

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

No. 22 - 6646

OMAR SHAHEER THOMAS,

Petitioner,

VS.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ET AL.

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:

Omar Shaheer Thomas #618144/240950C  
New Jersey State Prison  
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QUESTIONS PRESENTED

- 1) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His Warrantless Arrest was not Unlawful and Illegal and in Violation of the New Jersey and the United States Constitution.
- 2) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His Statements should not Have been Suppressed as His Arrest was Illegal given the Lack of Both an Arrest and Search Warrant in Violation of the New Jersey Constitution Article I, Para. 7 and the United States Constitution, IV Amendment, V Amendment and Fourteenth Amendment.
- 3) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that He was not Denied Effective Assistance of Trial Counsel.
- 4) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that He was not Denied Effective Assistance of Appellate Counsel.

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LIST OF PARTIES

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

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

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OPINIONS BELOW

The United States District Court for the District of New Jersey denied petitioner's petition for a writ of habeas corpus in an opinion on March 1, 2022. (**See Appendix - Ex-1**)

The United States Court Of Appeals for the Third Circuit filed an order on August 30, 2022, denying petitioner's petition for a Certificate of Appealability. (**See Appendix - Ex-51**)

The United States Court Of Appeals for the Third Circuit filed an order on October 21, 2022, denying petitioner's petition for a rehearing En-Banc. (**See Appendix - Ex-52**)

STATEMENT OF JURISDICTION

The United States District Court For the District Of New Jersey denied petitioner's petition for writ of habeas corpus on March 1, 2022, and on the United States Court of Appeals for the Third Circuit filed an order on August 30, 2022, denying petitioner's petition for a Certificate of Appealability and a petition for a rehearing En-Banc were denied on October 21, 2022. 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 **IV Amendment** which states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The **V Amendment** which states, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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

Petitioner was charged by a Morris County, New Jersey, grand jury with the following offenses: two counts of first-degree murder, two counts of felony murder, one count of first-degree robbery, one count of second-degree possession of a weapon for an unlawful purpose; one count of third-degree unlawful possession of a weapon, one count of first-degree use of a person 17-years of age or younger to commit a crime, one count of fourth-degree possession of prohibited ammunition and one count of second-degree possession of a weapon for an unlawful purpose and one count of violating the regulatory provision regarding the purchase of firearms. The grand jury also charged the Petitioner with counts of certain persons not to possess a firearm.

On December 1, 2002, David Indiveri was working at Panera Bread at the Roxbury Mall Township, New Jersey. At about 10:30 a.m. Mr. Indiveri took a break and walked to the Funcoland game store, also in the mall. On his walk, he observed a blue car with a black door on the driver's side in the parking lot with a black male inside. He saw another black male walking down the sidewalk towards Karin's Curtains. Mr. Indiveri observed the Funcoland employee (later identified as Jeffrey Eresman) walking toward the store talking on a green cell phone. When he returned from his walk, he noticed that the gate at the Funcoland store was halfway up, no one was inside the store and the two black men were in the

blue car. The black male on sidewalk was described as 6'2" - 250-300 lbs. wearing a blue jacket and jeans.

Dennis Davenport accompanied his wife to the Wiz at the Roxbury Mall on December 1, 2002. He attempted to enter the Funcoland store but was told the computers were down and the store was closed. He observed three black males in the store, two located behind the counter and one close to the door. While his wife went into the shoe store Marty's next door, Mr. Davenport waited on the sidewalk. While waiting, he was approached by Eric Rewoldt, a manager of the Funcoland store. When Mr. Rewoldt asked him why the door to the store was locked, Mr. Davenport said the computers were down. Mr. Rewoldt opened the door with his key and entered the store. Mr. Davenport saw a blue car pull up to Funcoland and two males exit the store get into the car. None of the men were wearing gloves. Mr. Davenport then picked up his wife and they left the mall.

Between May 5, 2008 to July 24, 2008, the Petitioner was tried before Hon. Salem Vincent Ahto, J.S.C. and a jury.

On July 24, 2008, the Jury returned a guilty verdict on two counts of first-degree murder, two counts of felony murder, one count of first-degree robbery, one count of third-degree unlawful possession of a weapon, one count for employing a juvenile to commit a crime.

Thereafter, the Petitioner was sentenced to two consecutive terms of life without parole on the counts of murder. The felony murder counts and possession of a handgun for an unlawful purpose were merged into other counts. On the count of armed robbery, the court imposed consecutive 18 year terms 85% to be served before parole. The rest of the convictions were ran concurrent.

On April 19, 2013, the New Jersey Superior Court Appellate-Division affirmed the Petitioner's convictions.

Thereafter, the New Jersey Supreme Court denied Petitioner's petition for certification.

On May 19, 2014, the Petitioner filed a petition for post-conviction relief.

On April 29, 2015, the New Jersey Superior Court Law-Division denied Petitioner's petition for post-conviction relief.

On June 29, 2017, the New Jersey Superior Court Appellate-Division affirmed the denial of the Petitioner's petition for post-conviction relief.

Thereafter, the New Jersey Supreme Court denied Petitioner's petition for certification. State v. Thomas, 177 A.3d 106 (N.J. 2017).

On January 17, 2018, the Petitioner filed a petition for a writ of habeas corpus.

The petition essentially raised thirteen grounds: **Ground One:** (a) All of the Defendant's Statements to the Police should

have been Suppressed; **(b)** The State's Failure to Advise the Petitioner of the Search Warrant Issued for His Person and Home Renders any Waivers of His Right to Remain Silent Invalid; **(c)** The Petitioner's Request for Counsel During His Interrogation Mandates that Any Statements Following this Request Must be Suppressed; **(d)** The Doctrine of the Fruit of the Poisonous Tree Mandates that all of the Petitioner's Statements be Suppressed; **(e)** The Totality of the Circumstances Establishes that the Petitioner's Statements to the Police were Not Voluntary Beyond a Reasonable Doubt and Should have been Excluded from Evidence;

**Ground II:** The State's Exercise of a Peremptory Challenge to Exercise the Only African-American to be Qualified as a Juror Violated the Petitioner's Right to Trial by Jury Guaranteed by Both the United States and New Jersey Constitution; **Ground III:**

The Admission of Other Crime Evidence was Error and Violated the Petitioner's Right to a Fair Trial; **Ground IV:** The Trial Court Erroneously Interpreted the Rule of Completeness to Exclude Relevant and Material Evidence; **Ground V:** Certain Conduct by the Trial Court Deprived the Petitioner of a Fair Trial; **Ground VI:**

The State's Violation of Sequestration Order Denied the Petitioner a Fair Trial; **Ground VII:** The Failure of the Court to Provide Proper and Accurate Instructions to the Jury Denied the Petitioner a Fair Trial; **Ground VIII:** Failure of the Court to Inform the Defense of Exculpatory Information Violated the Rules

of Discovery and Brady v. Maryland; **Ground IX:** The Denial of the Defense Motion for Mistrial were an Abuse of Discretion by the Court; **Ground X:** The Sentence Imposed on Petitioner of Two Consecutive Terms of Life Without Parole (LWOP) was Illegal; **Ground XI:** Trial Counsel was Ineffective for Failing to Thoroughly Discuss with the Petitioner All Relevant Ramifications Associated with the Decision Whether or Not to Testify, as a Result of which the Petitioner Did Not Testify in His Own Defense at Trial; **Ground XII:** The Cummulation of Certain Errors Deprived Petitioner of Due Process; **Ground XIII:** Appellate Counsel was Ineffective.

On March 1, 2022, the district court denied the petition for a writ of habeas corpus. Omar Shaheer Thomas v. Administrator New Jersey State Prison et al., No. 18-0710 (ES), slip opinion (March 1, 2022).

Thereafter, Petitioner filed a timely notice of appeal and a petition for a certificate of appealability (COA). On August 30, 2022, the Third Circuit denied the petition for a COA. On October 21, 2022, the Third Circuit denied a petition for rehearing and rehearing en-banc.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### Point I

The Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His Stop and Arrest was not Unlawful and Illegal and in Violation of the New Jersey and the United States Constitution.

Pursuant to the Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The State of New Jersey has a tantamount provision which parallels the 4th Amendment. According to the New Jersey Constitution, Article I, Paragraph 7.

Therefore, the Federal and State Constitutions declares that arrest warrants must be supported by probable cause. A warrantless arrest in a public place must satisfy the same standard. Maryland v. Pringle, 540 U.S. 366, 370 (2003); State v. Basil, 202 N.J. 570, 584 (2010).

Absent exigent circumstances or an officer's witnessing a crime, before arresting a suspect, police must obtain an arrest warrant issued by a judicial officer on a finding of probable cause that the suspect committed the alleged crime. See Steagald

v. United States, 451 U.S. 204 (1981); State v. Cleveland, 371 N.J. Super 286, 294, 852 A.2d 1150 (App. Div.), certif. denied, 182 N.J. 148, 862 A.2d 57 (2004). Warrantless arrests that are based on exigent circumstances or on an officer's witnessing a crime are presumptively unreasonable, and violate the right to be free from unreasonable seizure. See Payton v. New York, 445 U.S. 573 (1980); State v. Henry, 133 N.J. 104, 110, 627 A.2d 125, cert. denied, 510 U.S. 984 (1993). Without a warrant, the State has the burden of proving the overall reasonableness of an arrest. Payton v. New York, 445 U.S. 585 (1980); State v. Mann, 203 N.J. 328, 337-38, 2 A.3d 379 (2010).

The remedy for an unlawful arrest is not dismissal of the complaint or charges against the defendant, but rather suppression of the evidence obtained as a result of the unlawful arrest. Cleveland, 371 N.J. Super at 299.

A confession obtained through custodial interrogation after an illegal arrest should be excluded unless the chain of causation between the illegal arrest and the confession is sufficiently attenuated so that the confession was "sufficiently an act of free will to purge the primary taint." State v. Worlock, 117 N.J. 596, 621 (1990) (quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct 407, 416-17, 9 L.Ed.2d 441, 454 (1963)).

In considering whether evidence must be excluded, the courts have employed the three-part test promulgated in Brown v. Illinois, 422 U.S. 590, 95 S.Ct 2254, 45 L.Ed.2d 416 (1975). In

State v. Barry, 86 N.J. 80 (1981), cert. denied 454 U.S. 1017, 102 S.Ct 553, 70 L.Ed.2d 415 (1981), the court explained how the Brown factors should be evaluated:

The inquiry for determining whether a defendant's statements are tainted by antecedent illegality is a question of judgment. Considering the purposes of the exclusionary rule in these matters (deterrence of illegal arrests and preservation of the integrity of the judiciary) and the competing purpose of discovering the truth in a criminal trial, the court is required to make a value judgment by considering three factors as they relate to those purposes: the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct. Id. at 87.

The Miranda warning alone do not purge the taint of an illegal arrest. Brown, *supra*, 422 U.S. at 602, 95 S.Ct at 2261, 45 L.Ed.2d at 426. While "the question of whether a confession is the product of a free will. . . . must be answered on the facts of each case," a court should consider three factors: 1) the temporal proximity of the arrest and the confession; 2) the presence of intervening circumstances; 3) particularly the purpose and flagrancy of the official misconduct." Brown v. Illinois, 422 U.S. at 63, 95 S.Ct at 2261-62, 45 L.Ed.2d at 427.

In the Petitioner's case it is clear that the statements made by him commenced shortly after his seizure by the police and there were no intervening circumstances to purge the taint of this seizure. The court found that shortly after going to the

initiative, the Petitioner status was custodial. Coupled with the flagrancy of the police misconduct, the statements of the Petitioner were fruit of the illegal arrest and the only way to introduce a confession obtained after an illegal arrest, "the State should some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel of the accused's presentation before a magistrate for a determination of probable cause." Worlock, *supra*, 117 N.J. at 623-24.

There was no probable cause found by a judge, and the Petitioner had no time to himself free from the pressure of the interrogation. Rather, from his arrest to his confession, he was in custody and in the presence of police officers. He did not have the opportunity to speak with family members nor counsel. Therefore, the causal chain between the Petitioner's arrest and the confession essentially was unbroken.

A case which is similar to the Petitioner's is Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 840 (1979). In Dunaway, a homicide had been committed during the attempted robbery of a store. An informant told the police that Dunaway was involved in the crime but the information given was insufficient to allow the police to obtain a warrant for Dunaway's arrest. Nevertheless, the police took Dunaway into custody and questioned him after giving him Miranda warnings. While still in custody, he eventually gave statements and drew sketches implicating himself in the crime. This evidence was used at trial and

resulted in his conviction for attempted robbery and felony murder.

The United States Supreme Court reversed the conviction. It held that Dunaway's constitutional rights had been violated when the police, without probable cause to arrest, took defendant into custody and brought him to the police station for questioning. The Court held that the detention for custodial interrogation intruded so severely on interests protected by the Fourth Amendment as to trigger the traditional safeguards against illegal arrest. 442 U.S. at 216, 99 S.Ct at 2258, 60 L.Ed.2d at 838. After taking into account factors such as the temporal proximity of the illegal arrest and confession, the presence of intervening circumstances and the purpose and flagrancy of official misconduct, the Supreme Court concluded that there was no intervening event which broke the connection between the illegal detention and the incriminatory statements. The giving of Miranda warnings, even though sufficient for Fifth Amendment purposes, was held not to render the connection sufficiently attenuated under Fourth Amendment analysis to permit use of Dunaway's statements at trial. Dunaway, *supra*, 442 U.S. at 219, 99 S.Ct at 2259, 6 L.Ed.2d at 840.

In the Petitioner's case, the interrogation of the Petitioner lasted over 30 hours. For at least 28 of those hours, the State still had not officially charged the Petitioner with any crime. He was in police custody without contact with his family and without consultation with counsel. His illegal detention was not purged by any intervening circumstances.

This was not the Petitioner's first request for a lawyer and the response by the Investigator was inadequate. As such, all questioning of the Petitioner should have ceased until he had an opportunity to confer with counsel and the State's failure to honor his request for counsel, violated the Petitioner's right to remain silent and his right against self-incrimination. Therefore, any statements made after this request should have been suppressed.

**(B) The Totality of the Circumstances Establishes that the Petitioner's Statements to the Police were Not Voluntary Beyond a Reasonable Doubt and Should have been Excluded from Evidence.**

The State must prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne. State v. Galloway, 133 N.J. 631, 654 (1993).

In determining whether a defendant's will was overborne, the totality of the circumstances must be examined, "including both the characteristics of the defendant and the nature of interrogation." Id. at 654. Relevant factors include "the suspect's age, education and intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment and mental exhaustion was involved." Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct 2041, 2047-48, 36 L.Ed.2d 854, 862 (1973).

In the Petitioner's case at bar, the Petitioner was taken into custody illegally, then, he was held incommunicado for more

than 36 hours. He was in custody for 30 hours without being told the charges against him. Then, He was interrogated by police on seven (7) different occasions during this period of time. For this entire period of time, the Petitioner was either in the custody of police personnel or in an isolated place and for at least 8 hours, he was kept without clothing in a jail cell. He was allowed only, one or two short intervals of rest during this 36 hour period. Plus, the transcripts of the Petitioner's statements reveal that his interrogators advised him they would "speak up for him" with the prosecutor, which were "promises of favorable treatment."

Therefore, all the Petitioner's statements should have been suppressed because of the violations of his Fourth Amendment and State Constitutional protection against unlawful search and seizure and the violations of the privilege against self-incarceration guaranteed by both the Fifth Amendment and State privilege.

As such, reasonable jurists could disagree with the district court's decision.

## Point II

Reasonable Jurists Could Disagree with the District Court's Ruling that the State's Exercise of a Peremptory Challenge to Exercise the Only African-American to be Qualified as a Juror did not Violate the Petitioner's Right to Trial by Jury Guaranteed by Both the United States and New Jersey Constitution.

Article I of the New Jersey Constitution, paragraph 5 provides "no person shall be denied the enjoyment of any civil right, nor be discriminated against in the exercise of any civil . . . right . . . because of . . . race, color, ancestry or national origin." Paragraph 9 provides "the right of trial by jury shall remain inviolate." Finally, Paragraph 10 provides "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury. State v. Gilmore, 199 N.J. Super. 389, 398 (App. Div. 1985). In State v. Stewart, 2 N.J. Super 15, 24 (App. Div. 1949), the Court held that "in the drawing of jury panels, grand or petit, there must be no intentional discrimination against persons because of their color."

The Petitioner who is an African-American male and following four weeks of juror selection, an African-American male was qualified as a juror and seated in seat #1. Despite previously stating that the jury was satisfactory on fourteen separate occasions, the Prosecutor exercised a peremptory challenge to excuse this juror.

The defense immediately alerted the Court and Prosecutor that it felt the challenge was racially discriminatory especially since this was the only African-American juror qualified and the juror had served in law enforcement as a correctional officer for 27 years. The Prosecutor denied the challenge was racially motivated stating that "corrections officers fall into two groups, some maintain law enforcement ties or they become more friendly with inmates. The correction system is rife with contraband and officers are more sympathetic with people they guard."

Prior to the seating of the juror, the prosecutor had indicated his acceptance of the jury panel fourteen (14) times previously. All of the individuals in the array were white. This juror was the first African-American juror to be qualified in four (4) weeks of the jury selection and immediately upon him being seated in the box, the prosecutor exercised a peremptory challenge.

The African-American juror, was employed as a certified nursing assistant, had served four years (4) in the Air Force and had been a PBA representative and had spent twenty-seven (27) years as a corrections officer. The prosecutor's reliance on the juror's former employment as a corrections officer as the basis for his concern was ludicrous. While the juror indicated he felt that African-American were sentenced more severely by the court system, (a question posed by the jury questionnaire) he stated he could be fair and apply the law. The only thing distinguishing him from other jurors was that he was African-American.

By allowing the State's challenge to the sole African American juror to stand, violated the Petitioner's right to a fair and impartial trial.

As such, reasonable jurists could disagree with the district court's decision.

### Point III

Reasonable Jurists Could Disagree with the District Court's Ruling that the Admission of Other Crime Evidence was not Error and did not Violate the Petitioner's Right to a Fair Trial.

In N.J.R.E. 404(b) it states:

Evidence of other crimes, wrongs or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The State introduced other crime of evidence consisting of references to the Petitioner's possession of a gun on another occasion and discussion of another robbery at Best Buy stores. The evidence was proffered by the State to provide a context of the interpersonal relationship between the Petitioner and his co-conspirators (his cousins) and because an individual was more likely to conspire with persons with whom he has talked about crimes in the past. The defense objected and opposed the admission of this testimony citing N.J.R.E. 404(b) and N.J.R.E. 403.

In State v. Ramseur, 106 N.J. 123, 265 (1987), the court held that although evidence of prior wrongs may be admissible as evidence on relevant issues such as motive and intent, evidence of past crimes does not automatically become admissible just because it is relevant to the issue of motive and intent. See

also State v. Vallejo, 198 N.J. 122 (2009) (reversing a conviction wherein the Court concluded that the trial was "poisoned" with prejudicial evidence).

Therefore, a forceful and immediate curative instruction could have blunted the prejudicial effect of said references. However, absent any such instruction and the admission of such evidence was clearly capable of producing an unjust result in the Petitioner's trial and denying him to a fair trial.

In the Petitioner's case, the court ruled that the evidence was admissible to prove a plan to commit a crime and was in furtherance of the conspiracy, even-though the Petitioner was never charged with conspiracy.

Therefore, the trial court abused its discretion and violated the Petitioner right to a fair trial by allowing the State's to present other-crimes of evidence, which violated the Petitioner's right to a fair and impartial trial.

As such, reasonable jurists could disagree with the district court's decision.

#### Point IV

Reasonable Jurists Could Disagree with the District Court's Ruling that the Conduct by the Trial Court Deprived the Petitioner of a Fair Trial.

A judge must conduct a trial in a fair and impartial manner, refraining from remarks that might prejudice a party or might influence the minds of the jury. Cestero v. Ferrara, 110 N.J. Super 264, 273 (App. Div. 1970).

The N.J. Constitution Article I, paragraph 10 provides as follows:

In all criminal prosecutions, the accused shall have the right to be confronted with witnesses against him. N.J. Const. of 1947.

Among the primary interests protected by the right of confrontation are the opportunity for defendants to face their accusers and to cross-examine the State's witnesses. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 17 S.Ct 989, 998, 94 L.Ed.2d 40, 53 (1987).

In the Petitioner's case during the cross-examination of several State's witnesses in the Petitioner's the Court made multiple comments to the jury that information in the defense attorney's question is not evidence; comments that a judge determines the terms and provisions of an Order and examines affidavits in support of Orders for GPS and search warrants and that it is not important who prepares orders (State).

Also, during the cross-examination of co-defendant Vaughn, the Court stated that sentencing is up to the judge and that the

State's recommendation was 20/17 stipulated NERA sentence and 5 years of parole supervision. During his charge to the jury, the Court made the following comments: **1)** the police had no duty to record statements of Petitioner and had no duty to inform the person that their statement might be recorded; **2)** "that the Petitioner in his opening statement said he would present proofs that lead to the conclusion he is not guilty and the defense has introduced some evidence in the regard. If you believe the evidence does prove the Petitioner innocent than the verdict should be not guilty. However the fact the Petitioner attempted to prove his innocence does not shift the burden of proof."

The Court also limited the cross-examination of certain key witnesses most notably; **1)** Dennis Davenport and Brian Bordinaro regarding their out of court identifications; **2)** Deputy Chief Gannon regarding his knowledge about the Funcoland investigation and statements made by the Petitioner; **3)** Lt. Simonetti regarding the Petitioner's arrest affidavit; **4)** portions of the mall tape; **5)** questions to co-defendant Rahman Vaughn about what the investigating detectives told him what others had said.

In State v. Taffaro, 195 N.J. 442 (2008), the Supreme Court of New Jersey reversed a defendant's conviction because of questioning by the trial court. That court held that the "critical concern, of course, is that a court not suggest to jurors through its questioning that it is taking one party's side. To do so is to "cross the fine line that separates advocacy from impartiality." Id. at 451.

In the Petitioner's case the limitation of the cross-examination of these State witnesses denied the Petitioner his right of confrontation of the witnesses against him and by precluding the defense from questioning in key areas, therefore violated the Petitioner's right to due process and a fair trial.

Therefore, the trial court abused its discretion and violated the Petitioner right to a fair trial by interfering with the Petitioner's defense, which violated the Petitioner's right to a fair and impartial trial.

As such, reasonable jurists could disagree with the district court's decision.

### Point V

Reasonable Jurists Could Disagree with the District Court's Ruling that the Failure of the Court to Inform the Defense of Exculpatory Information Violated the Rules of Discovery and Brady v. Maryland.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, the prosecution has a constitutionally, non-delegable duty to disclose to the defense all favorable evidence material to guilt or punishment. Id. at 87. This duty extends to all exculpatory evidence material to either prove (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, either wilfully or inadvertently; and (3) the evidence is material i.e. prejudice must have ensued. Prejudice is established if there is a reasonable probability of a different result.

In the Petitioner's case, the State failed to provide discovery and exculpatory information regarding their investigation of the Petitioner which impacted upon issues of credibility of witnesses and the circumstances of the Petitioner's statements. These violations included failure to disclose prior to the pre-trial Miranda hearing the following 1) the seizure of the Petitioner's vehicle in August 2003 by Lt. De Francisci of the Essex County Prosecutor's Office to install a GPS device at the behest of the Morris County Prosecutor's Office; 2) that the Morris County Prosecutor Michael Rubinaccio

spoke to the Petitioner at the Morris County Prosecutor's Office prior to the November 18, 2003 inculpatory statement to Deputy Chief Gannon; **3)** that the Morris County detectives removed the Petitioner from their office building to a Sheriff's vehicle for a "perp walk" to accommodate a photo opportunity for the newspapers; **4)** that the Petitioner was put together with co-defendant Vaughn on evening of November 18, 2003 to confront each other regarding their statements. The State also failed to advise the defense that one of the identification witnesses, Kate Tschischik, was given a copy of the Petitioner's photo array and his photograph prior to testifying at the trial.

All of the evidence not disclosed was material. The information regarding Kate Tschischik had direct bearing upon her credibility and the validity of her identification. Moreover, the failure to inform the defense of her possession of identification documents prior to her testimony prevented the Petitioner from seeking a Wade hearing on her and other witnesses identification pre-trial. It also directly impacted upon the defense cross-examination of all the identification witnesses. Had this information been learned pre-trial, the defense would have prepared differently its cross-examination of the witnesses.

Therefore, the State's failure to disclose and turnover material evidence violated the Petitioner's right to due process and a fair trial.

As such, reasonable jurists could disagree with the district court's decision.

## **Point VI**

Reasonable Jurists Could Disagree with the District Court's Ruling that the Sentence Imposed on Petitioner of Two Consecutive Terms of Life Without Parole (LWOP) was Illegal.

The sentencing statute in effect at the time of the Petitioner's offense was for a sentence of up to life imprisonment with a thirty year parole ineligibility.

Under N.J.S.A. 2C:11-3(b) provides as follows:

(2) if the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced, except as otherwise provided in subsection c. of the section, by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder and who is not sentenced to death under this section shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and (b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation N.J.S. 2C:14-2 or N.J.S. 2C:14-3.

(4) If the defendant was subject to sentencing pursuant to subsection c. and the jury or court found the existence of one or more aggravating factors, but that such factors did not outweigh the mitigating factors found to exist by the jury or court or the jury was unable to reach a unanimous verdict as to the weight of the factors, the defendant shall be sentenced by the court to a term of life imprisonment during which the defendant shall not be eligible for parole.

In the Petitioner's case the sentence of LWOP was limited to murders of a law enforcement officer, murder of child during the course of a sexual assault and to anyone not sentenced to death following a separate sentencing proceeding wherein the jury found the existence of one or ore aggravating factor beyond a reasonable doubt, but that these factors did not outweigh the mitigating factors found or if the sentencing jury as unable to reach an unanimous verdict.

The sentence represents a violation of the Ex Post Facto Clause of both the federal and State constitutions. In State v. Fortin, 198 N.J. 619 (2009), the defendant was pending retrial in a capital case when the death penalty was repealed. The Court held that the State should proceed to the penalty phase of defendant's trial as if the statute had not been amended. If the jury found for the imposition of death, then there was no ex post facto violation in applying the amended life-without-parole sentence because it was less than death. However, the Court held:

On the other hand, if the jury finds in favor of a non-death sentence, then we cannot avoid the conclusion that application of the amended statute to defendant would violate the Ex Post Facto Clause because a sentence of life without parole would be greater than the maximum non-death sentence allowed at the time of the offense: life with a thirty-year parole disqualifier.

Therefore, if the jury rejected the death penalty, in order to avoid an unconstitutional application of the new statute, the

defendant must be sentenced under the former statute as it existed at the time of the offense, i.e., thirty years to life with a thirty-year parole bar. Id. at 633.

The Fortin case has been interpreted by the Court to mean that for a defendants facing the death penalty at the time the offense was committed, a penalty phase proceeding must be held in order for the court to impose life without parole.

In the Petitioner's case, no such proceedings were held and he was sentenced to two consecutive life without parole sentences, which violated the Ex Post Facto Clause.

Therefore, the Court's failure to conduct a separate sentencing proceeding and allowing the jury to find an aggravating factor beyond a reasonable doubt during that proceeding, violated the Petitioner's right to due process and a fair trial.

As such, reasonable jurists could disagree with the district court's decision.

### Point VII

Reasonable Jurists Could Disagree with the District Court's Ruling that the Trial Counsel was not Ineffective for Failing to Thoroughly Discuss with the Petitioner All Relevant Ramifications Associated with the Decision Whether or Not to Testify, as a Result of which the Petitioner Did Not Testify in His Own Defense at Trial.

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.

In the Petitioner's case it was maintained trial counsel had not adequately represented the Petitioner in this regard since counsel essentially coerced him not to testify his Miranda

hearing or at his trial. With respect to the Petitioner testifying at trial, the day before the State rested, and after the jury had been excused for the day, the court addressed the Petitioner in the following fashion:

(Off the record/on the record).

**THE COURT:** -- State's case may conclude Wednesday and the defense case may commence on Wednesday afternoon. I'd like to address the defendant, and I think you know the area I'm going to address him on.

**MR. THOMAS:** - I'll give you a second to talk to your attorney.

**THE COURT:** Mr. Thomas, you have the right to testify and the right not to testify. And if you elect not to testify, the Prosecutor cannot comment. And if you want me to, I would charge the jury, I would instruct the jury as follows. The defendant has chose (sic) not to be a witness in this case. It is his constitutional right to remain silent. I charge you that you are not to consider for any purpose or in any manner in arriving at your verdict that fact that the defendant did not testify. Nor should that fact enter into your deliberations or discussions in any manner at any time.

The defendant is entitled to have the jury consider all of the evidence -- please close that door -- and he is entitled to the presumption of innocence even if he does not testify as a witness.

Now I was interrupted for one second so I'll repeat the portion that was interrupted. The defendant is entitled to have the jury consider all of the evidence and he is entitled to the presumption of innocence even if he does not testify as a witness.

Now, I would instruct the jury or charge the jury just as I have indicated to you. I don't want you to tell me what you're going to

do, that's something between you and your attorneys. The only thing I want to know is do you understand what I've just said?

**THE DEFENDANT:** Yes.

The parties then discussed other matters with respect to witnesses who would potentially testify for the defense, all of whom were members of law enforcement.

Testimony concluded three days later, and the trial did not resume until 11 days later. At that time, when respective counsel and the court discussed the scheduling of the charge conference and summations, the prosecutor indicated the following:

Judge, I am not prepared to sum up today. Mr. Glazer was kind enough to give me a best-of articulation as to whether or not the defendant might testify or not. So, I had to prepare for cross-examination. Mr. Glazer was kind enough, at least on Friday, tell me that he wasn't sure what was going to happen. He couldn't provide me information one way or the other, but I spent the weekend preparing for this potential cross-examination. So, I'd ask that we at least sum up tomorrow. If not, tomorrow, Wednesday.

Shortly thereafter, the court then addressed the Petitioner in the following fashion:

**THE COURT:** I am going to read them the stipulation, though. But his stipulation is going to not have real meaning to them until you get 69 into evidence.

All right. Let me speak to the defendant once again. Mr. Thomas, I previously mentioned to you that you have the right to testify, and the right not to testify. And if you choose not to testify, if that's your election, then

### Point VIII

Reasonable Jurists Could Disagree with the District Court's Ruling that the Cumulation of Certain Errors did not Deprived the Petitioner of his Due Process.

Petitioner contends that if the errors complained of in all of the Points supra, do not individually entitle him to relief, they entitle him to relief in their aggregate. The Petitioner's Statements to the Police should have been Suppressed, the State's Exercise of a Peremptory Challenge to Exercise the Only African-American to be Qualified as a Juror Violated the Petitioner's Right to Trial by Jury Guaranteed by Both the United States and New Jersey Constitution, the Admission of Other Crime Evidence was Error and Violated the Petitioner's Right to a Fair Trial, the Trial Court Erroneously Interpreted the Rule of Completeness to Exclude Relevant and Material Evidence, the Certain Conduct by the Trial Court that Deprived Petitioner of a Fair Trial, the State's Violation of Sequestration Order Denied the Petitioner a Fair Trial, the Failure of the Court to Provide Proper and Accurate Instructions to the Jury Denied the Petitioner a Fair Trial, the Failure of the Court to Inform the Defense of Exculpatory Information Violated the Rules of Discovery and Brady v. Maryland, the Denial of the Defense Motion for Mistrial were an Abuse of Discretion by the Court, the Sentence Imposed on Petitioner of Two Consecutive Terms of Life Without Parole (LWOP) was Illegal, Trial Counsel Failure to Thoroughly Discuss with the Petitioner All of the Relevant Ramifications Associated with the

Decision Whether or Not to Testify, the inadequate Legal Representation and Coercion by Trial Counsel, which Resulted in the Petitioner Not testifying at the Miranda Hearing --all clearly combined to deprive petitioner of a fair trial. The state court's finding was contrary to established federal law and therefore unreasonable applied.

As such, reasonable jurists could disagree with the district court's decision.

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: January 5, 2023

  
Omar Shaheer Thomas,  
Petitioner