

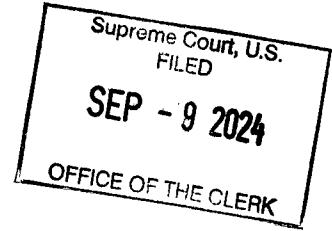
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No. \_\_\_\_\_

ORIGINAL

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In The  
Supreme Court of the United States



FREDERICO BRUNO

Petitioner;

v.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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Frederico Bruno #971058/570357E  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625

## QUESTIONS PRESENTED

1. Whether the District Court and the Third Circuit Court of Appeals erred in refusing to issue a certificate of appealability and granting an evidentiary hearing.
2. Whether the District Court and the Third Circuit Court of Appeals decisions are contrary to the United States Supreme Court's decisions.

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## OPINIONS BELOW

The United States District Court of New Jersey denied Petitioner's habeas corpus in an opinion on February 1, 2024. (See Appendix - Ex-1)

The United States Court Of Appeals for the Third Circuit filed an order on July 12, 2024, denying petitioner's petition for a rehearing En Banc. (See Appendix - Ex-37)

## JURISDICTION

The Third Circuit Court of Appeals entered its order denying an application for a certificate of appealability, which served as the court's judgment.

Thereafter, on July 12, 2024, the Third Circuit Court of Appeals 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 5

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 offence 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.

### 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.

### Amendment 14

Sec. 1. [Citizens of the United States.] 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 shall abridge 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 FACTS

The New Jersey Superior Court, Appellate Division provided the following factual summary of the proofs of trial: Petitioner broke into an apartment where his three-month-old son, the son's mother, and the mother's friend resided. Petitioner brought a meat cleaver into the apartment, brandished it, and slashed the friend's face and arm. The mother, who was in the same area, tried to protect the son, but Petitioner threatened to kill her, punched her in the face, and attempted to take the son. The violence continued in the apartment. Video footage captured the mother and son going through a window and hitting the ground. Thereafter, Petitioner found them and struck the mother with a chair, which was also captured on video. Tragically, the son died. In the apartment, the police located the meat cleaver that Petitioner utilized, and on the roof, they found gloves worn by Petitioner during the attacks. State v. Bruno, A-0144-19, 2021 N.J. Super. Unpub. LEXIS 382, 2021 WL 867036 at \* 1 (N.J. Super Ct. App. Div. March 9, 2021.)

Petitioner was charged with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (a)(2) (Count One); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (Count Two); second-degree burglary, N.J.S.A. 2C:18-2 (Count Three); first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (Counts Four and Five); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (Counts Six and Seven); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (Counts Eight, Ten and Twelve); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (Counts Nine, Eleven, and Thirteen);

second-degree witness tampering, N.J.S.A. 2C:28-5(a) (Count Fourteen); third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2 (Counts Fifteen, Sixteen, and Seventeen); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (Count Eighteen); and fourth-degree obstructing the administration of justice, N.J.S.A. 2C:29-1 (Count Nineteen).

The jury convicted Petitioner on the lesser included charge of aggravated manslaughter under Count One, as well as Counts Two through Eighteen. Bruno, 2021 N.J. Super. Unpub. LEXIS 382, 2021 WL 867036 at \* 1. The court sentenced Petitioner to an aggregate prison term of 113 years with seventy-six and one-half years without parole eligibility. State v. Bruno, A-0435-15T1, 2017 N.J. Super. Unpub. LEXIS 2956, 2017 WL 5898780 at \* 1 (N.J. Super. Ct. App. Div. Nov. 28, 2017).

The Petitioner filed a Notice of Appeal with the Appellate Division. On November 29, 2017, the Appellate Division affirmed Petitioner's judgment of conviction. Bruno, 2017 N.J. Super. Unpub. LEXIS 2956, 2017 WL 5898780. The New Jersey Supreme Court denied Petitioner's petition for certification.

The Petitioner then filed a post-conviction relief ("PCR") petition on June 13, 2018. On June 25, 2019, the PCR court denied his petition. Petitioner appealed, and the Appellate Division affirmed the denial. Bruno, 2021 N.J. Super. Unpub. LEXIS 382, 2021 WL 867036. The New Jersey Supreme Court then denied his petition for certification. State v. Bruno, 248 N.J. 589 (2021).

The Petitioner then filed his habeas petition on March 7, 2022. Petitioner asserted twelve grounds for relief: Ground One, the Petitioner asserted that His federal constitutional rights to due process and a fair trial were violated by the Trial Court's Failure to Give an Unanimity Instruction because the State's Alternative Theories were not Conceptually Similar, but Rather were Contradictory, relying on Different Acts and Different Evidence; Ground Two, the Petitioner asserted that It Is Cruel and Unusual Punishment that a Felony Murder Conviction Leads to a Greater Sentence than Aggravated Manslaughter because it is Grossly Disproportionate and it Serves no Legitimate Penological Objective to Punish a Negligent Homicide More Severely than a Reckless Homicide; Ground Three, the Petitioner asserted that the Trial Judge Failed to Address the Real-Time Consequences of this Sentence, which are the most Severe Possible under the law: Life Imprisonment without the Possibility of Parole; the Overall Sentence was Excessive; Ground Four, the Petitioner asserted that the Trial Court Failed to Exclude Juror #8 (Maria Romero) After of She Observed the Petitioner Handcuffed, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial; Ground Five, the Petitioner asserted that the Trial Court Erred in Denying the Petitioner's Motion for a Mistrial based Upon Prosecutorial Misconduct, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to a Fair Trial and Due Process; Ground Six, the Petitioner asserted that He was Denied Fair Trial by An Impartial Jury, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to a Fair Trial and Due Process; Ground Seven, the Petitioner asserted that

He was Denied His Constitutional Right to Confront and Cross-Examine of His Accuser, by the State's Misconduct, which Violated the Petitioner's Fourteenth Amendment Right to a Fair Trial and Due Process; Ground Eight, the Petitioner asserts that He was Denied His Constitutional Right to Testify on His Behalf, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to a Fair Trial and Due Process; Ground Nine, the Petitioner asserted that He was Denied His Constitutional Right to Present a Defense, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to Effective Assistance of Counsel and a Right Due Process; Ground Ten, the Petitioner asserted that He was Denied His Constitutional Right to Effective Assistance of Counsel, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial and Due Process; Ground Eleven, the Petitioner asserted that He was Denied His Constitutional Right to Effective Assistance of Appellate Counsel, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial and Due Process; Ground Twelve, the Petitioner contends that He should have been granted an Evidentiary hearing.

The Respondents filed an answer and the Petitioner filed a reply to the answer.

On February 1, 2024, the Honorable Julien Xavier Neals, U.S.D.J. in the district court denied the petition for a writ of habeas corpus. Bruno v. Administrator, New Jersey State Prison, 22-1470 (JXN), slip opinion (February 1, 2024).

Thereafter, the Petitioner filed a timely notice of appeal and a petition for a certificate of appealability (COA). The Petitioner's

Certificate of Appealability (C.O.A.) was denied and on July 12, 2024, 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 His Trial Counsel was Ineffective, 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.

The district court simply referred to the state court's conclusion, citing the state court's holding that most of petitioner's claims were either barred or without merit. 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 rather than on procedural grounds.

## Point II

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Trial Court Failed to Exclude Juror #8 (Maria Romero) After of She Observed the Petitioner Handcuffed, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial.

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, after the testimony of Detective Victor Cherry the court excused the jury for lunch at approximately 1:20 p.m. prior to the exiting the courtroom the judge gave precise instructions. One of which was "not to linger out in the hallway."

Once back on the record the court was informed that Juror #8 Ms. Romero observed the Petitioner in "handcuffs," while being brought back to the bullpen.

At side-bar the court asked Ms. Romero a series of questions to see exactly what Ms. Romero saw and Ms. Romero clearly stated "I saw him being taken into the back -- he was wearing handcuffs."

The juror further stated "I kind of presume that he would be in handcuffs," "he's the defendant and I presumed that he was incarcerated." Subsequently, to interrogating Ms. Romero the court decided there was "no prejudice" and allowed Ms. Romero to continue serving on the jury.

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. The Petitioner contends that an accused is constitutionally guaranteed the right to trial by an impartial jury. U.S. Const. Amend 14; N.J. Const. Art 1, Par. 1 & 10.

In addition, "a defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court during the course of the criminal trial itself." See State v. William, 93 N.J. 39, 60 459 A.2d 641 (1983)

On the outset of the interrogation, the court stated there was no "prejudice" and found Ms. Romero to be "candid" and allowed her to continue to serve on the jury. In State v. Grant, 254 N.J. Super 571 (App. Div. 1992) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61, 80 A.2d 302 (1951), "The test is not whether the irregularity actually influenced the results, but whether it had the capacity of doing so."

The Panko's Court further stated:

"The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all suspension of corrupting practices." Panko, supra. 7 N.J. 61-62.

In the Petitioner's case, the court invited the extraneous influences by not excusing Ms. Romero and justifying her statement by stating "most of us presumed the same as she does."

In addition, there is no way of knowing or to say if Ms. Romero did not influence the remaining jurors given the extraneous material she was exposed to. See Sheppard v. Maxwell, 384 U.S. 353, 362-63, which states, "not only the Sixth Amendment, but the Fourteenth Amendment right to due process requires the accused receive a trial by an impartial jury free from outside influences.

### Point III

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that the Trial Court Erred in Denying the Petitioner's Motion for a Mistrial based Upon Prosecutorial Misconduct, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to a Fair Trial and Due Process.

In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct 629, 633, 79 L.Ed 1314, 1321 (1935):

The . . . [prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In the Petitioner's case, during the trial on cross-examination of Saydee Figueroa defense counsel learned, for the first time, that Ms. Figueroa had previously discussed the case with the Assistant Prosecutor. This apparently took place at least three separate

occasions back in 2013, shortly after Ms. Figueroa gave testimony in support of him seeking a restraining order before Judge Baber. According to Ms. Figueroa, she provided details about what occurred and that a couple of these interviews lasted "[a]n hour or so." Ms. Figueroa testified that the assistant prosecutor at trial, Ms. McClure, was the same person she previously met with.

Upon ascertaining this information, trial counsel immediately sought a sidebar telling the Court that he had an application to make, and did seek a mistrial insisting that this was a complete "surprise":

Judge, the surprise is evidence, because I had no idea that she had ever met with anybody from the Prosecutor's Office because every single report that I had in discovery said they hadn't spoken to her at all since their attempts to see her in 2012. So, it is a surprise to me, and I was surprised and that's why I'm moving for a mistrial because of - - of this discovery violation. I should have been apprised of this a long time ago, and I should have been made aware that there were meetings. So that's my position, Judge. This is a violation.

Not only was this a surprise to the defense, but according to trial counsel, the assistant prosecutor had even misled him by representing that she had not previously spoken with Ms. Figueroa:

Judge, I don't know what happened with the interviews that were done with this witness. She's just testified under oath that she had several conversations with the prosecutor about this. I've never been given anything. In fact, I've been told by this prosecutor - - she represented on the record during motions she's never spoken

to her, so I don't know what's going on here, but that's a problem and I am entitled to know who she talked to, what was said during those interviews.

Therefore, there was a clear conflict between what Ms. Figueroa was testifying to and what the assistant prosecutor was asserting:

This witness said that she did speak to Ms. McClure in 2013. So there's a conflict between what the witness says and what Ms. McClure says. It is outrageous that this assistant prosecutor met with a victim, didn't note the day, didn't note the place, didn't note the time and never told defense counsel anything about meeting with the person. This was not in preparation for trial, Judge.

The trial Judge denied the motion for a mistrial. In doing so, the trial court erred. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct 2142, 2146, 2146, 90 L.Ed.2d 636, 645 (1986): "A defendant has the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. U.S. Const. Amend. VI. Moreover, the evidence went to the very heart of the defense as it related to the credibility of Ms. Figueroa, one of the alleged victim.

## Point IV

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that He was Denied His Constitutional Right to Confront and Cross-Examine of His Accuser, by the State's Misconduct, which Violated the Petitioner's Fourteenth Amendment Right to a Fair Trial and Due Process.

The right of confrontation guarantees criminal defendant's "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct 645 (1986); California v. Trombetta, 467 U.S. 479, 485, 14 S.Ct 2528, 2532, 81 L.Ed.2d 413, 419 (1984).

Both the Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution (1947) afford a defendant in a criminal case the right to confront the witnesses against him. This necessarily includes the right to cross-examine such witnesses. State v. Williams, 182 N.J. Super 427, 434 (App. Div. 1982). Indeed, the right to cross-examine is the essential purpose of the Confrontation Clause of the Sixth Amendment. State Crudup, 176 N.J. Super 215, 220 (App. Div. 1980); State v. Sheppard, 197 N.J. Super 411, 435 (Law Div. 1984).

Therefore, based on the prosecutorial's misconduct and the failure to disclose all relevant information and discovery, the Petitioner's Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution (1947) were violated.

## Point V

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that He was Denied His Constitutional Right to Testify on His Behalf, which Violated the Petitioner's Sixth and Fourteenth Amendment Right to a Fair Trial and Due Process.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674, 692 (1984); State v. Fisher, 156 N.J. 494, 499, 721 A.2d 291 (1998). In order to prevail on an ineffective assistance of counsel claim, defendant must establish that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Strickland, supra, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Fisher, supra, 156 N.J. at 499, 721 A.2d 291; State v. Fritz, 105 N.J. 42, 53-58, 519 A.2d 336 (1987). If defendant satisfies the first prong of the test, he must also establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698, Fisher, supra, 156 N.J. at 500, 721 A.2d 291; Fritz, supra, 105 N.J. at 52, 519 A.2d 336. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Ibid.* The failure to conduct an adequate pre-trial investigation may give rise to a claim of ineffective assistance

of counsel. Preciose, supra, 129 N.J. at 464, 609 A.2d 1280; State v. Savage, 120 N.J. 594, 621-22, 577 A.2d 455 (1990) (only those strategic choices made after thorough investigation are virtually unchallengeable); State v. Davis, 116 N.J. 341, 357, 561 A.2d 1082 (1989) (same). The American Bar Association Standards, The Defense Function §4.1 (1971) provides, as follows: "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." Relying on that standard, the Third Circuit has held that a defendant is entitled to a complete and vigorous defense, requiring counsel, at the very least, to investigate all substantial defenses available to a defendant. United States v. Baynes, 687 F.2d 659, 668 (3rd Cir. 1982). We agree; inadequate pretrial investigation may form the basis of an ineffective assistance of counsel claim. State v. Russo, 333 N.J. Super 119, 138-139 (2000).

Criminal defendants also have a constitutional right to testify on their own behalf. State v. Savage, 120 N.J. 594, 626-28, 577 A.2d 455 (1990). The decision whether to testify rests with the defendant. *Id.* at 631, 577 A.2d 455. Defense counsel must inform defendants of their right to testify. Counsel may not merely rely on their own trial strategy. As we have written:

It is the responsibility of a defendant's counsel, not the trial court, to advise defendant on whether to testify and to explain the tactical advantages or disadvantages of doing so or not doing so. Counsel's responsibility includes advising a defendant of the benefits inherent in exercising that right and the consequences

inherent in waiving it. . . . Indeed, counsel's failure to do so will give rise to a claim of ineffectiveness of counsel.

[Id. at 630-31, 577 A.2d 455 (internal citation omitted)]

The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." Faretta v. California, 422 U.S. 806, 819, n. 15, 95 S.Ct 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony . . . See also Ferguson v. Georgia, 365 U.S. 570, 602, 81 S.Ct 756, 773, 5 L.Ed.2d 783 (1961) (Clark, J., concurring) (Fourteenth Amendment secures right of a criminal defendant to choose between silence and testifying in his own behalf") . . . In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination. . . . Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessary implied by the structure of the Amendment," ibid., is an accused's right to present his own version of events in his own words. Rock v.

Arkansas, 483 U.S. 44, 51-52, 107 S.Ct 2704, 2708-09, 97 L.Ed.2d 37 (1987) See also U.S. v. Lore, 26 F.Supp.2d 729 (D.N.J. 1998).

In the Petitioner's case, the record in support of this claim that petitioner was not informed of his right to testify on his own behalf at his trial, or the tactical advantages or disadvantages of doing so or not doing so, or that the decision to do so rests solely with the petitioner, clearly establishes that petitioner was denied his Sixth Amendment right to the effective assistance of counsel.

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, the Petitioner wanted to testify at trial to profess his innocence, but trial counsel told him not to due to the statement he made at the police station.

The Petitioner contends that trial counsel never discussed with him the type of testimony that might have been elicited during the trial should he have chosen to take the stand on his own behalf.

The petitioner asserts that unlike U.S. v. Lore, *supra*, the petitioner did not persist in taking the stand because he did not know that he had a Constitutional right to testify if he chose to, or that the decision whether or not to testify was solely his to make and not counsel's, and that this Court should not infer any waiver of that right based on petitioner's silence. Lore, at 738.

Indeed, while courts have come to different conclusions about the effect of counsel's failure to advise his client of his right to testify, they unanimously have held that the client must be advised of the right to testify, and that the ultimate decision as to whether to testify rests with the defendant. See State v. Bey, supra, 161 N.J. at 269-270 (The decision whether to testify rests with the defendant, defense counsel may not rely upon their own trial strategy) (citing State v. Savage, supra, 120 N.J. at 631)

Accordingly, the failure to advise a client of his right to testify constitutes the type of egregious conduct required by the first prong of the Strickland/Fritz test, and because the requisite determination of the jury for self-defense was predicated on the petitioner's mental state of whether he reasonably believed it was necessary to use force to protect himself, trial counsel's failure to not only inform petitioner of his right to testify, but that his action of stripping petitioner of the opportunity to make that decision, amounted to irreparable prejudice to the petitioner

The Petitioner will also rely on the supporting facts of Point IV in his petition for a writ of habeas corpus to show that both of the prongs of the Strickland/Fritz has been satisfied.

## Point VI

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that He was Denied His Constitutional Right to Effective Assistance of Counsel, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial and Due Process.

The Petitioner contends that he was denied the opportunity to adequately present a defense. According to the Petitioner in the very early hours of July 27, 2012, shortly after midnight, he received a telephone call from Saydee Figueroa asking him to come over, but not until later when they came first. Therefore, the Petitioner waited until around 6:00 a.m. According to him, Ms. Figueroa apparently wrongly believed that he had something to do with her friend being assaulted. Therefore, despite testimony to the contrary, the Petitioner was actually invited to Ms. Figueroa's home. The Petitioner insists that he informed his attorney about this call wherein Ms. Figueroa invited him to her place, and moreover, that he was not alone when he received that call. The Petitioner further contends that he asked his attorney to investigate this assertion so that this defense could be presented at trial. Unfortunately, no such witness was presented at trial. Nonetheless, a recent investigation revealed that one of the persons that overheard this telephone conversation from Ms. Figueroa was Dermaine Scott. Not only would this have demonstrated that the Petitioner was not guilty of a burglary since he did not enter the premises without permission, but it also shows that he did not go there

with the purpose to commit an offense therein. Mr. Scott's testimony would have also been helpful to undermine the credibility of the State's witnesses.

See also Marshall v. Hendricks, 307 F.3d 36 (3rd Cir. 2002) (overturning district court's rejection of Strickland claim where defense attorney "fail[ed] to contact witnesses who were prepared and willing to provide relevant mitigating evidence" and state court's opinion unreasonably "assume[d] that counsel had prepared and investigated") and holding that habeas grant was warranted.

In light of the above principles, it should be clear that the decisions made by trial counsel in the Petitioner's case were neither reasonable or strategic.

Therefore, violating the Petitioner's right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution.

## Point VII

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that He was Denied His Constitutional Right to Effective Assistance of Appellate Counsel, which Violated the Petitioner's Sixth Amendment Right to a Fair Trial and Due Process.

The constitution provides that the accused is entitled to the assistance of counsel. That means counsel acting as his assistant. United States v. Ash, 413 U.S. 300, 93 S.Ct 2568 (1973). The right to defend is personal to the defendant. Faretta v. California, 42 U.S. 806, 95 S.Ct 2525 (1975).

The services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. Evitts v. Lucey, 469 U.S. 387 (1985). (Right to effective assistance of counsel applies on appeal as of right.)

Counsel assigned to indigent defendant on appeal of criminal case should, except in most extraordinary circumstances, constitute mandate to assigned counsel to proceed and make for appellant the best case he can, keeping in mind that, in the ultimate, the determination of merits of appeal is for the court after full consideration, and not for counsel on either side. In re Application of Palumbo, 58 N.J. Super 80 (1959).

The Petitioner asserts that the claims argued supra have substantial merit. Appellate counsel therefore could have had no sound strategic reason to not present these claims on Petitioner's direct

appeal, and had counsel presented these claims, there is a reasonable probability that Petitioner's convictions would have been reversed by the Appellate Division.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals and remand it back to the lower court for further proceedings.

Respectfully submitted,

Dated: Novemebr 8, 2024

Frederico Bruno  
Frederico Bruno