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January 10, 2023

Honorable Chief Justice and Associate Justices  
Supreme Court of New Jersey  
Hughes Justice Complex  
P.O. Box 970  
Trenton, New Jersey 08625-0970

**NEW JERSEY SUPREME COURT**

State of New Jersey v. KALIL COOPER

Docket Number 087742

**CRIMINAL ACTION**

ON PETITION FOR CERTIFICATION FROM AN  
APPELLATE DIVISION DECISION AFFIRMING AN  
ORDER ENTERED IN THE NEW JERSEY SUPERIOR  
COURT - LAW DIVISION, UNION COUNTY

Sat Below: Honorable Mary Gibbons Whipple, J.A.D.  
Honorable Hany A. Mawla, J.A.D.  
Honorable Morris G. Smith, J.A.D.

**LETTER-BRIEF IN SUPPORT OF  
PETITION FOR CERTIFICATION**

Honorable Chief Justice and Associate Justices:

Petitioner respectfully submits the instant letter-brief in support of his  
Petition for Certification to be filed on his behalf in lieu of a more formal brief.

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## PROCEDURAL HISTORY

The petitioner relies on the procedural history as set forth in the brief filed by counsel.

### STATEMENT OF THE MATTER

The petitioner raised several substantive claims with respect to Count Four (first-degree promoting organized street crime, contrary to N.J.S.A. 2C:33-30a). Following the defense and the State resting their case, the trial judge recognized that Count Four was fatally flawed and legally incorrect. Rather than dismiss Count Four, the judge amended Count Four thereby changing the charging terms and elements of Count Four as returned by the Grand Jury. This amendment of Count Four also occurred just prior to the jury retiring to deliberate. More importantly, petitioner argued that this amendment undermined the procedure of “notice,” and failed to afford petitioner his most basic fundamental right of Due Process. Additionally, the trial judge did not offer a postponement or delay of the proceedings to afford petitioner his Due Process right to defend against the amended Count Four offense.

The Appellate Division acknowledged that, the racketeering chapter, N.J.S.A. 2C:41-1 to -6.2, is not encompassed by N.J.S.A. 2C:33-30, “[t]herefore, **count four was legally incorrect.**” (App. Div. Op., 18) (Emphasis added) The trial judge broadened the charging terms of Count Four to include inchoate crimes such as “attempts” pursuant to N.J.S.A. 2C:5-1 and conspiracies pursuant to N.J.S.A. 2C:5-2, which are not predicate offenses for N.J.S.A. 2C:33-30. The petitioner argued that the jury charge on Count Four also deprived petitioner of his Sixth Amendment Constitutional right to have the jury charged on the correct elements of the charge returned by the Grand Jury,

which also violated the New Jersey's State Constitution, and the fundamental principles of petitioner's right to Due Process.

Petitioner raises substantial questions of public importance. Namely, whether the Appellate Division's reliance on "notice" as a justification for the amendment of Count Four, which it determined was legally incorrect, is misplaced? Petitioner was not on notice of the offense Count Four came to be until the amendment, which occurred at the close of the State's case just prior to the jury retiring to deliberate. There was no postponement or delay in this matter. As such, petitioner contends that the Appellate Division's interpretation of "notice" as a justification for the improper amendment was an abuse of discretion and a deprivation of petitioner's fundamental right to Due Process.

The Appellate Division's holding that the petitioner had time to prepare a defense is not supported by sufficient, credible, evidence in the record. In fact, because the amendment occurred well after the Defense and the State had rested their case, it was too late for petitioner to offer a defense to the amendment of Count Four, which was no longer the Count Four returned by the Grand Jury. As such, contrary to the Appellate Division's holding that petitioner did not show prejudice; the prejudice petitioner suffered was irreparable barring intervention by this Court.

The manner in which the trial judge amended Count Four created further problems that also deprived the petitioner of his Due Process right to a fair trial. The amendment of Count Four permitted the jury to consider a conspiracy to distribute drugs. However, the jury charge never specified to the

jury what specific drug it had to find petitioner conspired to distribute. This further usurped the function of the jury to properly make this determination.

Again, it must be emphasized that the amendment of Count Four did not occur until after the State rested its case, and just prior to charging the jury, the trial judge recognized that “racketeering” under N.J.S.A. 2C:41-1 was not one of the enumerated predicate crimes of N.J.S.A. 2C:33-30. The amendment also permitted the jury to find the petitioner was a “leader” without any guidance on what constitutes a “leader.” The trial judge in an attempt to remedy the error that racketeering was not a predicate offense for N.J.S.A. 2C:33-30 still substituted another non-predicate offense or one not enumerated in N.J.S.A. 2C:33-30. This did not cure the error, but rather made the situation far more prejudicial to the petitioner because the trial judge broadened the charging terms and elements of the offense returned by the Grand Jury.

The petitioner raises a significant question of public importance whether the trial judge can amend a charge returned by the Grand Jury to broaden the charging terms and significantly change or alter the requisite elements? Whether the petitioner was deprived of his Sixth Amendment Constitutional right to have the jury properly charged, and the fundamental principles of Due Process.

The petitioner asserts that the petition for certification should be granted to address these questions.

## QUESTIONS PRESENTED

1. WHETHER THE APPELLATE DIVISION ERRED BY DENYING RELIEF ON PETITIONER'S CLAIM THAT THE TRIAL JUDGE ABUSED HIS DISCRETION BY AMENDING COUNT FOUR AS RETURNED BY THE GRAND JURY, WHICH CHANGED THE ELEMENTS OF THE OFFENSE, ESPECIALLY, WHERE THE APPELLATE DIVISION ACKNOWLEDGED THE STATE CONCEDED THAT COUNT FOUR AS WRITTEN, WRONGLY STATED THAT N.J.S.A. 2C:33-30 COVERED A PATTERN OF RACKETEERING ACTIVITY?

2. WHETHER THE PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE JUDGE AMENDING COUNT FOUR AFTER THE CLOSE OF THE STATE'S CASE JUST PRIOR TO THE JURY RETIRING TO DELIBERATE, WHICH BROADENED THE CHARGING TERMS AND ELEMENTS OF THE INDICTMENT RETURNED BY THE GRAND JURY AND DID NOT AMOUNT TO?

3. WHETHER THE FAILURE TO DISMISS COUNT FOUR RATHER THAN AMENDING THE CHARGE TO INCORPORATE AN UNDERLYING PREDICATE OFFENSE THAT WAS NOT ENUMERATED AMONGST THE PREDICATE OFFENSES FOR N.J.S.A. 2C:33-30?

4. WHETHER THE APPELLATE DIVISION ERRED BY HOLDING THAT COUNT FOUR WAS LEGALLY INCORRECT BUT DENYING RELIEF STATING THAT PETITIONER WAS GIVEN NOTICE, WHEN THE AMENDMENT OCCURRED AT THE CLOSE OF THE STATE'S CASE WITHOUT ANY POSTPONEMENT OR TIME TO PREPARE TO THE AMENDED COUNT FOUR



**THE ERRORS COMPLAINED OF:**

**POINT ONE**

THE APPELLATE DIVISION ERRED BY DENYING RELIEF ON PETITIONER'S CLAIM HE WAS PREJUDICED BY THE TRIAL COURT'S AMENDMENT OF COUNT FOUR OF THE INDICTMENT JUST BEFORE THE JURY CHARGE AND THE JURY COMMENCING DELIBERATIONS, WHICH DEPRIVED HIM OF NOTICE, HIS DUE PROCESS RIGHT TO A FAIR TRIAL, AND VIOLATED THE DOCTRINE OF FUNDAMENTAL FAIRNESS THEREFORE THE PETITION SHOULD BE GRANTED

The Appellate Division in addressing this issue specifically stated that: "Defendant next asks us to conclude the court erred in its charge under N.J.S.A. 2C:33-30, promoting organized street crime (count four), because the statute does not encompass conspiracy to distribute CDS or racketeering as a predicate crime." (App. Div. Op., pg. 13)

The Appellate Division acknowledged that, "The racketeering chapter, N.J.S.A. 2C:41-1 to -6.2, is not encompassed by N.J.S.A. 2C:33-30, "[t]herefore, **count four was legally incorrect.**" (App. Div. Op., 18) (Emphasis added) The trial judge broadened the charging terms of Count Four to include inchoate crimes such as "attempts" pursuant to N.J.S.A. 2C:5-1 and conspiracies pursuant to N.J.S.A. 2C:5-2, which are not predicate offenses for N.J.S.A. 2C:33-30. The petitioner argued that the jury charge on Count Four also deprived petitioner of his Sixth Amendment Constitutional right to have the jury charged on the correct elements of the charge returned by the Grand Jury,

which also violated the New Jersey's State Constitution, and the fundamental principles of petitioner's right to Due Process and fundamental fairness.

The Appellate Division further stated that, "The trial court agreed it would be confusing and inconsistent with N.J.S.A. 2C:33-30 to require the jury find a pattern of racketeering activity. Instead, the court informed the jury that it had to find defendant guilty of one of three underlying offenses alleged by the State in order to find defendant guilty under N.J.S.A. 2C:33-30." (App. Div. Op., pg. 15) The problem with the Appellate Division's ruling in this regard is that the judge went beyond amending Count Four as returned by the Grand Jury to change the charging terms of N.J.S.A. 2C:33-30 and its requisite elements. More problematic, is the fact that the charge allowed the jury to consider offense and elements to those offenses that were not underlying predicates of N.J.S.A. 2C:33-30, and were also inconsistent with N.J.S.A. 2C:33-30.

Equally problematic, is the fact that the jury was not charged or guided with how to consider which CDS or drug petitioner was alleged to have specifically conspired to distribute. Also, that the charge allowed the jury to consider petitioner as a "leader," which is also inconsistent with N.J.S.A. 2C:33-30.

The Appellate Division held that, "defendant was aware that he was charged with various drug-related offenses, aggravated assault, and conspiracy to commit murder, all of which could constitute the predicate offense for promotion of organized street crime as set forth in the jury charge and the

verdict sheet. Thus, he was provided with adequate notice prior to the court amending count four to specifically include a conspiracy to distribute CDS offense. In addition, defendant did not show how he was prejudiced by the amendment of count four, as he was aware of all the counts and was able to present a defense against them. (App. Div. Op., pg. 18)

The record clearly establishes that contrary to the Appellate Division's ruling that petitioner was given adequate notice that the amendment occurred after the State rested its case. At this point, the amendment foreclosed any opportunity for the petitioner to formulate a defense contrary to, State v. Dorn, 233 N.J. 81, 94-96 (2018). Case law on this issue primarily concerns amendment done before the start of trial not after the defense and the State concludes their case. The combination of an improper amendment of Count Four, which changed the charging terms of the indictment returned by the Grand Jury and the requisite elements to Count Four, in addition to an erroneous jury charge on Count Four all worked to petitioner's disadvantage and resulted in irreparable harm. Appropriate and proper jury instructions are essential to a fair trial. State v. Savage, 172 N.J. 374, 387 (2002). Under Rule 3:7-4:

The court may amend the indictment or accusation to correct an error in form or the description of the crime intended to be charged or to charge a lesser included offense provided that the amendment does not charge another or different offense from that alleged and the defendant will not be prejudiced thereby in his or her defense on the merits. Such amendment may be made on such terms as to postponing the trial, to be had before the same or another jury, as the interest of justice require.

The Appellate Division's ruling is clearly contrary to State v. Dorn, as decided by this Court. Petitioner's case was not a matter of charging a lesser included offense. The trial judge made no attempts to postpone or delay this matter following the amendment, and failed to have it reconvened before a different jury. The Appellate Division cited to no case to support the amendment that occurred in petitioner's case after the State and defense has both rested their case, especially, without any postponement, where the charging terms and the requisite elements of the indictment were changed. The prejudice in this matter is inescapable and overwhelming.

**REASONS WHY CERTIFICATION SHOULD BE GRANTED:**

Petitioner asserts that certification should be granted based on this Court's holdings in State v. Savage, 172 N.J. 374, 387 (2002), and State v. Dorn, 233 N.J. 81, 94-96 (2018), given that the trial judge amended Count Four thereby changing the charging terms and requisite elements of the offense, deprived petitioner of notice since the amendment occurred after the State and defense both rested their case, the court failed to postpone or reconvene the matter before a different jury, and the jury charge created more problems on top of the multiple errors involving the amendment. These multiple errors related to Count Four whether addressed individually or cumulatively worked to petitioner's substantial disadvantage and deprived him of his Sixth Amendment Constitutional right, and his fundamental right to Due Process under the United State's Constitution and the New Jersey State Constitution.

Based on the above, in the interests of justice the petitioner asserts that certification should be granted.

**COMMENTS ON THE APPELLATE DIVISION'S OPINION:**

The Appellate Division acknowledged that Count Four was legally incorrect, and that multiple errors occurred with respect to Count Four following the trial judge's amendment of this count. However, the Appellate Division held that petitioner was on notice that he was being tried for first-degree promoting organized street crime, contrary to N.J.S.A. 2C:33-30a. First, the Appellate Division failed to address that the amendment occurred at the close of the State's case just prior to the jury retiring to deliberate. At this point, notice for the offense returned by the Grand Jury of first-degree promoting organized street crime, contrary to N.J.S.A. 2C:33-30a was no longer applicable because the amendment changed the charging terms and the elements of the offense. Second, there was never a postponement or attempt to have the matter reconvened before a different jury after the late amendment, which deprived petitioner of the ability to formulate a defense to the amended offense that was no longer the offense returned by the Grand Jury. The Appellate Division's holding that petitioner was on notice is not supported by sufficient, credible, evidence in the record. The Appellate Division also acknowledged that multiple other errors occurred as a result of the judge's amendment of Count Four, namely, the jury was not charged or guided with how to consider which CDS or drug petitioner was alleged to have specifically conspired to distribute. Also, the charge allowed the jury to consider petitioner as a "leader," which is also inconsistent with N.J.S.A. 2C:33-30. The Appellate


Division also acknowledged that the jury charge and verdict sheet created a problem by utilizing the phrase “and/or” and “yes/no,” throughout the charge, which the Appellate Division referenced as “inartful,” and minimized the prejudicial effect on top of the amendment that it determined was legally incorrect. The Appellate Division’s decision is clearly contrary to the holding in State v. Gonzalez, 444 N.J. Super. 62 (App. Div. 2016). The Appellate Division decision failed to weigh the prejudice in light of the fact that the amendment occurred after the defense and the State had rested their case, thereby making it too late for the petitioner to formulate a defense to the amendment to Count Four. Adding to the prejudice is the fact that the jury charge only served to reinforce the prejudice as well as to further deprive petitioner of his Sixth Amendment Constitutional right to have the jury properly instructed and guided on the charge and its elements. The petitioner was deprived of his Due Process right to fundamental fairness.

**CONCLUSION AND CERTIFICATION**

The record establishes that the Appellate Division decision the trial judge's amendment to Count Four was legally incorrect, but that petitioner failed to show how he was prejudiced is not supported by sufficient, credible, evidence in the record. Petitioner established that he was deprived of his Sixth Amendment Constitutional right as well as his Due Process right to fundamental fairness and a fair trial. Based on the aforementioned argument, the petition for certification should be granted.

January 10, 2023

Respectfully submitted,

  
Kalil Cooper

**CERTIFICATION**

I, Kalil Cooper, hereby certify that the foregoing petition for certification presents substantial questions of law and is filed in good faith and not for purposes of delay.

Dated: 1-10, 2023

  
Kalil Cooper