such, reasonable jurists could disagree with the district court's decision. Slack v. McDaniel, supra.

## Point II

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Right to Due Process and His Confrontation Rights was Violated by the Trial Court Foreclosing Defense Counsel from Impeaching the Alleged Accomplice Keith Mercer, about His Involvement with Drugs at the Time of the Barnegat Shooting, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

"An accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made." State v. Garfole, 76 N.J. 445, 452-53 (1978) This evidences evidence of bias or improper motivation on the part of a primary State witness, which is relevant to the witness's credibility and is exculpatory evidence that a defendant has the right to present to the jury. See also, State v. Harris, 156 N.J. 122, 177 (1998) ("[a] defendant in a criminal trial has a Sixth Amendment right to offer any evidence that refutes guilt or bolsters a claim of innocence."

Also in Garfole, the New Jersey Supreme Court held that the determination of admissibility of other crimes evidence introduced by a defendant in his own defense must be evaluated by the standard of relevance to guilt or innocence, rather than by the stricter standards governing the State's attempt to use such evidence:

We are of the view . . . that a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State when such evidence is used incriminately. As indicated above,

other-crimes evidence . . . when defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility . . . The application of a modified requirement of relevancy to the proffer by a defendant is additionally justified by the consideration that the defendant need only engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt.

It is well established that a defendant may use similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him.

The trial court violated these principles below in precluding defense counsel from questioning Mercer about his involvement in drug dealing at the time in question. One of the defense's main thrusts to the jury was that Mercer, the primary State witness pointing to the Petitioner, was really a main culprit in the Barnegat crimes. That Mercer had in fact performed the very role he'd now ascribed to the Petitioner, substituting the Petitioner in his place to absolve himself from even more serious charges.

The defense strategy was in direct response to the State's central theory of the case that Mercer was simply the "third man" to what was a plan masterminded by the Petitioner. In his direct testimony, Mercer claimed that he was not involved in dealing drugs after his release from prison in March 2000 and leading up to the time of the Barnegat shootings. Mercer claimed he worked in construction at that time, and that he'd only became involved in the events in question at the Petitioner's continual urging

during the prior months. Mercer claimed to know little about South Jersey (where the shootings took place other than gambling in Atlantic City, and he denied being involved in drug dealing at the time in question.

The Petitioner and his counsel had the right to impeach Mercer in this regard. The defense contended that Mercer was actually heavily involved in drug dealing at the time of the Barnegat shootings. The questions the defense attempted to ask Mercer were designed to probe this area of credibility of the State's primary witness and to support the defense theory that Mercer, in fact, had done many of the things he now ascribed to the Petitioner (or at least raise reasonable doubt as to the State's theory of the case. Indeed, Mercer admitted knowing Shaka though he denied that Shaka had sold drugs for him.

The trial court abused its discretion and violated the Petitioner's confrontation rights by precluding the defense from pursuing this questioning further. Counsel advised the court that the questioning was designed to impeach Mercer's claim that he wasn't involved in drug activity at the time of the shootings.

It was part of exposing Mercer's apparent comment to Petitioner that "Shaka" had been dealing drugs for Mercer in Lakewood and had "ripped off" Mercer. Though counsel did not know precisely how this area of cross-examination might develop, it was an appropriate and vital area to the defense that the court should have been able to explore.

In Alford v. United States, 282 U.S. 687, 694, 51 S.Ct 218, 22, 75 L.Ed 624 (1931), for example, the Supreme Court found the

trial court abused its discretion by restricting exploratory cross-examination regarding the residence of a prosecution witness whom defendant alleged was in federal custody and thus motivated to testify against him. In reversing the lower court, the Court explained, "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop." Id. at 692.

Though trial courts may limit cross-examination that completely lacks a proper foundation or is unduly speculative, see Delaware v. Van Arsdall, 475 U.S. 673, 679, 16 S.Ct 1431, 1435, 89 L.Ed.2d 674 (1986); United States v. Lo, 231 F.3d 471, 482-483 (9th Cir. 2000), the court's discretion to limit is not boundless. Rather, any limits imposed must be considered in light of the particular witness being cross-examined and the extent to which the defendant's confrontation rights are being curtailed. When cross-examination of the prosecution's key witness is truncated - as it was below - a defendant's right to cross-examination may be infringed. See e.g., Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct 1105, 1111 (1974) (where accuracy and truthfulness of witness' testimony were "key elements in the State's case against [defendant]," trial court's refusal to allow defendant to cross-examine key prosecution witness regarding bias and prejudice violated Sixth Amendment rights); Wilkerson v. Cain, 233 F.3d 886, 891 (5th Cir. 2000) ("the imperative of protecting a defendant's right to effective cross-examination is even more critical where, as here, the witness is crucial to the

prosecution's case"); United States v. Foster, 986 F.2d 541, 543 (D.C. Cir. 1993) ("The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment, to cross-examine the witness").

In the Petitioner's case at bar, the trial court failed to abide by those fundamental principles. In precluding the entire area of inquiry into Mercer's knowledge of New Jersey and possible drug dealing in the area, the court overlooked that Mercer was the primary State witness against the Petitioner. He was central to the prosecution's entire case. The jury was entitled to observe this witness's demeanor when confronted with questions regarding his involvement with Shaka and familiarity with New Jersey. See Henry v. Speckard, 22 F.3d 1209, 1215 (2nd Cir.) (explaining "witness may well answer bias-probing questions in the negative; but the matter of whether her answer should be believed or disbelieved is within the sole province of the jury"), cert. denied, 513 U.S. 1029, 115 S.Ct 606, 13 L.Ed.2d 517 (1994); Davis, 415 U.S. at 316, 94 S.Ct at 1110 ("The partiality of a witness is subject to exploration at trial, and always relevant as discrediting the witness and affecting the weight of his testimony").

Yet, the court completely precluded defense counsel from inquiring into Mercer's alleged drug involvement. This prevented counsel from testing Mercer's now insulated claim on direct examination that he was not involved in drug activity at the time in question.

In rejecting this claim, the district court gave no analysis for its conclusion that petitioner had failed to establish that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. As such, reasonable jurists could disagree with the district court's decision. Slack v. McDaniel, supra.

### Point III

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Right to Due Process and a Fair Trial was Violated by the Trial Court when the Trial Court Provided an Insufficient Accomplice Liability Charge to the Jury, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

Gillispie was the actual shooter, but the State claimed that the Petitioner was equally guilty of Staton's and Michael's murders because the Petitioner shared the criminal intent required for purposeful or knowing murder. When prosecution is based on the theory that the Petitioner acted as an accomplice, the trial court must "provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 72 N.J. 374, 388 (2002).

When the jury is charged as to accomplice liability in the context of lesser-included offenses, such circumstances require the court to carefully impart to the jury the distinctions between the specific intent required for the grades of the offenses. State v. Bielkiewicz, 267 N.J. Super 520, 528 (App. Div. 1993). The court must tailor the accomplice liability charge to the case's particular facts, Savage, 172 N.J. at 389, and instruct on the differences in culpability required for the grades of crime. It must remind the jury that the principal might be guilty of one crime and the accomplice guilty of a lesser one based on differences in their mental status and purposes.

In its charge on accomplice liability, the trial court told the jury in general terms that Gillispie could be guilty of "the crimes alleged in the indictment" while the Petitioner's intent might have only been to "promote or facilitate the commission of the lesser-included offense." But the court did not relate this general concept to the specific offenses the jury had to consider (murder and aggravated and reckless manslaughter) or to the facts presented during trial.

The trial court did not discuss the accomplice liability concept when it charged the jury on the aggravated and reckless manslaughter offenses. The judge did not incorporate the accomplice liability principles in discussing these lesser offenses. Rather, the court discussed these lesser offenses as if the Petitioner, not Gillispie, was the actor. The only reference that the court made to the accomplice liability principles discussed earlier was telling the jury that the law of accomplice liability applies to all three of those. This brief reference did not explain, in carefully tailored factual terms, how the Petitioner could be guilty of the lesser offenses as an accomplice to Gillispie's physical shooting of the victims even if the jury believed that Gillispie himself was guilty of purposeful murder. Therefore, these deficiencies in the jury instructions affected the central accomplice liability principles on which the State's entire theory of events rested.

**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 10, 2019

Gregory Butler  
Gregory Butler