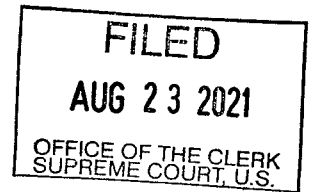


ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

No. 21-5526



DUANE KELLY

Petitioner,

VS.

STATE OF NEW JERSEY,

Respondent.

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

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SUBMITTED BY:

Duane Kelly #470596/488959B  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625

### QUESTIONS PRESENTED

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- 1.) WAS THE DISTRICT COURTS FINDINGS THAT THE STATE COURT REASONABLY APPLIED THE INCONSISTENT VERDICT LAW IN THIS CASE CORRECT?
- 2.) WOULD A REASONABLE JURIST DISAGREE WITH THE DISTRICT COURTS DECISION THAT THE STATE COURT DID NOT ERROR WHEN THEY PRESENTED THE .357 OR .38 CALIBER WEAPON THAT THE PETITIONER WAS FOUND NOT GUILTY OF POSSESSING AND NOT GUILTY OF USING IN A UNLAWFUL WAY AS EVIDENCE IN A SECOND TRIAL TO SAY THE CONTRARY?
- 3.) WOULD A REASONABLE JURIST DISAGREE WITH THE DISTRICT COURTS FINDINGS THAT THE STATE COURT DID NOT ERROR IN DENYING PETITIONER'S POST-CONVICTION RELIEF WITHOUT AFFORDING HIM EVIDENTIARY HEARING.

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#### LIST OF PARTIES

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

The respondents are Raymond Royce Administrator of New Jersey State Prison, and the Union County Prosecutor's Office.

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#### OPINIONS BELOW

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The United States District Court for the District of New Jersey denied petitioner's petition for a writ of habeas corpus in an opinion on June 11, 2020. **(See Appendix - Ex-1)**

The United States Court Of Appeals for the Third Circuit filed an order on December 8, 2020, denying petitioner's petition for a Certificate of Appealability. **(See Appendix - Ex-32)**

The United States Court Of Appeals for the Third Circuit filed an order on May 28, 2021, denying petitioner's petition for a rehearing En Banc. **(See Appendix - Ex-34)**

## **STATEMENT OF JURISDICTION**

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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



### STATEMENT OF THE CASE

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Petitioner was convicted of killing 24-year-old Rajauhn Anderson and 21-year-old Malcolm Mills on the evening of June 15, 2001. Anderson maintained a business selling marijuana and hallucinogenic mushrooms from his apartment located at 327 Watson Avenue in Plainfield. Charles Knight went to the apartment in the late afternoon of June 15 to purchase some marijuana, and Petitioner answered the door and let him in. Derrick Davis and Mills arrived some time later.

Davis testified that Anderson opened a kitchen drawer and took out what appeared to be a gun wrapped in a scarf and took it upstairs. Davis said that he did not go upstairs because Anderson insisted that anyone doing so take off his shoes and Davis did not wish to do so.

Knight, however, did remove his shoes and go upstairs with Anderson, as did Mills and Petitioner. Knight testified that when the four men were upstairs, Anderson displayed a .38 caliber silver revolver that he kept wrapped in a scarf. Knight also testified that Anderson took a box out of a closet and showed the man a black, semiautomatic handgun that had been in the box. Anderson passed it around but would not permit Petitioner to handle the weapon. Anderson returned the gun to the box and placed the box back in the closet.

There was additional testimony about Anderson keeping guns in the house. His next door neighbor, Yusef Greene, testified that Anderson kept a .38 caliber chrome revolver wrapped in a

scarf and had a .40 caliber semiautomatic handgun that he kept in a box.

After Anderson showed these guns, he, Mills and Knight decided to get something to eat and Knight drove the men to a nearby health food store. Davis left the house at the same time but he did not go with the other three men. Petitioner remained in the house.

Knight testified that he, Anderson and Mills were away for about thirty or forty minutes. When they had finished eating their food, Knight drove them back to Anderson's home. Anderson and Mills got out of the car and walked into the house. Knight remained in the car, expecting them to come back, because they had asked for a ride to the barbershop. Knight waited in the car for twenty to thirty minutes and then went and knocked on the door and rang the bell but no one answered. He also called Anderson on his cell phone, but there was no answer. A review of Anderson's cell phone records placed call at 5:57 p.m. Knight waited a few more minutes and then drove off.

Jeffrey Goodman was a friend of the Petitioner. He testified that he was working at the South Avenue Car Wash in Plainfield on June 15 when he saw Petitioner walking by quickly, carrying a book bag. Goodman could not place the time but he knew that it was still light. He said that Petitioner was sweating and looking behind him. Goodman spoke to Petitioner, but he testified Petitioner just waved back and continued walking quickly, not stopping to talk.

At approximately 6:00 p.m. on June 15, Anthony Sapienza  
drove his Ford pick-up truck to Little Italy Pizza in Fanwood. He parked his truck and went into pick up his pizza but left his keys in the truck. When he returned, the truck was gone. He reported the theft and the truck's license plate number. There was testimony that it was a ten-minute walk from Anderson's home in Plainfield to the pizza place in Fanwood.

At approximately 6:30 p.m. Patrolman Alejandro Yanes of the Clark Police Department, who had received a broadcast about the stolen truck, saw Petitioner driving that truck. Yanes testified that Petitioner looked in his direction, saw the patrol car, sped up, crossed double yellow lines and turned left. Yanes turned on his lights and siren and followed him. Yanes said the pursuit went through residential areas (at one point through several back yards) and streets with heavy traffic, that Petitioner's speed went up to sixty miles per hour and that he went through stop signs without stopping. Eventually the front passenger tire on the truck blew out and the truck hit a parked car, a light post, and then a tree.

Petitioner leapt out of the truck and began to run, with the police in pursuit. Petitioner ran toward a reservoir, jumped in and went out approximately twenty feet from the shore. He eventually responded to repeated commands to come out of the water and was handcuffed. Petitioner was bleeding from his head, and the first aid squad was summoned to assist him.

Patrolman Steven Francisco of the Clark Police Department assisted Yanes in apprehending Petitioner. Francisco secured the

scene and retrieved the following items: (1) a .40 caliber High Point semiautomatic handgun that had been wedged between the dashboard and the windshield of the truck; (2) a black knapsack with contained eight bags of marijuana, weighing, .78 pounds, large and small plastic bags and a scale; (3) a box of .40 caliber metal jacket rounds.

Sapienza, the truck's owner did not own any guns, and he did not keep any guns, drugs or scales in his truck. After the truck was returned to him, he found a box for a High Point .40 caliber handgun, and he turned it over to the police.

Petitioner was placed under arrest and charged with burglary, theft, possession of a controlled dangerous substance with intent to distribute within 500 feet of a public facility, eluding, resisting arrest, possession of a weapon in the course of a drug crime, and certain persons not to have weapons.

The day after Petitioner was arrest, Patrolman Yanes saw him in the Clark jail and inquired how he was doing, Yanes told him he would probably face ten years in jail based on the events of the day before. Yanes testified that Petitioner responded no, that he was going away for life. Yanes did not understand this response.

Two days later, on June 17, Leslie Pennington, an aunt of Mills, went to Anderson's house looking for Mills. She was accompanied by his brother, father and his brother's fiancé. Knocks on the door received no response. The front door was locked. Pennington went to the rear and tried the back door, which was not locked. She entered the house and heard music

~~playing loudly. Upstairs, she found the bodies of Anderson and~~  
Mills, each of whom had been shot to death.

Police and emergency personnel responded to the scene. Their search of the house did not turn either the .38 caliber revolver or the .40 caliber semiautomatic handgun that Anderson had shown to Petitioner, Mills, and Knight on June 15.

The medical examiner could not estimate a precise time of death but testified that both men were shot at the same time, which he estimate to be from 36 to 48 hours before their bodies were discovered. Bullets were retrieved during the autopsies.

Based upon their investigation, Petitioner, who was in custody for the incidents which occurred in Clark, was also charged in connection with the killings of Anderson and Mills. Ballistic testing determined that those bullets recovered at the autopsies were not fired from the .40 caliber semiautomatic handgun that had been recovered when Petitioner was arrested.

The homicide matter was tried first. By the time of that trial, the murder weapon had still not been recovered. A jury convicted Petitioner of the murder of Anderson and Mills, felony murder of Anderson and Mills, robbery of Anderson while armed, and possession of a .40 caliber handgun without a permit. The jury found Petitioner not guilty of possession of the .38 caliber handgun without a permit and not guilty of possessing that gun with the intent to use it unlawfully. He was only found guilty of possession of the .40 caliber handgun with intent to use it unlawfully.

Petitioner appeared for sentencing on December 12, 2003.

The trial court merged the felony murder convictions into the murder convictions and sentenced Petitioner to two consecutive life terms, each with a thirty-year period of parole ineligibility. It also sentenced Petitioner to a concurrent twenty years for robbery and five years for unlawful possession of a weapon.

Approximately three months later, the trial court conducted a hearing at which it determined that Petitioner's convictions flowing from this trial had to be set aside. During Petitioner's trial he had presented one defense witness, Shelley Copeland Perrey. Ms. Perrey testified that on June 23, 2001, she had been with Terrence Wilson (whom she referred to as "T") and George Pennant (whom she referred to as "G"). She said the three had been walking to buy marijuana and Wilson asked her to go away with him, saying "he had gotten himself into a situation," that he had a lot of money and could take care of her. She continued that they went to a house to smoke the marijuana and Wilson and Pennant got into an argument, Wilson saying that if Pennant had done his job, Wilson would not have to leave town. She said that Wilson asked her if she had heard about the two young men who had been shot, and she said yes. She said that Wilson then told her that a woman he knew had asked him to rob "her man" and that he and Pennant went to Anderson's house. He said that while the robbery was in progress, Pennant let someone enter the house and that person pulled off the mask Wilson had been wearing and

that, as a result, "they had to do them," meaning kill Anderson and Mills.

Perrey had supplied a statement to the police to this effect during their investigation and, based upon that statement, Petitioner and Wilson were indicted as co-Petitioners, but their trials were severed, with Petitioner being tried first. After Petitioner was convicted and sentenced, but before Wilson's trial commenced, Perrey wrote a letter to the prosecutor's office and the trial court, stating she did not want to testify at Wilson's trial because she did not want to be untruthful. The prosecutor's office then interviewed Perrey and determined that her story about this conversation was not true. Because the prosecution's case against Wilson was premised upon her testimony, it dropped all charges against him.

Based upon this presentation, the trial court sua sponte concluded that Petitioner's convictions for murder, felony murder and robbery had to be vacated because false testimony had been presented. The prosecution did not oppose that determination, although it was the defense which had presented the false testimony. Neither did the prosecution seek leave to appeal from that ruling. The trial court concluded that the false testimony tainted the convictions for murder, felony murder and robbery and set them aside. Petitioner had, in the interim, been tried on the charges coming out of Clark and had been convicted on all counts. The trial court concluded that the tainted testimony did not affect those convictions.

The month after the trial court vacated these convictions,  
the murder weapon, which had not been available at the first trial, was recovered at 326 Leland Avenue in Plainfield. This property abutted the rear of 327 Watson Avenue. Roy Stange purchased the building at 326 Leland and hired a crew to clean up the grounds, which had been neglected and were overgrown. One of the work crew found a handgun, which he gave to his foreman who, in turn, gave it to Stange. Stange delivered it to the police. It was a .38 caliber Smith and Wesson revolver that was dirty and rusted. The cylinder contained three spent shells and three whole cartridges. Ballistics testing determined that the bullets that killed Anderson and Mills had been fired from this gun.

Prior to Petitioner's second trial getting under way, the trial court ruled that the State could only proceed against Petitioner on the retrial on the theory that Petitioner was the shooter. The trial court noted that at the first trial, the State had proceeded both on the theory that Petitioner was the shooter and on the theory of accomplice liability. According to the trial court, the only evidence supporting a theory of accomplice liability was that of the discredited witness Perrey. Absent that evidence, the trial court ruled, the State was restricted to attempting to prove that Petitioner committed the murders himself.

At Petitioner's second trial, he was again convicted of the murders of Anderson and Mills, of felony murder and of robbery. He was not tried on the weapons charges for which he had been



~~acquitted at the first trial. The trial court sentenced~~  
Petitioner as it had after the first.

Petitioner was convicted of two counts of first-degree murder in violation of N.J. Stat. Ann. 2C:11-3a(1) and 2C:2-6; one count of first-degree robbery in violation of N.J. Stat. Ann. 2C:15-1 and 2C:2-6; and two counts of first-degree felony murder in violation of N.J. Stat. Ann. 2C:15-2.

The Appellate Division affirmed Petitioner's conviction and sentence on April 6, 2009. On September 28, 2009, the New Jersey Supreme Court granted Petitioner's Petition for Certification for the limited issue of whether Petitioner's second prosecution violated the Double Jeopardy Clause of the United States and New Jersey Constitutions. On May 4, 2010, the New Jersey Supreme Court affirmed the Appellate Division's judgment, holding that Petitioner's second trial was not barred by the principles of collateral estoppel. On June 24, 2010, Petitioner then filed a pro se petition for post-conviction relief ("PCR") that was denied on the merits. On October 29, 2015, the New Jersey Supreme Court denied Petitioner's subsequent petition for certification.

Petitioner filed a petition for habeas relief under 2254 on May 5, 2016. Respondents filed a motion to dismiss arguing that the petition was time-barred by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. 2254. Petitioner file a motion for equitable tolling in response. The District Court denied both Respondents' motion to dismiss and Petitioner's motion for equitable tolling without prejudice, because neither party

~~verified when Petitioner's notice of appeal nunc pro tunc of the~~  
PCR Court's decision was filed in the Appellate Division.

The petition raised four grounds: **GROUND ONE:** The New Jersey Supreme Court Erred when it denied Defendant's Motion to Reverse Conviction from second trial that should have been barred on principles of collateral estoppel incorporated in U.S. Const. Amend. V; **GROUND TWO:** The New Jersey Supreme Court erred in denying Defendant's motion to reverse conviction from second trial based on principles of collateral estoppel incorporated in U.S. Const. Amend. V Double Jeopardy Clause; **GROUND THREE:** The trial court erred in denying Defendant's Petition for Post-Conviction Relief, without affording Him an evidentiary hearing; **GROUND FOUR:** In reply to Respondent's contention that Petitioner's Habeas Corpus petition should be dismissed because it was filed beyond the one year limitation in 28 U.S.C. 2244(D).

The district court denied the petition for a writ of habeas corpus. Duane Kelly, v. Stephen Johnson, Civil Action No. 16-2553 (ES), slip opinion (June 11, 2020). Petitioner filed a timely notice of appeal and a petition for a certificate of appealability (COA). On December 8, 2020, the Third Circuit denied the petition for a COA. On May 28, 2021, 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 New Jersey Supreme Court Erred when it denied Defendant's Motion to Reverse Conviction from second trial that should have been barred on principles of collateral estoppel incorporated in U.S. Const. Amend. V. Double Jeopardy Clause.

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 Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct 1189, 1194 (1970) governs this claim. Under this standard, "where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded it's verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

~~The Petitioner contends that the New Jersey Supreme Court~~  
erred in its' ruling that the verdicts were inconsistent and that the first jury did not determine an ultimate fact that preclude a retrial. The New Jersey Supreme Court stated in its' opinion, moreover, the court cannot determine from the verdict sheet whether the jury convicted Petitioner of the robbery and murder as an accomplice or principle, or whether some of the jurors convicted on the basis of accomplice liability and others as a principle. Unanimity on whether a defendant is guilty as an accomplice or principle is not required in this state... . Based on the evidence, the jury charge, and verdict, the Petitioner was found guilty - as an accomplice or principle (or both) - of robbery while armed with a .357 or .38 caliber handgun and the felony murders, which were committed with the use of a .357 or .38 caliber handgun.

According to the first trial transcripts, (October 30, 2003, 11T 13-19 to 14-21):

**The Court:** Number ten, possession of a firearm, a handgun, either the .38 caliber or .357 without a permit to carry, guilty, sir?

**Mr. Foreman:** Not guilty.

**The Court:** Unanimous?

**Mr. Foreman:** Yes.

**The Court:** Next page. Possession, this eleven, of a firearm, a handgun, .40 caliber, either in Plainfield, or Fanwood, or Clark without a permit to carry, guilty or not guilty?

**Mr. Foreman:** Guilty.

**The Court:** Unanimous, sir?

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**Mr. Foreman:** Yes.

**The Court:** Okay, Number twelve, sir, possession of a firearm, a handgun, .357 or .38 with a purpose to use it unlawfully against the person of Mr. Anderson, guilty or not guilty.

**Mr. Foreman:** Not guilty.

**The Court:** Unanimous?

**Mr. Foreman:** Yes.

**The Court:** Thirteen, possession of a firearm, a handgun .38 or .357 caliber with a purpose to use it unlawfully against the person in an unlawful manner of Mr. Mills, guilty or not guilty?

**Mr. Foreman:** Not Guilty.

**The Court:** Unanimous, sir?

**Mr. Foreman:** Yes.

**The Court:** Okay, Number twelve, sir, possession of a firearm, a handgun, .357 or .38 with a purpose to use it unlawfully against the person of Mr. Anderson, guilty or not guilty?

**Mr. Foreman:** Not guilty.

**The Court:** Unanimous?

**Mr. Foreman:** Yes.

**The Court:** Thirteen, possession of a firearm, a handgun .38 or .357 caliber with a purpose to use it unlawfully against the person in an unlawful manner of Mr. Mills, guilty or not guilty?

**Mr. Foreman:** Not guilty.

**The Court:** Unanimous?

**Mr. Foreman:** Yes.

As the New Jersey Supreme Court stated, "Unanimity on whether a defendant is guilty as an accomplice or principle is not required in this State." This jury was unanimous in regards to all its' verdicts.

In United States v. Keller, 624 F2d. 1154 (1980), the Court stated, "In considering the effect of the constitutional doctrine of collateral estoppel as enunciated in Ashe 90 S.Ct at 1194, on our earlier cases applying the collateral estoppel defense, we stated, "Ashe would entirely bar a retrial when collateral effect is given to facts established in favor of the defendant which are necessary to sustain a conviction in a second prosecution.

In the Petitioner's case, in between trials, the weapon the State alleges was used as the murder weapon was found and used as evidence in the Petitioner's second trial, eventhough in the first trial the Petitioner was acquitted of possessing the same .38 caliber weapon or using said weapon for an illegal purpose, but found him guilty of being an accomplice.

In Dowling v. United States, 494 U.S. 342 (1989), the opinion was the subject of a pointed dissent by Justice Brennan, stating that, "the Courts holding reflects an unrealistic view of the risks and burdens imposed on the defendant when facts relating to a prior offense for which he has been acquitted are introduce in a subsequent criminal proceeding." Id. at 359 (Brennan J. dissenting), stating his belief" that when the Government fails to prove a defendant guilty by a reasonable doubt, the defendant is considered leggaly innocent."

The New Jersey Supreme Court stated in its' opinion (State v. Kelly, 201 N.J. at 475), "We do not disturb the benefit defendant received from the acquittals and reversal of convictions based on perjured testimony." In Yeager v. United States, 129 S.Ct 2360 (2009), the Supreme Court strongly reaffirmed the strength of the issue preclusion doctrine under the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. In finding that the acquittal of fraud did preclude the later prosecution for insider trading and money-laundering, the Supreme Court in Yeager noted that the possession of insider information was a critical issue of ultimate fact in all of the charges against the Petitioner, and that a jury verdict that necessarily decided that issue in favor protects him from prosecution for any charge for which that is an essential element. Id. at 129 S.Ct at 2368-69.

In the Petitioner's case there was no evidence on record that Petitioner ever possessed or possessed the .38 caliber weapon, the sole murder weapon with a purpose to use unlawfully against anyone. No fingerprints, DNA, witnesses etc. Had there been obviously, the first jury would have found the Petitioner guilty on those charges. The Court used speculative reasoning to allow the State to relitigate a matter already adjudicated. The Petitioner would not have been allowed to use speculative reasoning to come to a conclusion, nor should the court be allowed to use speculative reasoning to deny Petitioner's appeal.

It is a well established fact of law that a Not guilty verdict cannot be recharged and retried. The State did not recharge the Petitioner, but went ahead and presented evidence of the .38 and .357 caliber handguns at the second trial, contrary to the supposes benefit afforded to the Petitioner by the Not guilty verdict rendered at his first trial and as such, a reasonable jurists could disagree with the district court's decision on this issue and as such a petition for a writ of certiorari should be granted in the interest of justice.

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



## Point II

Reasonable Jurists Could Disagree with the District Court's Ruling that the State Court Did Not Error In Denying Appellant's Post-Conviction Relief Without Affording Him Evidentiary Hearing.

The Petitioner contends that he failed to receive "Effective Assistance" of trial counsel. To establish a reasonable likelihood of success under the test set forth in Strickland v. Washington, 466 U.S. 668, 694, (1984), " a defendant not only has to demonstrate his attorney's performance was deficient, but also had to demonstrate there existed a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

(See also, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973), " Rights to confront and cross-examine witnesses and to call witnesses in one's own behalf are essential to due process. U.S.C.A. Const. Amend. 14, and Washington v. State of Texas, 388 U.S. 16, 87 S. Ct. 1920 (1967), "Bill of Rights provision which is fundamental and essential to fair trial is made obligatory upon States by Fourteenth Amendment." U.S.C.A. Const. Amend. 14, "Right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, and a fundamental element of due process of law."

Petitioner did raise this issue in Petition for Post-Conviction Relief. Where the Court did procedurally bar Petitioner. But agreed to hear the case based on the merits. The Court erred due to the fact that it failed to view facts of case

in a light most favorable to the defendant and fairly consider  
~~the~~ value of the testimony of these specific witnesses for the  
defense in this case.

John and Tanya Bush lived next door to Mr. Anderson. They  
never testified at the first or the second trial as the State  
has claimed. But they both gave sworn, "Voluntary Statements",  
to the Plainfield Police Department, dated June 17, 2001. In  
John Bush's statement he was asked:

**Q.** What did you hear from your neighbors'  
apartment beginning on Friday?

**A.** Nothing until Saturday at five twenty in  
the morning, then the music came on extremely  
loud, then after three or four minutes it got  
turned down to a lower level but still very  
loud. Then stayed that way all weekend.

Tonya Bush his wife confirmed the same in her statement.  
There was no other witness called who provided the court or the  
jury a specific time with detail of when the music was turned  
on. And even more notable when it was turned down. Which would  
suggest that someone was there alive to turn music on and then  
turn it down.

In regards to Ms. Roslyn Bradshaw. The Court denied this  
issue, the Appellate Court concurring, for no other reason  
except that there was no affidavit provided. Which was raised to  
the Appellate Court stating "Ineffective Assistance of PCR  
Counsel". Who did raise this issue in his brief and argue it  
during oral arguments, but failed to investigate and provide the  
court with the necessary affidavit to support this issue.  
(affidavit is required in accordance to Rule 3:22-10 (c) Ms.

Roslyn Bradshaw, whose testimony would have supported alibi defense even more, gave an on-scene statement to Sgt. Robert Gilliam on June 17, 2001. Just two days after she says she not only saw but also spoke to Mr. Anderson at approx. 8:30 p.m. And he told her, "People were out to get him and he was afraid." This is approx. 3 hours after the State claims they were already dead. The State has never provided the Petitioner with any written statements or affidavits from Ms. Bradshaw suggesting that she was unsure of the date (June 15, 2001) she said she saw and spoke to R. Anderson. And even if she was unsure of the exact date 4yrs. later before the second trial, her testimony of how her memory was alot better two days after she saw and spoke to R. Anderson than say four or more years later. Along with what Mr. Anderson said to her would suggest to a reasonable juror that someone other than the Petitioner was responsible for his murder.

In addition, Dr. Graciela Linares, the County Medical Examiner who did the autopsy on both Mr. Anderson and Mr. Mills. Dr. Linares was not called to testify by the State at the first trial or the second.

By the time of the second trial, Dr. Linares had retired and no other reason for not calling her was given to the Court except that she had previously retired and moved to Florida. The State subsequently called Dr. Leonard Zaretski, the new Chief Medical Examiner to testify at the second trial. (Dr. Zaretski was called to testify in reference to time of death. Dr. Linares failed to put a time of death on her autopsy report.) By his own

admission Dr. Zaretski testified that he was not present at

~~either autopsy.~~ And was basically giving his opinion based on Dr. Linares' incomplete autopsy reports, and autopsy photos.

In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, L.Ed. 2d 314 (2009) U.S. Lexis 4734, the Supreme Court clearly states, "The Sixth Amendment guarantees a defendant the right to be confronted with the witnesses against him. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him" the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor". U.S. Const. Amend. 6." And also, "To be sure, the Clause's ultimate goal is (emphasis added) to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 61-62, 124 S.Ct. 1354, 158 L.Ed. 2d 177.

In Bullcoming v. New Mexico, 546 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 2011 U.S. Lexis 4790. The Supreme Court stated, "In the case before us, petitioner Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcomings' blood-alcohol concentration

was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bulloming's blood sample.

The question presented was whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification-made for the purpose of proving a particular fact through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is (emphasis added) to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity pretrial to cross-examine that particular scientist." (See also State v. Rehman, 419 N.J. Super 451, (2011) N.J. Super Lexis 572, Where the N.J. Appellate Division stated, "The Court concluded that a surrogate witness knowing nothing but what is stated in another's report will not (emphasis added) satisfy a defendant's Confrontation right's")

In the Petitioner's case, the State was allowed to present surrogate testimony from Dr. Zaretski. who not only denigrated the scientific findings of Dr. Linares but also cast doubt on the validity of the time of death Dr. Linares would have testified to had she been called, stating, "I should say that

the time, the placement of a time of death is the least precise finding in forensic pathology.

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**Q.** So hypothetically speaking would it be medically possible for Mr. Anderson to have died somewhere between 5:30 and 6 p.m. on June 15<sup>th</sup> of 2001?

**A.** Yes. There's no evidence that would be against that."

Detective Carmen of the Plainfield Police Department prepared a affidavit in connection to this case. Which stated in part, "The medical examiner determined the time of death to be on Saturday, June 16, 2001, between 12:00p.m. and 6:00 p.m. However the air conditioner in the victims apartment was set at 60 degrees, the apartment was quite cold and this could affect the accuracy of the time of death estimate." Detective Carmen was not cross-examined as to these statements. Nor is Detective Carmen qualified as a medical expert to know for a certainty what affect the temperature could have on the time of death. According to Melendez-Diaz and Bullcoming, Dr. Linares should have been called to testify to satisfy the Sixth Amendment's guarantee to the Confrontation Clause.

In light of the exculpatory nature of her testimony defense counsel should have subpoenaed Dr. Linares. At the very least as a rebuttal witness to the State's expert Dr. Zaretski. Dr. Zareski was a State's witness called to testify for the State to further the State's theory. The Petitioner should not have been forced to rely solely on a State's witness. When the Sixth Amendment guarantees him the right to present witness's in his

favor. Especially when there was no way of discerning from Detective Carmen's affidavit what was his personal lay opinion and what Dr. Linares actually said. Especially considering Dr. Linares autopsy report for Mr. Mills, says the air temperature was 71.2 degrees. Which would have been taken into account when formulating the estimation of time of death. But again, this is something that could only be ascertained through cross-examination. Which the State failed to do and defense counsel Shelley Logan failed to do by not subpoenaing Dr. Graciela Linares. Contrary to Petitioner's Sixth Amendment rights.

Therefore due to the exculpatory value of the testimony of all of the above witness's. The Petitioner asserts that had a rational jury heard this evidence the outcome of this case would have been different.

Therefore, the State Court's and the District Court's rulings was contrary to Supreme Court rulings and the Petitioner's constitutional right to Due process and a Fair Trial and as such, reasonable jurists could disagree with the district court's decision.

**Point III**

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The Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on other Rulings of the District Court.

Petitioner asks the Court to review the other rulings of the Third Circuit Court of Appeals in order to determine if reasonable jurists could find the district court's rulings debatable or wrong.




### CONCLUSION

In the interest of justice 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: August 23, 2021

  
Duane Kelly - Petitioner