

19-8396

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

ROBERT HILL,

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

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether the district court and the third circuit erred in refusing to issue a certificate of appealability when it determined the Conflict of Interest Between the Trial Judge and the Prosecutor did not violate the Petitioner's due process right under the Fourteenth Amendment?
2. Whether the Ineffective Assistance of Trial Counsel 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 the Trial Court Permitted the Co-Defendant to Testify while Appearing in Prison Clothing did not violate Petitioner's Fourteenth Amendment to Due Process and a Fair Trial?
4. Whether the Trial Court Prejudicial accomplice and Vicarious Liability jury instructions was so erroneous that it violated Petitioner's due process and render the trial fundamentally unfair?
5. Whether the district court and the third circuit erred when it determined that the Trial Court Precluded the Petitioner His Right to Be Present at Sidebar Conferences During the Jury Voir Dire?

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The United States District Court of New Jersey denied petitioner's habeas corpus in an opinion on September 25, 2018.

(See Appendix - Ex-1)

The United States Court Of Appeals for the Third Circuit filed an order on April 5, 2019, denying petitioner's petition for a Certificate of Appealability. **(See Appendix - Ex 37)**

The United States Court Of Appeals for the Third Circuit filed an order on May 7, 2019, denying petitioner's petition for a rehearing En Banc. **(See Appendix - Ex-38)**

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 May 7, 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

At approximately 1:30 p.m. on May 18, 2002, the Petitioner knocked "heavily" on the door of his neighbor, John Winstanley. After observing the Petitioner was sweating, breathing heavily, and had mucous coming out of his nose, Winstanley repeatedly asked the Petitioner "what the problem was or what's the matter," but the Petitioner did not "reply at all." Because he was unable to get any information from the Petitioner, Winstanley told his daughter to dial 9-1-1. As the Petitioner started to leave, Winstanley told him that help was on the way, at which point the Petitioner dropped to his knees and said, "She's dead. Mother F'er." Winstanley understood that the Petitioner was referring to Gwendolyn Boyd, his fiancée? With whom he resided at 1854 Moore Road. Winstanley stood in his driveway watching as the Petitioner returned to his residence.

Minutes later, Officer Kevin Geoghegan of the Dover Township Police Department arrived at the scene. As he walked up to the front door at 1854 Moore Road he heard a male voice screaming and crying out. Geoghegan opened the screen door and began to enter through the partially-opened interior wooden door when he realized there was a female body clad only in panties lying face-up in the doorway. He quickly determined the victim was cold and had no pulse. Geoghegan then observed the Petitioner sitting on the steps leading to the first floor of the split-level home. The Petitioner was distraught, yelling "[w]ho could have done this? Why did this happen?"

Shortly thereafter, Edward Spahr of the Dover Township Police Department arrived, and it was determined the victim was forty-year-old Gwendolyn Boyd. Although the police officers attempted to elicit information from the Petitioner, he was extremely agitated, and, for the most part, "he was not forthcoming with direct answers to direct simple questions."

As more officers arrived at the scene, Geoghegan and Spahr asked the Petitioner if he would accompany them to the police station to give a statement, and he agreed to do so. Spahr testified that as they left the house, the Petitioner "was more concerned with looking out the window of the door than actually looking down at his fiance? Detective James Pissott, of the Ocean County Prosecutor's Office, who was also present in the house as the Petitioner was leaving, recalled the Petitioner stating, "I don't want any cameras out there," and "Damn, why is [sic] there so many cops out there?"

Following the Petitioner's departure, Pissott noticed a bungee cord near Boyd's body, as well as a rubber glove tip under one of Boyd's legs and another one next to her body. He also examined the body and noted there was a ligature mark on the neck. Dr. Hydow Park, the pathologist who performed an autopsy on Boyd's body, subsequently confirmed that she died from "ligature strangulation." At trial, Park would not give an estimated time of death, but he concluded Boyd had "been dead at least six hours, and probably twelve hours" when her body was discovered.

At the police station, Sergeant Vincent Frulio of the Ocean County Prosecutor's Office and another detective interviewed the Petitioner. The Petitioner stated he and Boyd had been together for two years, and he had moved into her Toms River home in January 2001. He related he had been unemployed since May 5, 2002, and he said he was trying to start an on-line business. He acknowledged he regularly used Boyd's Mitsubishi Montero because he did not own a car, and his cell phone was registered to Boyd.

The Petitioner told the police he had driven Gwendolyn Boyd to the Newark school where she worked as a second-grade teacher on May 17, 2002, and then spent most of the day in the company of his girlfriend, Nadia Bryant. He later picked Boyd up around 3:30 p.m. and drove home after stopping briefly at a fast food restaurant to pick up some food for Boyd. He remained at the house with Boyd (except for a brief trip to a local restaurant to pick up some take-out food) until approximately 10:00 p.m., when he left to go visit friends in North Jersey.

During the trip north, the Petitioner placed numerous calls to Michelle Simmons, another one of his girlfriends. The Petitioner told the police he drove to various locations in Jersey City and East Orange in the hopes of seeing some friends, but he was unable to provide details of his whereabouts. Eventually, at approximately 2:30 a.m. on May 18, 2002, the Petitioner went to Nadia Bryant's apartment in East Orange where he spent the rest of the night.

The Petitioner consented to a search of Boyd's Montero, but he asked to be present when the vehicle was searched. Accordingly, the police took the Petitioner to a motel for the night and then picked him up the next morning and drove him to 1854 Moore Road. Upon arriving at the house, Sergeant Frulio noticed the Petitioner was shaking, and he appeared extremely nervous. During the search, the Petitioner "became visibly upset" when the police told him he "would not be taking possession of the vehicle or have access to the residence" when the search was completed. At trial, Mitchell testified the Petitioner "was shocked" when he was told he would not have access to Boyd's vehicle, and the Petitioner stated: "What am I going to do now?"

When the search of the vehicle was completed, Mitchell asked the Petitioner if he would return to the police station to speak with him. The Petitioner agreed. During this interview, Detective Mitchell again reviewed the Petitioner's activities on May 17 and 18, 2002. The Petitioner told Mitchell that before he left home on the night of the 17th, he had received a phone call from Omar Byrd, the house painter he and Boyd had hired, who had advised him that he would be unable to make it the following day due to the weather. The Petitioner also told Mitchell that he stayed with Nadia Bryant until about noon on May 18, and when he tried to telephone Boyd while he was driving home, he got no answer. In addition, the Petitioner mentioned that after he returned from Winstanley's house, he touched Boyd and picked up

the bungee cord lying nearby. At the end of the interview, the Petitioner was given twenty dollars and driven to the Point Pleasant Train Station, so he could take the train to his mother's house in Roselle.

Over the course of the next few days, police determined there were no broken windows in the house and no sign of a forced entry, although a few windows were open. They found no fingerprints in the house other than the Petitioner's and Boyd's.

They submitted numerous items, including the two rubber glove fingertips, to the police lab for DNA analysis. They recorded the messages on Boyd's telephone answering machine, which ultimately turned out to be inaudible, and they confirmed Gwendolyn Boyd owned the home alone, and she died intestate. They also spoke to Michelle Simmons, Nadia Bryant, and Omar Byrd. During the course of their investigation the police discovered a number of Boyd's personal belongings, including her vehicle registration, Blue Cross/Blue Shield card, a pay-stub and a credit union statement, in a dumpster on Crane Street in Newark, near the home of one of the Petitioner's former girlfriends with whom he was still in contact.

Based upon a review of the Petitioner's cell phone records, the police learned that a call had been placed to Kadisha Little on the night of May 17. They subsequently learned that Little was the girlfriend of one Michael Scott, and they interviewed Scott on May 24, 2002.

The Petitioner was not arrested for the murder of Boyd until July 2003. The DNA results from the glove tips did not come back until March 2004. The DNA of Gwendolyn Boyd and Michael Scott, but not the Petitioner, was identified in the fingertips of the rubber gloves. At that time Scott was also arrested for the murder of Gwendolyn Boyd. Following his arrest, Scott gave several statements to the police.

At trial, Scott testified that sometime prior to May 2002, the Petitioner told him he had two girlfriends, who were both pregnant, and he asked Scott to help him "get rid of one of them." According to Scott, at approximately 10:00 p.m. on May 17, 2002, the Petitioner telephoned him and said: "Well, today is the day. I'm tired. Got to get rid of got to do this today." The Petitioner subsequently picked Scott up at Scott's girlfriend's apartment on Crane Street in Newark. Scott's trial testimony included the following:

Q. Where did you go?

A. First we went to a gas station on Route 22. And then we went to Toms River.

Q. Did you have any conversation on the way down to Toms River?

A. No.

.

Q. Why were you going to Toms River?

A. To get rid of his problem.

Q. Did you arrive down at the house you just identified?

A. Yes.

Q. What happened when you got there?

A. I sat out in the truck. He pulled up on the side of the house. I sat in the truck. He went inside through a back door. And when I came in after a light came on, I heard rumbling and bumbling, stuff hitting the floor, whatever. I came in and I went upstairs.

Q. And what did you see when you got upstairs?

A. I came upstairs I seen Gwendolyn Boyd's body.

Q. Where was it?

A. Laying on the bed.

Q. Where was the Petitioner?

A. Standing in the room.

Q. What did he say to you?

A. He didn't say anything much. He just said, here, take these. Help me move it.

Q. Here, take what?

A. Take these gloves and help me.

Q. What kind of gloves are you talking about?

A. Latex rubber gloves.

Q. And what did you do with the gloves.

A. I put the gloves on.

Q. And did you help move the body?

A. Yes.

Q. Did he tell you where the body was being moved to?

A. No.

Q. How did you grab the body? By the way, did anybody help you move the body?

A. Yes, he did.

Q. Anybody else in the house other than the two of you and the victim?

A. No.

Q. And how did you grab the body?

A. I grabbed the body by the upper torso.

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Q. You grabbed the upper torso. What does he do?

A. He grabs her down by the legs and stuff. And we start carrying her to the stairs.

Q. And how far did you get?

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A. The first four or five stairs that's right there on the landing. My back gave out.

Q. When you say your back gave out, what's the deal with your back?

A. I have a chipped disk in the lower back.

.

Q. What did you tell him when your back gave out?

A. My back gave out. That's it. I'm done.

Q. Would you have physically been able to help move her any more?

A. No, sir.

Q. What did the Petitioner do when you told him that?

A. He didn't do nothing. He walked back upstairs and proceeded to get her purse and whatever. And put a red bag by the front door.

Q. How about the gloves, what did you do with them?

A. I took them off and gave them to him.

.

Q. Did you get anything out of this for helping him?

A. He gave me \$60 in the house. And he gave me three rings.

Q. What did you do with the rings?

A. I sold them on the street for drugs and cash.

Q. How about the 60 bucks, what did you do with that?

A. When we first got back to Newark, I bought some drugs.

Q. Did you have any conversation on the way back with the Petitioner about

A. At one point, no. And then after I made two phone calls, then I had a conversation with him. A short conversation with him.

.

Q. And tell us about the conversation you had with the Petitioner?

A. I asked him why. He said, I needed to take care of my kids. And that was that. During his testimony, Scott admitted he was a drug dealer, and he was in prison on drug charges and for receiving stolen property. He testified he usually did drugs and drank heavily, and he was high on May 17, 2002. He

admitted he had lied in his original statements to the police, and he conceded his plea agreement with the State limited his maximum sentence to fifteen years in prison. He insisted, though, that he did not kill Gwendolyn Boyd.

Michelle Simmons testified she went to high school with the Petitioner, and they reconnected and began an intimate relationship in September 2001. She was married at the time and was aware that the Petitioner was living in Toms River with Boyd in a house she believed they both owned. According to Simmons, the Petitioner told her his relationship with Boyd was not working out, and he wanted to marry Simmons. The Petitioner told Simmons he wanted to ask Boyd to give him the house so that he and Simmons could move in there together. Because the Petitioner was insistent that he wanted to have children with Simmons, they did not do anything to prevent pregnancy, and every month the Petitioner asked Simmons if she was pregnant.

Nadia Bryant testified she met the Petitioner in 1999, but they did not begin dating until May 2002. She related that the Petitioner told her he had bought a house in Toms River. She confirmed that the Petitioner arrived at her apartment "at about" 3:00 a.m. on May 18, 2002, and he stayed with her through lunchtime.

Omar Byrd, the house painter, testified it was the Petitioner who called him at approximately 8:00 p.m. on May 17, 2002, and canceled his job for May 18.

Although the Petitioner elected not to take the stand, his mother, Catherine McCallum, testified on his behalf that the Petitioner's daughter, from a prior relationship, was due to visit with him in late May 2002. The Petitioner's brother, Derrell McCallum, testified he spoke to Michael Scott sometime prior to May 18, 2002, and Scott told him that Boyd "had nice things in [her] house." According to McCallum, Scott also said "he would rob her" if he had the opportunity. Derrell admitted, however, that he only came forward with this information in April 2004. State v. Hill, No. A-4536-05T4, 2008 N.J. Super. Unpub. LEXIS 2486.

On January 27, 2006, the jury found Petitioner guilty of: (i) first-degree murder; and (ii) second-degree conspiracy to commit murder. On March 28, 2003, Petitioner received a sentence of "life in the custody of the Commissioner of Corrections, subject to the No Early Release Act. The Appellate Division affirmed Petitioner's conviction and sentence on July 28, 2008. The New Jersey Supreme Court denied certification of Petitioner's direct appeal on October 31, 2008.

Petitioner thereafter filed an application for post-conviction relief ("PCR") in the New Jersey Superior Court, Law Division (the "PCR court"). The PCR court held a hearing on Petitioner's motion for post-conviction discovery on January 29, 2010. The PCR court then held a non-evidentiary hearing on the merits of Petitioner's PCR application on March 3, 2010. On April 8, 2010, the PCR court issued an order denying Petitioner's

request for post-conviction relief. That order notes that Petitioner's PCR application was denied for the reasons stated on the record on March 3, 2010, and for the additional reasons detailed in the PCR court's April 8, 2010 written decision appended to its PCR denial order.

Petitioner appealed the PCR court's decision to the Appellate Division. On October 20, 2011, that court ordered a limited remand for the PCR court "to consider [two] certifications of the Petitioner dated [August 19, 2011 in which Petitioner claimed that his legs were shackled during trial in the presence of the jury and that Michael Scott wore prison garb and was shackled when he testified], and whatever other evidence relevant to the issue raised therein that the PCR [c]ourt deems appropriate." The evidence subsequently considered by the PCR court on this issue included certifications from Petitioner, his trial counsel, and the two prosecutors who tried his case. In addition, the PCR court heard testimony from Petitioner and the two prosecutors. On December 19, 2011, the PCR court issued a "Memorandum and Finding of Facts for Appellate Division on [PCR] Remand."

The Appellate Division thereafter issued two separate opinions affirming the denial of Petitioner's PCR petition. It issued the first such opinion on February 1, 2013. State v. Hill, No. A-0201-10T4, 2013 N.J. Super Unpub. LEXIS 226, slip op. In response, Petitioner "moved for reconsideration [of that decision] as he had requested oral argument." State v. Hill, No.

A-0201-10T4, slip op., 2013 N.J. Super Unpub. LEXIS 2151. The Appellate Division granted Petitioner's reconsideration motion and held oral argument in May 2013. On August 29, 2013, the Appellate Division issued its second opinion affirming the denial of Petitioner's PCR petition "for the reasons stated in [its] February 1, 2013 opinion." The New Jersey Supreme Court denied certification of Petitioner's PCR appeal on March 31, 2014.

Petitioner initiated an 2254 action on June 10, 2014. Petitioner filed his amended habeas petition on September 23, 2014. That pleading raises the following points for this Court's review: **GROUND ONE:** Petitioner's Constitutional rights were violated due to the conflict of interest between the trial judge and the prosecutor; **GROUND TWO:** Petitioner was denied effective assistance of counsel where: **(a)** Trial counsel provided ineffective assistance when he informed the jury that he advised the Petitioner not to testify, **(b)** Trial counsel failed to retain a forensic scientist as a defense expert to analyze the rubber glove fingertip with the bungee cord to determine whether the bungee cord caused the glove finger to rip, which would have established that co-defendant Scott committed the murder, **(c)** Trial counsel provided ineffective assistance of counsel by failing to move for a mistrial when Investigator Mitchell Continually spoke to co-defendant Scott during breaks and recesses of his trial testimony, thereby violating the trial court's sequestration order; **GROUND THREE:** The ineffective of Petitioner's trial counsel resulted in a denial of Petitioner's

rights to due process, under the 6th Amendment of the United States Constitution, and Art. 1, para. 10 of the New Jersey State Constitution, because trial counsel failed to call essential witnesses to testify at trial; **GROUND FOUR:** The Petitioner's right to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, para. 1 of the New Jersey Constitution were violated when the trial court permitted the co-defendant to testify in prison clothing and has further adversely affected the result due to the lower court's conduct to dismiss the jury to allow co-defendant to enter and leave the court room to take the stand without being seen by the jury, and also Petitioner's feet were shackled at the defense table which could be seen by the jury; **GROUND FIVE:** The manner in which the jury was charged caused the guilty verdict against the Petitioner to be inevitable, and thus must be reversed; **GROUND SIX:** The Petitioner was denied his right to a fair trial as a result of the trial court's ruling precluding him from being physically present at sidebar conferences during jury voir dire.

Respondents filed their answer on February 5, 2015. Petitioner filed a traverse, i.e., a reply, on April 6, 2015. Petitioner thereafter filed a motion to supplement the record to include an additional argument related to his already-asserted Ground Four claims. The Court granted the Petitioner's motion and considered the newly-raised argument, in addition to all of Petitioner's previously asserted habeas claims.

On September 25, 2018, the district court denied the petition for a writ of habeas corpus. Hill v. D'Ilio, No. 14-3706 (PGS), slip opinion (September 25, 2018). Petitioner filed a timely notice of appeal and a petition for a certificate of appealability (COA).

On April 5, 2019, the Third Circuit Court of Appeals denied the petition for a COA. On May 7, 2019, the Third Circuit Court of Appeals denied a petition for rehearing and rehearing en banc.

Point I

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Conflict of Interest Between the Trial Judge and the Prosecutor did not Violate the Petitioner's due process right under the Fourteenth Amendment and the Third Circuit's Decision to Affirm is Likewise Erroneous.

In Offutt v. United States, 34 U.S. 11, 14, 75 S.Ct 11, 13, 99 L.Ed 11, 16 (1954), "Justice must satisfy the appearance of Justice." To that end judges must refrain from engaging in any conduct which may be hurtful to the judicial system or from sitting in any cases where their objectivity and impartiality may fairly be bought into question.

In State v. Muraski, 6 N.J. Super 36, 38 (App. Div. 1949), The Appellate Division stated:

Next in importance to the duty rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness, and integrity of the judge. . . . Every litigant, including the State, in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge, and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.

In the Petitioner's case, there was a special relationship between the assistant prosecutor Cunningham and trial judge Turnbach. The center of the conflict of interest stems from a law firm created by Judge Turnbach and Charles Starkey. These two attorneys formed the partnership that lasted eleven years, until Judge Turnbach became the Ocean County Prosecutor. Prosecutor

Turnbach hired prosecutor Cunningham in 1976 and was his boss for many years, until Turnbach became a Superior Court Judge.

The evidence to support the Petitioner's claim was the fact that Judge Turnbach's son was hired by the Starkey firm after he completed his clerkship with Judge Citta in 2003.

In addition to the above, prosecutor Cunningham appeared to been negotiating employment with the Starkey firm, because four days after the Petitioner's trial Prosecutor Cunningham retires from the Prosecutor's Office and becomes a partner in the Starkey firm within a couple months, then Judge Turnbach retires and becomes a special counsel to the Starkey firm.

It is apparent and certainly reasonable to believe that Charles Starkey was still close with Judge Turnbach as he hired the Judge's son years earlier. It is also certainly reasonable to conclude that it was the Judge's intent to return to the Starkey firm after his retirement and this fact, coupled with all the above mentioned.

The conflict of interest issue only because all this happened while prosecutor Cunningham was prosecuting the Petitioner for murder before Judge Turnbach.

In an Article by Professor Frank on the disqualification of judges referred to the likelihood that special attorney-judge relationships would increasingly be considered as grounds for disqualification particularly in States where cases may conveniently be transferred to other judges. Frank, Disqualification of Judges, 56 Yale L.J. 605, 618-19 (1947).

Judge Turnbach was the presiding criminal part judge during the Petitioner's trial and there were at least three other criminal part judges (approximately 19 other Superior Court Judges), which the matter could have been transferred. In addition, Judge Turnbach could have transferred the matter to an alternate county for trial. Now, turning to the Prosecutor's Office, there were approximately 34 assistant prosecutor's that could have participated in the trial, yet assistant prosecutor Cunningham was chosen for the case. There is certainly a bona fide appearance of bias to the Petitioner that could have been avoided ever so easily.

In New Jersey Rule of Court 1:12-1 requires a judge to be disqualified on the court's own motion and shall not sit in any matter, "when there is any other reason which might preclude a fair and unbiased hearing and judgment. Or might reasonably lead counsel or the parties to believe so."

In the Petitioner's case, neither the trial judge, nor the prosecutor disclosed the prosecutor's employment negotiations with the trial judge's former law office to defense counsel. Prior to trial, the Petitioner expressed concern over Judge Turnbach presiding over his case due to his decisions and statements that were made on the record. Judge Turnbach had denied the Petitioner's bail reduction motion; denied his speedy trial motion stating that he would set a trial date at the next status conference - which did not occur for 14 months; denied defense counsel's access to co-defendant Scott's murder file and;

referred to the Petitioner's voice stress analysis test as "voodoo."

If these additional facts had been disclosed to defense counsel and the Petitioner, the defense would have moved to disqualify Judge Turnbach who just received the case from another court on July 9, 2004.

It was an appearance that Prosecutor Cunningham was put on the Petitioner's case due to his special relationship with Judge Turnbach. **First**, Prosecutor Cunningham was not lead counsel, but second chair. Again, there was 34 other assistant prosecutors who could have sat second chair. **Second**, during the jury selection, the Petitioner was not able to participate in side-bar voir dire because Prosecutor Cunningham demanded to be present at side bar even though he was second chair. **Finally**, during the course of the trial all pretrial motions were denied and it appeared to the Petitioner that the trial court was favoring Cunningham, who took control of the prosecution during the direct and cross-examination of the State's most critical witness, co-defendant Scott.

The Petitioner was entitled to face a single adversary, the State, not the State and the trial judge. In State v. Taffaro, 195 N.J. 442, 551 (2008), the Court reaffirmed the well-established principle that, in presiding over a jury trial, the judge, who holds a powerful symbolic position vis-a-vis jurors, must maintain a mien of impartiality and must refrain from any action that would suggest that he favors one side over the other,

or has a view regarding the credibility of a party or witness. Evidence within the record that Judge Turnbach favored the prosecution, especially prosecutor Cunningham, is as followed:

The prosecutor was permitted to lead witnesses on direct examination over defense counsel's objection.

The State ignored sustained objections and continued questioning the witness concerning the excluded hearsay.

The prosecutor was given great leeway in ignoring sustained objections and continuing with questioning by rephrasing the witnesses answers.

The prosecutor was effectively testifying for Scott by the use of leading questions - objections were sustained but the conduct continued throughout Scott's testimony. The prosecutor was also allowed to introduce irrelevant evidence concerning the Petitioner being an alleged philanderer.

The Prosecutor was permitted to make sarcastic remarks during Scott's testimony.

The prosecutor was permitted to give defense counsel advice on how to try his case, by stating "why don't you show it to him (Scott)."

During cross-examination, the prosecutor continually interrupted - not with an objection - but with a comment. The prosecutor stated, "excuse me, can we read it correctly . . ."

The prosecutor interrupted cross-examination and made statements he wanted the jury to immediately hear instead of waiting until re-direct.

The Judge would sustain his own objections for the State on numerous occasions and inform the State when to object.

Judge Turnbach even held up his hand to defense counsel and stated, "wait." At that point, the prosecutor would object as the judge had again tipped him off when to object. Sometimes the prosecutor would even state, "no objection" after the judge said "wait."

Point II

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Petitioner was denied effective assistance of counsel and the Third Circuit's Decision to Affirm is Likewise Erroneous.

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

The well-known standard of Strickland v. Washington governs this claim. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Under this standard, petitioner must show that trial counsel's performance was deficient and the deficient performance prejudiced the defense.

(a) Trial Counsel Provided Ineffective Assistance when He Informed the Jury that He Advised the Petitioner Not to Testify.

The right to due process and a fair trial encompasses the right to testify on one's own behalf. Rock v. Arkansas, 483 U.S. 44 (1987); State v. Savage, 120 N.J. 594 (1990); N.J. Const. Art. I, paras. 1, 10. It is defense counsel's responsibility to advise a defendant on whether or not to testify and to explain

the consequences of either decision. State v. Bogus, 223 N.J. Super 409, 423 (App. Div.) certif. denied, 111 N.J. 567 (1988). As with any other constitutionally-based right, a defendant must knowingly waive the right. State v. Ball, 381 N.J. Super 545, 556 (App. Div. 2005).

In Strickland v. Washington, 466 U.S. 668, (1986), and adopted by the Supreme Court of New Jersey in State v. Fritz, 105 N.J. 42 (1987).

The two-prong test of Strickland, and Fritz is (1) whether counsel's performance was deficient, and (2) whether there exist "a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

During defense counsel's summation he inexplicably chose to discuss the Petitioner's decision not to testify. Counsel argued to the jury as followed:

Trial Counsel: We have chose not to put [Petitioner] on the stand. That's the beauty of our system. [Petitioner] has the right not to testify, or to testify if he so desires. And the Honorable Judge Turnbach will charge you in a couple of minutes that you cannot draw any adverse inference from the fact that [the Petitioner] did not testify. You can't do that. That's his right. Those are the rules. One of the hardest things, and I have been doing this for 23 years, the hardest thing that you can do as a defense attorney is to advise somebody whether to take the stand or not take the stand.

(The State's objection is sustained).

Trial Counsel: In this case, members of the jury, I advise [the Petitioner] -- [not to testify].

The State: Objection, Objections.

The State was actually protecting the Petitioner's constitutional right to remain silent. The only conclusion that the jury could have drawn from trial counsel's statement is that defense counsel had knowledge that the Petitioner was guilty and that is why he advised him not to testify.

It is well-settled law that the State cannot comment on the defendant's constitutional right to remain silent by implying guilt therefrom. State v. Josephs, 174 N.J. 44, 146 (2002); State v. Marshall, 123 N.J. 1, 152-164 (1991). A comment concerning post-arrest silence to impugn alibi defense held to be plain error, clearly capable of producing an unjust result. State v. Aceta, 223 N.J. Super 21, 28, 31-32 (App. Div. 1998); State v. Pierce, 330 N.J. Super 479, 492 (App. Div. 2000).

There is no reported cases wherein defense counsel states, "I advised my client not to testify." If a comment concerning a defendant's silence coming from a prosecutor is **"plain error,"** then the error would be even more significant when the comment comes from the defense counsel, who is supposed to be the defendant's zealous advocate. It appeared that trial counsel was trying to argue to the jury that the Petitioner wanted to testify, but counsel did not allow him to do so. This too is error as the only conclusion that can be drawn from the statement is that defense counsel possessed "attorney-client" privileged information that the Petitioner murdered the victim and, therefore, counsel **"advised"** the Petitioner not to testify. State

v. Castagna, 376 N.J. Super 323, 360-63 (App. Div. 2005), (counsel's opening remarks conceding defendant's guilt of serious offenses charged constituted deficient performance.

Therefore, counsel's actions rose to ineffective assistance of counsel and substantially affected the jury's deliberations and infringed upon the Petitioner's 5th Amendment Right to remain silent.

(b) Trial counsel was Ineffective when He Failed to Retain a Forensic Scientist as a Defense Expert to Analyze the Rubber Glove Finger Tip with the Bungee Cord to Determine Whether the Bungee Cord Caused the Glove Fingers to Rip, which would have Established that Co-Defendant Scott Committed the Murder.

In Harrington v. Richter, 131 S.Ct 770, 178 L.Ed.2d 624 (2011), Richter was convicted of the murder of Klein largely on the testimony of Johnson, a drug dealer with whom Richter and Klein had been smoking marijuana on the day at issue. Johnson testified that he and Klein were shot by Richter and Branscombe in Johnson's apartment. Richter, 131 S.Ct at 781-82. Richter's defense attorney sought to show that Klein was shot in the bedroom doorway but the prosecution introduced expert testimony based on Klein's blood pattern that Klein was shot near the living room couch. Although Richter's attorney called seven witnesses, the jury found Richter guilty. Id. at 782. The California Supreme Court rejected Richter's Strickland claims by summary denial, and the District Court agreed. Id. at 783. The Ninth Circuit reversed by a divided en banc vote, holding the California decision was unreasonable because Richter's trial

counsel was deficient for failing to consult experts on blood evidence. The Supreme Court granted certiorari and reversed the decision of the Ninth Circuit, holding the Court of Appeals erred in finding that Richter's attorney was deficient under the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984), for evaluating ineffective assistance of counsel claims.

In Richter, the Supreme Court stated "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." 131 S.Ct at 785. The Court then proceeded to explain "that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 786 (quotation omitted). The Court noted that even under de novo review the standard for judging counsel's representation is a most deferential one; the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms." Id. at 788 (quoting Strickland, 466 U.S. at 690).

In the Petitioner's case his defense was that he was not involved in the murder and that his co-defendant was the sole perpetrator who killed the victim while committing a robbery. The State's only direct testimony that the Petitioner murdered the victim came from the co-defendant Scott. The Petitioner and the victim were living together in a home in Toms River. On May 19, 2009 at 1:30 p.m., the Petitioner came home and found the victim

dead in the doorway of their home. The medical examiner concluded that the victim died from "ligature strangulation." A bungee cord was recovered next to the victim's body and it was concluded that this was the murder weapon as the victim's DNA was on the cord. The Petitioner maintained his innocence throughout the trial.

Two pieces of rubber glove tips were recovered in close proximity to the victim. DNA analysis revealed that the DNA of the victim and co-defendant Scott were in the glove tip. The Petitioner's DNA was not on the bungee cord or the glove tips. Scott gave numerous version of the events, but ultimately testified that the Petitioner committed the murder while he waited outside. Scott claimed his only involvement was to assist in moving the body, but he could not because he threw his back out. Scott also claimed that the Petitioner gave him the rubber gloves to use.

The defense contended that the tips of the rubber gloves ripped off of Scott's fingers because he was using the accordion like bungee cord to strangle the victim that had hooks on the end. The bungee cord would separate when extended and shrink when release. The grooves of the bungee cord likely caught the tips of the rubber gloves causing them to tear.

The Petitioner requested that trial counsel investigate this issue, but no investigation took place. Trial counsel only argued this point to the jury, but did not have the forensic evidence to support the theory, which could have been obtained rather easily.

Therefore, failing to call or hire an expert alone has been the basis for the reversals of convictions. Rompilla v. Beard,

545 U.S. 374, 387, 125 S.Ct 2456, 162 L.Ed.2d 360 (2005) (attorney has duty to investigate all avenues leading to facts relevant to the merits); Couch, 632 F.3d at 246 (state court unreasonably rejected habeas petitioner's argument that counsel should have investigated causation defense where counsel ignored readily available evidence); Dugas v. Coplan, 428 F.3d 317, 329 (1st Cir. 2005) (representation found deficient where counsel failed to investigate "not arson" defense and seek expert assistance or educate himself on techniques of defending arson).

Although "[e]ven the best criminal defense attorneys would not defend a particular client in the same way," Strickland, 466 U.S. at 689, even the most minimally competent attorney here would have consulted at least one of the experts suggested to him by the testimony of Scott and the theory he was projecting, so any available experts would have injected significant doubt regarding the Petitioner's guilt. Reliance on the jury to draw that conclusion was not objectively reasonable.

Even "[t]he exercise of utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their assistance." State v. Fritz, supra. 105 N.J. at 63-64, quoting Moore v. United States, 432 F.2d 730, 739 (3rd Cir. 1970). See United States v. Gray, 878 F.2d 702 (3rd Cir. 1989) (Conviction reversed on showing defendant was prejudiced by counsel's ineffectiveness for failure to contact and interview witnesses).

In the Petitioner's case, defense counsel presented a defense without any support. Counsel also asked the jury to "put their CSI hats on." If the jury followed his advice, they would have asked, why a scientific analysis of the glove tips was not conducted? The only conclusion would be that the evidence did not support the Petitioner's theory.

Expert testimony from a reputable forensic scientist would have created "**reasonable doubt**" in the minds of reasonable jurors with regards to their conviction of the Petitioner for murder. Therefore, defense counsel deficiency substantially affected the jury's deliberation and rises to the level of ineffective assistance of counsel.

(c) Trial counsel was Ineffective when He Failed to Move for a Mistrial when Investigator Mitchell Continually Spoke to Co-Defendant Scott During Breaks and Recesses of His Trial Testimony, thereby Violating the Trial Court's Sequestration Order.

In the Petitioner's case, the defense was that co-defendant Scott was a liar and he was coached by the Investigator Mitchell. Mitchell assisted Scott with his first statement dated October 22, 2004. When Scott's plea negotiations were complete, it was Mitchell who coached Scott with the factual basis aspect of his plea the day before his plea hearing. On September 12, 2005, Mitchell assisted Scott in getting his story straight.

Mitchell testified on January 19, 2006. During co-defendant Scott's trial testimony, Mitchell will leave the courtroom with Scott; bring him water; was present with him in the hallway; and appeared to be with Scott every moment he was not testifying.

This has been confirmed by Mitchell, who gave a statement that he was assisting Scott to keep him comfortable with water, food, bathroom and housing issues. Which makes no sense in that Corrections Officers from East Jersey State Prison had custody of Scott and were present at the trial.

This was a clear violation of the sequestration order that visible to defense counsel, which the Petitioner had requested defense counsel to address with the judge.

Defense counsel was obligated to immediately bring the violations to the attention of the trial court, which was required to promptly conduct a voir dire out of the present of the jury in order to ascertain the nature and extent of the violations and then determine what remedial action is required.

In State v. Dayton, 292 N.J. Super 76, 89 (App. Div. 1996). Where the prejudice cannot be dissipated, a mistrial may be granted or an order excluding the testimony. Id. 88-89.

In the Petitioner's case defense was that Scott was a liar and he was being coached by Investigator Mitchell. The fact that Mitchell is still talking to Scott after his testimony has begun would have called into question of Scott's credibility. In addition, if the jury was informed by the trial court that the State had violated the sequestration order by Mitchell speaking to Scott and defense counsel argued this fact to the jury during summation, this would have tipped the scale in favor of a verdict of not guilty.

Point III

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Trial Court Permitted the Co-Defendant to Testify while Appearing in Prison Clothing, which Violated the Petitioner's Constitutional Rights to Due Process.

The law has long forbidden routine use of visible shackles during a capital trial's guilt phase, permitting shackling only in the presence of a special need. In light of Holbrook, Illinois v Allen, 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct 1057, early English cases, and lower court shackling doctrine dating back to the 19th century, it is now clear that this is a basic element of due process protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that restraints are justified by a state interest specific to the particular defendant on trial.

In the Petitioner's case Michael Scott to provide testimony in favor of the state's theories and presumptions which such testimony failed to meet the requisites of N.J.R.E. 602. There was no "evidence" introduced that was "sufficient" to support any "finding". Michael Scott was allowed to become a state's witness and testify while appearing in prison clothing and feet shackles. Although he was not handcuffed, the norm relevant to "custody and control" of inmates is that the Sheriff provided feet shackles" as a form of restraint locking mechanism as applicable to the defendant.

A trial court may subject a witness to physical restraint only when it has reason to believe it is necessary to maintain the security of the courtroom, and to make a determination, the court must hold a hearing, however informal, and state on the record out of the Jury's presence its reasons for shackling the witness, whether they are based on evidence from trial, information obtained from criminal records, or statements made by law enforcement officers.

The trial transcripts are silent as to the holding of any such "hearing" in the instant case. The Jury was not allowed to be present during the time when Scott nor defendant were entering the court room, nor leaving. Scott's performance was sought to testify in the court room to "take the stand" but was when his medication was brought by the prosecutor with his state prison coat. By these circumstances it allowed the State to have a strategic advantage, over the perception of the jurors to ultimately fulfill their mission of a "unfair result" with countless opportunities to side bar.

There was no justification or disclosure as to the determination, nor the hearing that the trial court should have made in this matter. When a risk exists that the Jury will render its decision on a basis other than the evidence, a defendant's right to a fair trial requires that the risk be justified by an essential state interest. U.S.C.A. Const. Amend 5, 6, 14; N.J. Const. Art 1, Par. 1 & 10. Appellant relies on the Decision of State v. Michael Russell, 384 N.J. Super, 586. The Opinion in this case was approved for publication on April 10, 2006; Case

Docket No. A-4681-03T4. The conditions that the Russell court adjudicated it case, the Petitioner's case is Similarly Situated and the same relief should have been applied. There is a clear absence of evidentiary record establishing the security concerns posed by defendant and Co-defendant Michael Scott who was brought from the Prison where he was currently in custody. As caused by Scott's appearance in prison clothing and both defendant and Co-defendant "leg restraint", denied defendant his right to a fair trial under Federal and State Constitutions. The appearance of a State's witness in prison garb & restraints undermines the credibility of the testimony that state's witness offers in the State's Behalf. cf. See Harrell Supra 672 F.2d at 635. Michael Scott has given inconsistent and unreliable testimony.

The Trial judge did not address Michael Scott appearance in Prison Clothing nor permit him to change into civilian clothes, nor did the trial court instruct the jurors at the commencement of Scott's testimony that they could draw no inference of defendant's guilt from Scott's appearance (again "Guilty by Association"), and he gave no such instruction at the close of this case. A Motion for Mistrial due to Scott's clothing and leg restraint should have been presented and Approved. Both the defendant and the co-defendant appeared in court under some sort of restraint. Courts have long held that to insure his fair trial, a criminal defendant has the right to appear before a jury free from restraints. See e.g. State v. Roberts, 86 N.J. Super. 159, 162-63, 206 A.2d 200 (App. Div. 1965).

Point IV

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Trial Court Prejudicial accomplice and Vicarious Liability Charge did not Present the Proof of Claim that the Petitioner Shared the Intent Required.

In State v. Bielkiewicz, 267 N.J. Super. 520 it held: that erroneous instructions regarding accomplice liability for murder required reversal of defendants' conviction, even though defense counsel did not object, where instructions did not convey that jury could convict the principal of murder and accomplice of lesser included offense, but rather, gave jury impressions that if they found principal guilty of murder, they would be required either to acquit or also to convict alleged the accomplice. In the Petitioner's of murder, and where jury could have found, if inadequately instructed, that the Petitioner had a purpose to aid Co-Defendant Michael Scott in assaulting the victim, but not purpose to cause death or serious bodily injury.

In State v White, 98 N.J. 122, 129, 484 A. 2d 691 (1984) the definition of an accomplice is a person who acts with the purpose of promoting the commission of the substantive offense for which he is charged as an accomplice.

Therefore such 'theory' of finding the Petitioner in the present case of accomplice liability is dissented and objected with reliance to State v. Jackmont, 702 A.2d (N.J. Super. A.D. 1997) and therefore The murder Conviction must be reversed.

The State also failed to prove the elements of the Petitioner Agreed with co-defendant Michael Scott... to engage in

conduct which constitutes the murder of Gwendolyn Boyd. There is no clear lawful finding that the Petitioner was at the Scene of the crime, to provide any inferences that he participated to justify any accomplice liability and vicarious Liability.

Point V

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Petitioner's Constitutional Rights were not Violated when the Trial Court Precluded the Petitioner His Right to Be Present at Sidebar Conferences During the Jury Voir Dire.

Prior to the jury selection defense counsel requested that the Petitioner be permitted to be present during sidebar conferences, which might arise during the jury selection process. The court denied the request, indicating it would utilize the "lawyer shuttle system" instead, which served to deny the Petitioner his right to a fair trial.

In State v. W.A., 184 N.J. 45 (2005), the Supreme Court addressed the specific question as to whether a defendant is entitled to attend sidebar conferences during the jury selection process. The court concluded that pursuant to New Jersey Court Rule 3:16, a defendant ordinarily had the right to be present at voir dire sidebar conference if so requested.

In the Petitioner's case, jury selection lasted two days, with 16 jurors being empaneled. The jury selection process was lengthy because many prospective jurors was excused by the court, either pursuant to their responses to various questions in open court, or as a result of information given during sidebar conferences. There was also 13 additional jurors, during which time a "lawyer-shuttle" process was apparently utilized. Nine of the jurors were excused, however, there was two issues as to whether the trial court erred in denying counsel's request to have the Petitioner present at the sidebar conferences and as a

result of the four jurors who had been voir dired during sidebar conferences who ultimately decided the Petitioner's fate.

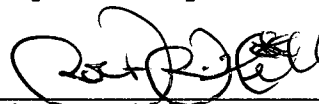
Based on the trial record and the applicable law reasonable jurists could find that trial court's denial to permit the Petitioner be present at sidebar during the juror voir dire, there exists a reasonable probability that the outcome of petitioner's trial would have been different because of the decision that would have been made.

As emphasized in State v. W.A., "just as it is difficult to articulate was induces the exercise of a peremptory challenge, it is improbable to expect a lawyer to be able to relate those impression gained at the bench to his client. Each impression is, at bottom, a personal one." 184 N.J. at 54-55, quoting from Boone v. United States, 483 A.2d 1135 (D.C. 1984).

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,

A handwritten signature in black ink, appearing to read "Robert Hill", written over a horizontal line.

Robert Hill

Dated: August 6, 2019