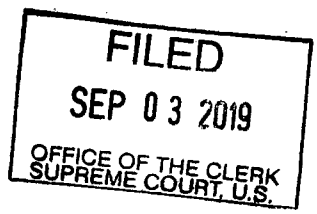
No. 19-5914 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Lena Lashen — PETITIONER
(Your Name)

vs.

Rogen Stavis, Esq, etal — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lena Lashen
(Your Name)

16 Patton St.
(Address)

High Bridge NJ 08829
(City, State, Zip Code)

908-447-4484
(Phone Number)

QUESTIONS PRESENTED

1. Should a civil action be granted to proceed to correct the District Court's error where they misrepresented a precedent, Hoffenberg v. Meyers, and thus failed to properly apply it.

The district court, in citing Hoffenberg v. Meyers, states "[U]nder New York law, a plaintiff cannot state a malpractice claim against his **criminal defense attorney** if his conviction 'remains undisturbed.'" Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003). However, the District Court was incorrect in this regard for at least two significant reasons, both easily found within Hoffenberg v. Meyers. The standard cited by the District Court only applies to "criminal defense attorneys" and not appellate counsel, as evidenced in the next paragraph of this motion. More importantly, the Southern District of New York turned a blind eye to the most relevant portion of Hoffenberg v. Meyers, failing to address the Plaintiff's proof of actual innocence. In this Plaintiff's case, the charges in the defective indictment are not crimes as detailed in the "amended complaint and jury demand", Innocence is also shown via exculpatory video recording evidence, which the Defendants REFUSED to help the Plaintiff's attain. The Defendants also ignored other exculpatory evidence. "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003). Here, the Plaintiff clearly asserts and can demonstrate her ACTUAL and FACTUAL innocence.

2. Should a civil action be granted to proceed to address ineffectiveness of appellate counsel when they did not raise the objection of the best evidence rule with regard to suppressed and withheld exculpatory video recordings?

An instance of the Defendants' ineffectiveness was that they did not raise the objection of the best evidence rule with regard to suppressed and withheld exculpatory video recordings, when testimony was given by the Government witnesses who claimed that the Plaintiff directed them to commit pharmacy law violations. This critical evidence would establish that the Plaintiff did not direct of ship Butalbital, a drug that never existed in the pharmacies, and was not present in the video as referenced at trial by the Government's witnesses. It is not an exaggeration to say that the objection of the best evidence rule should have been raised for physical evidence that contradict every single one of

the government's witnesses.

Also, in this specific case, the video recordings proved the Petitioner's actual innocence in that she followed the law, did not commit the crime, and was wrongly convicted due to Attorney's malpractice and negligence, as stated in the "amended complaint and jury demand".

3. Did the District Court erred by improperly dismissed the Plaintiff's amended complaint prior to service of process?

The Plaintiff was granted in forma pauperis. The District Court improperly dismissed her amended complaint prior to service of process. In fact, the Third Circuit Court of Appeals held the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) prior to service of process is improper. This action was filed by a Pennsylvania prisoner at a State Correctional Institution. The complaint alleged the defendants, all judges, court clerks, or lawyers, conspired to have a civil case he filed in the State Court of Common Pleas dismissed. The district court granted the prisoner in forma pauperis status, and it then dismissed the complaint for failure to state a claim under Rule 12(b)(6) before Service of process was made. The prisoner appealed.

The Third Circuit held that 28 U.S.C. § 1915(d) ONLY allows dismissal of a complaint if it is frivolous or malicious. Once a plaintiff is granted in forma pauperis and the suit is not considered frivolous or malicious, it must proceed as any other suit under the civil procedures. A complaint may fail to state a claim upon which relief may be granted under Rule 12(b)(6), but it is not frivolous under §1915.

The court held that once in forma pauperis status is granted the clerk must issue summons under Rule 4(a) and the court shall serve all process under §1915(c). Dismissal of the complaint under Rule 12(b)(6)is contrary to these rules, and it may create the perception the judge has abandoned the rule of neutral arbitrator. This ruling may have been overruled by the passage of the Prison Litigation Reform Act (PLRA) which allows court to sua sponte dismiss meritless suits by prisoners, but it remains good law for suits by non prisoners. Accordingly, the district court's dismissal was vacated. See: Outess v. Sobolvetich, 914 F.2d 428 (3rd Cir. 1990).

4. Should a civil action complaint be granted to proceed when appellate counsel appeal can be shown to be in conflict with the law itself, including definitions of terms within the law, and where her rulings can be shown to be a usurpation of powers reserved for the Attorney General under the law, and where her rulings are in conflict with rulings of other federal jurisdictions and her rulings can be shown to have had a negative impact on national industry where regulatory bodies and licensed professionals have to adapt in the absence of clear federal guidance correcting these conflicts?

5. Because her due process was violated, and the district and appellate court state that the Plaintiff cannot sue her attorneys until the conviction is overturned; however, shouldn't the law be changed because courts must be check and balance of each other.

The District Court was incorrect by stating in its order of dismissal that the Plaintiff's complaint cannot proceed until her conviction is overturned; also, the Southern District of New York turned a blind eye and failed to address the Plaintiff's proof of actual innocence: The charges in the defective indictment are not crimes as detailed in the "amended complaint and jury demand" and, an exculpatory video recording evidence, which the Defendants REFUSED to help the Plaintiff's attain. "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Carmel v. Lunny, 70 N.Y. 2D 169, 173 (1987)(Internal citation omitted). Here, the Plaintiff clearly asserts and can demonstrate her ACTUAL and FACTUAL innocence.

6. Should a civil action proceed when Appellate Counsel failed to argue evidence of the Trial judge usurping administrative and legislative powers during a criminal proceeding to create subject matter jurisdiction where none would otherwise exist, and where other courts ruled there is no jurisdiction and state regulatory bodies have recognized the lack of jurisdiction, must she disqualify herself?

7. Should a civil action proceed when the Plaintiff can show that the Defendants failed to appeal based on the fact that the legal standards applied by the government were clearly not applicable to the case matter and that legal standards were created by the government at the trial but not found in the law, and when the charges did not claim violations of those inapplicable standards, where other jurisdictions have acquitted similarly charged defendants?

LIST OF PARTIES

[√] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

INDEX TO APPENDICES

JURISDICTION

[√] For cases *from* **federal courts**:

The date on which the United States Court of Appeals decided my case was 4/11/2019.

[ ] No petition for rehearing was timely filed in my case.

[√] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 3, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The federal conspiracy to misbrand drugs statute, **18 U.S.C. Sec. 371**, states in pertinent part that whoever conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined.

The federal introduction of misbranded drugs into interstate commerce in violation of **21 U.S.C. Sec. 331(a) and 333(a)(2) and 18 U.S.C. Sec 2**, states in pertinent part that the delivery for introduction into interstate commerce of any article that is adultered or misbranded and the causing thereof are hereby prohibited, such a violation after a conviction under this section has become final, or commits such a violation with the intent to defraud or mislead, shall be imprisoned for not more than three years or fined, whoever commits an offense against the United States or aids is punishable as a principal, respectively.

The Federal conspiracy to commit mail and wire fraud in violation of **18 U.S.C. Sec. 1349**, states in pertinent part that any person who attempts or conspires to commit any offense shall be subject to the same penalties as these prescribed for the offense.

The federal mail fraud statute, **18 U.S.C. Sec. 1341**, states in pertinent part that whoever uses the mail "for obtaining money or property by means of false or fraudulent pretenses: is guilty of mail fraud. The wire fraud statute, **18 U.S.C. Sec. 1343**, similarly state that whoever use means of interstate communication" for obtaining money or property by means of false or fraudulent "pretenses" is guilty of wire fraud. However, the Petitioner did NOT receive any money from this "alleged" crime.

The federal authority to control; standards and schedules statutes **21 U.S.C. Sec. 811 and 812**, state in pertinent part the rules and regulations of Attorney General, evaluation of drugs and other substances, factors determinative of control or removal from schedules, abuse potential, temporary scheduling to avoid imminent hazards to public safety, scheduling of newly approved drugs, schedules of controlled substances, placement on schedules; finding required, initial schedules of controlled substance.

The federal exemptions and consideration for certain drugs, devices, and biological products state **21 U.S.C. Sec. 353**, state in pertinent part the exemption from labeling and prescription requirements; misbranded drugs.

STATEMENT OF THE CASE

A. BACKGROUND on the 'Controlled Substances Act' (CSA)

> § 801. Congressional findings and declarations: **controlled substances**.
> The Congress makes the following findings and declarations:
> (1) Many of the drugs included within this sub chapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
> In determining into which schedule a drug or other substance should be placed, or whether a substance should be decontrolled or rescheduled, certain factors are required to be considered. These factors are listed in Section 201 (c), [21 U.S.C. § 811 (c)] of the CSA as follows: **Its actual or relative potential for abuse**.

21 U.S.C. 811 (4)(f) clarifies the *Abuse potential*

> If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.
> Within the CSA there are five schedules (I-V) that are used to classify drugs based upon their abuse potential, medical applications, and safety. Individuals who order, handle, store, and distribute controlled substances must be registered with the DEA to perform these functions. They must maintain accurate inventories, records and security of the controlled substances.

B. The Controlled Substances Act states plainly that only controlled substances required the dispensing of valid (face to face) prescriptions, which is between a doctor and its patient; this relationship does NOT involve a pharmacist, as stated in 21 U.S.C. **§829. Prescriptions:**

(e) Controlled substances dispensed by means of the Internet

> (1) No controlled substance that is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] may be delivered, distributed, or dispensed by means of the Internet without a valid prescription.
> (2) As used in this subsection:
> (A) The term "**valid prescription**" means a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by-
> (i) a practitioner who has conducted at least 1 in-person medical evaluation of the patient; or
> (ii) a covering practitioner.
> (B)(i) The term "in-person medical evaluation" means a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.

C. Federal law 21 USC 353 does not say that a face-to-face is required for NON controlled substances. In fact, the **Online Pharmacy Safety Act (S2002) legislation** which would have required valid(face to face)prescription for NON controlled substances prescription drugs ordered online introduced to US Senate did NOT pass.

D. The governing pharmacy law (PA27.12(b)(2) and the criminal statute 21 U.S.C. 321 (g)(1), 352 (a), 352(c),

353(b)(1), and 353(b)(4)(A), and 21 USC 331(a) and 333(a)(2) require for the accused to be present at the pharmacy at the time the specific prescriptions in question were filled. Because of potential biases and to avoid any shifting of blame, the pharmacy law eliminates any double standard or shifting of blame; each pharmacist is accountable for his actions and can NOT shift blame to someone else.

> It is the job of any pharmacist while on duty to ensure they themselves follow all laws, regulations, and policies; any misdeeds or mistakes are the responsibility of whoever made the misdeeds or mistakes. Further, any pharmacist on duty also serves as a "supervisor" of themselves and their technicians and is accountable for his shift. Pharmacists do not supervise each other with regard to the practice of pharmacy. Furthermore, the governing pharmacy law states that pharmacy technicians to "assist" pharmacists; the technicians can only work under the supervision of the pharmacist on duty (PA27.12(d)(1)).
>
> Pharmacists are state licensed and are responsible for their own licenses. A hearing is required in front of the State Board of Pharmacy in an event of a dispute over who is responsible for a misdeed or mistake; the Federal Court neither has jurisdiction nor is there any federal law governing the conduct in a pharmacy or that creates a federal oversight of the way a pharmacist performs his work. This is left to the states Board of Pharmacy. Only the State Board of Pharmacy can penalize the pharmacist on duty and pharmacy owner for non-compliance of regulations; such are not federal issues, whereas in this case the District Court INVENTED its own law to create a jurisdiction.

E. To cover up for Stavis's ineffectiveness of counsel, the District Court and Second Circuit, dismissed the Plaintiff's civil action via no law allowing them to do such, thus behaved as a **kangaroo court.**

PROCEDURAL HISTORY

1. Because the Plaintiff's trial was rigged by the District Court, On September 2, 2016, the Circuit Court wrongfully affirmed her conviction of May 15, 2015 in violation of:

> 18 U.S.C. 371 (Count I); introducing misbranded drugs into interstate commerce in violation of 21 U.S.C. 331(a) and 333(a)(2) (Count II); conspiracy to commit mail and wire fraud in violation of 18 U.S.C.1349(Count III); and mail and wire fraud in violation of 18 U.S.C.1341 and 1343 (Counts IV and V). She was sentenced to 36 months' imprisonment, for:

a. dispensing "butalbital" (See Exh C) which **NEVER** existed in the pharmacies,

b. the dispensing of tramadol which was **NOT a controlled substances at the time of dispensing** but the only misbranding alleged about Tramadol is only applicable to controlled substances (Valid Prescription standard),

c. the dispensing of "highly addictive pain meds" which is a term that **does not exist** in law nor in the health care industries and used only to deceive the jury by creating standards that do not exist under the law, which both the District and Appellate Court failed to mention ONE name of the "highly addictive pain meds" that was dispensed, because there were NONE. In fact, the Plaintiff has filed motion(s) requesting the District AND Circuit Courts for an EVIDENTIARY HEARING.

1). for an **inventory and bill of laden** of all **butalbital** tablets that allegedly existed in the three Riccio's pharmacies, based on the filing of the Plaintiff's 2255 Motion.

2) **name ONE "addictive pain med" that was dispensed by the Plaintiff**; and to date, both the District AND Circuit Courts failed to name one "addictive pain med". Instead, the District Court denied "each of the supplementary motions" (Page 2 of 8/20/18 Memorandum and Order") by NOT answering them, because **the Plaintiff NEVER dispensed One "butalbital tablet" nor an "addictive pain med" NOR a "pain med" via the "internet"** (This will be further discussed below) **If trial and appellate counsels had done their due diligence, they would know that the aforementioned statement was flawed and is NOT found in the law.**

Plaintiff now moves for a writ of certiorari, to affirm her actual innocence. In addition to her actual innocence, the Plaintiff will point out the following:

1. The conviction came about through a deliberate deceit of the jury by presenting a made up legal standards that does not exist under the law and by presenting perjured testimonies to the jury that everyone knew it was perjured testimonies, except for the jury. Without these deceptions, they have no actual physical evidence that would have even associated the Plaintiff with any crime. Morse v. Fusto, No. 13-4074 (2d Cir. 2015)

2. the District Court and the Government violated the Plaintiff's right to due process as well as judicial and prosecutorial misconduct via suppression/withholding of exculpatory evidence, a Brady's violation, including to but not limited to the suppressed video recording, which she viewed for the first time on August 31, 2017.

3. Ineffective assistance from both trial and appellate counsel, which is detailed in this writ of certiorari.

The District Court created a jurisdiction when none exists by treating drugs that are not Federally controlled as controlled substances, and **applying the food drug cosmetics act onto the Plaintiff as if it were the "controlled substances act"**. This is an **usurpation of administrative power the District Court does not have, and it is proof her recusal is necessary**.

As has been detailed in previous filings over these matters, and as will be detailed below, Fioricet is not a federally controlled substance, **only the Attorney General** has the power to make drugs controlled substances, judges to not have the power nor expertise to assess or schedule drugs, a drug is an entity under the law not an assemblage of components for a judge to dissect and assess as if it were one of its components, and the law itself is clear on all of this both in the way "**drug**" and "**fixed-combination drug**" is **defined under the law** and in how the Controlled Substances Act is written. Further evidence of just how wrong this trial court is on this matter can be found in West Virginia Board of Pharmacy News from September 2014, where they state on page

one: "**Fioricet is not federally scheduled**" (W V Vol 34, No. 1, see exhibit D). This evidence came into existence prior to the Plaintiff's trial and after her indictment, and it clearly adds to proof of the **incompetence of Plaintiff's trial lawyers**. More importantly it adds to the proof that the Plaintiff's constitutional right was violated by the District Court, as evidenced in this motion and as in many other previous motions filed against the District Court. The injustice suffered by the Plaintiff at the hands of the trial Court's judge that this complaint must proceed, as indicated below.

GROUND FOR RELIEF

That the Plaintiff can prove actual and factual innocence, thus meeting the Hoffenberg v Meyers standard, is one reason this motion should proceed. But further, this civil action is about the Defendants' ineffective assistance of counsel. The defendants' incompetence and negligence affirmed the Plaintiff's wrongful conviction; Legal malpractice cause of actions in this case were based on the Defendant's negligence, fraud, and misrepresentation. In fact, the Defendants disregarded all of the plaintiff's evidence affirming her actual and factual innocence, focusing solely on work they previously did on an unrelated case for their client Michael Bindy, recycling that work and misapplying it to this Plaintiff's case even after they lost with Bindy. They failed to perform the basic prerequisite tasks required to understand the Plaintiff's case, as detailed throughout this writ of certiorari.

PETITION FOR WRIT OF CERTIORARI

1. The opinion is in conflict with the governing pharmacy law as well as decisions of the United States Supreme Court and of the United States Court of Appeals for the Second Circuit and Third Circuit Court to which the petition is addressed. McQuiggin v. Perkins, 569 U.S. 383 (2013). Grunwald v. Bronkesh, 131 N.J. 483, 492, 621 A.2d 459 (1993) (citations omitted). Buck v. Davis, 580 U.S. ___ (2017) Supreme Court, Foster v. Chatman, 578 U.S. ___ (2016) Supreme Court. McQuiggin v. Perkins, 569 U.S. 383 (2013) Carmel v. Lunny, 70 N.Y. 2D 69, 173 (1987)(Internal citation omitted). Morse v. Fusto No. 07–CV–4793, 2013 WL 4647603, at *7, 2013 U.S. Dist. LEXIS 123823, at *18 (E.D.N.Y. Aug. 29, 2013), Outess v. Sobolvetich, 914 F.2d 428 (3rd Cir. 1990). Foman v. Davis, 371 U.S. 178; 83 S.Ct. 227; 9 L.Ed.2d 222 (1962). Hoffenberg v. Meyers.; the conflict is not addressed in the opinion, and consideration by the Supreme court is therefore necessary to secure and maintain uniformity of the court's decisions.

2. A material factual or legal matter was overlooked in the decision in that the Petitioner believes the court has overlooked or misapprehended the following:

A. FRCP 15 - US Supreme Court Held Plaintiffs Have A Right To Amend Complaints

INTRODUCTION

In this complaint, the Plaintiff asserts claims for malpractice and negligence. The Plaintiff alleges, including but not limited to: (1) That Defendants made various legal mistakes, (2) That Defendants failed to obtain the suppressed exculpatory video recordings which would have exonerated the Plaintiff (3) That Defendants did not review all the documents they promised to review, (4) that Defendants inadequately argued for bail pending appeal, (5) that Defendants failed to make certain legal or factual arguments on appeal. Thus, the aforementioned amount to "omissions of material issues of facts which is now legally a fabrications of evidence Morse v. Fusto No. 07–CV–4793, 2013 WL 4647603, at *7, 2013 U.S. Dist. LEXIS 123823, at *18 (E.D.N.Y. Aug. 29, 2013)

LEGAL STANDARDS

A. The District Court was incorrect by stating in its order of dismissal that the Plaintiff's complaint cannot proceed until her conviction is overturned; also, the Southern District of New York turned a blind eye and failed to address the Plaintiff's proof of actual innocence: The charges in the defective indictment are not crimes as detailed in the "amended complaint and jury demand" and, an exculpatory video recording evidence, which the Defendants REFUSED to help the Plaintiff's attain. "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Carmel v. Lunny, 70 N.Y. 2D 169, 173 (1987)(Internal citation omitted). Here, the Plaintiff clearly asserts and can demonstrate her ACTUAL and FACTUAL innocence.

An instance of the Defendants' ineffectiveness was that they did not raise the objection of the best evidence rule with regard to suppressed and withheld exculpatory video recordings, when testimony was given by the Government witnesses who claimed that the Plaintiff directed them to commit pharmacy law violations. This critical evidence would establish that the Plaintiff did not direct or ship Butalbital, a drug that NEVER existed in the pharmacies, and was not present in the video as referenced at trial by the Government's witnesses.

It is not an exaggeration to say that the objection of the best evidence rule should have been raised for physical evidence that contradict every single one of the government's witnesses.

Because of the Defendants ineffectiveness assistance in counsel, the plaintiff's conviction and sentence were affirmed. If only they had raised all the issues the Plaintiff had asked them to, by providing evidence of her actual and factual innocence, in that she abided by all the law and regulations, did not commit the underlying offense as affirmed in the suppressed exculpatory video recording evidence and by the pharmacy paper trail, and pursued and obtained the suppressed exculpatory video recording as she had requested multiple times, they would be able to prove the Plaintiff's actual innocence. However due to their incompetency, the Appellate Court should not deny her civil action.

"Actual innocence, if proved, can overcome procedural hurdles", the Supreme Court held in McQuiggin v. Perkins, 569 U.S. 383 (2013), As in that case, this Plaintiff's lawyer, Attorney Stavis, was ineffective. In this case, the video recordings show the Petitioner's actual innocence in that she followed the law, did not commit any crimes, and the Plaintiff's wrongful conviction was wrongfully affirmed due to the Attorney's malpractice and negligence, as stated in the "Amended Complaint and Jury Demand".

Thus, due to the Defendant's negligence, relief must be granted; the Plaintiff has adequately pled a cause of action for legal malpractice and negligence, as stated in her "AMENDED COMPLAINT AND JURY DEMAND" (See Exhibit A) The Plaintiff has every right to move forward with this malpractice and negligence complaint, and present proofs of the attorneys malpractice and negligence, with evidence of the trial transcripts, witnesses, pharmacy paper trail, and suppressed video recordings. The Appellate Court must allow her Complaint to proceed, to protect the integrity of the Court's processes and in preventing injustice

B. The Plaintiff was granted in forma pauperis. The District Court improperly dismissed her amended complaint prior to service of process. In fact, the Third Circuit Court of Appeals held the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) prior to service of process is improper.

C. To **protect the integrity of the Court's processes and in preventing injustice**, this Court must allow this Complaint to proceed, and/or either 1) apply New Jersey law to her civil action; or 2) change venue from the US Southern District Court of New York to the US District Court of New Jersey for the interests of justice, including but not limited to allow a trial to be relocated due to a variety of factors, such as: travel costs, judicial

expenditures, location of witnesses or evidence, choice of applicable law, racial and/or socioeconomic population breakdown of the area which proves unfavorable to the case, previous problems with the judge, authorities and other lawyers, and the Plaintiff's request for oral argument(s). Also, the Plaintiff is an indigent and can not afford to travel to New York for oral arguments and trial.

Most importantly, **New Jersey law allows a civil action of legal malpractice and negligence claim to PROCEED without the requirement of a reversal of her conviction.**

The District Court denied her constitutional right by improperly dismissing her complaint, as evidenced in the aforementioned. Thus, the Plaintiff's complaint must proceed.

DISCUSSIONS

A. Allegation of actual innocence

The Appellate Court must correct the District Court's error because they misrepresented and failed to properly apply a precedent, Hoffenberg v. Meyers.

For instance, in citing Hoffenberg v. Meyers, The district court, states "[U]nder New York law, a plaintiff cannot state a malpractice claim against his **criminal defense attorney** if his conviction 'remains undisturbed.'" Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003). However, the District Court was incorrect in this regard for at least two significant reasons, both easily found within Hoffenberg v. Meyers. The standard cited by the District Court only applies to "criminal defense attorneys" and **not appellate counsel**, as evidenced in the next paragraph of this motion. More importantly, the Southern District of New York turned a blind eye to the most relevant portion of Hoffenberg v. Meyers, failing to address the Plaintiff's **proof of actual innocence**. In this Plaintiff's case, the charges in the defective indictment are not crimes as detailed in the "amended complaint and jury demand", Innocence is also shown via exculpatory video recording evidence, which the Defendants REFUSED to help the Plaintiff's attain. The Defendants also ignored other exculpatory evidence. "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003. Here, the Plaintiff clearly asserts and can demonstrate her **ACTUAL and FACTUAL innocence**; thus her **civil action must proceed**. (2d Cir. 2003, v. Lunny, 70 N.Y. 2D 169, 173 (1987)(Internal citation omitted).

Also, in Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003, Carmel v. Lunny, 70 N.Y. 2D 169, 173 (1987)(Internal citation omitted) **actual innocence does NOT require exoneration**. Black's Law Dictionary has the following definitions:

> **EXONERATION**: The removal of a burden, charge, or duty. Particularly, the act of relieving a person or estate from a charge or liability by casting the same upon another person or estate. Louisville & N. R. Co. v. Comm., 114 Ky. 787, 71 S. W. 916; Bannon r.Burnes (C. C.) 39 Fed. 898.A right or equity which exists between BL.LAW DICT.(2D ED.)
>
> **INNOCENT**: Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections.

Therefore, this civil action Must proceed due to her Colorable claim of innocence, which does not require an exoneration.

Significant in the district court's misapplication of Hoffenberg v. Meyers, the Defendants were not the Plaintiff's criminal defense attorney; they were her **appellate counsel**, and so the standard cited does not apply to this case. Black's Law Dictionary makes a clear distinction between Defense counsel and appellate counsel:

> **"DEFENSE COUNSEL** is the name that is given to the **trial lawyer** who is the defendant's representative. ... The Basics of the Defense Attorney Role is to represent a defendant in court proceedings. They most often appear in criminal court when the defendant has been accused of committing a crime like burglary or murder. Whether the charges against the defendant are a misdemeanor or a major felony, they are entitled to vigorous legal defense, and it is the job of the defense attorney to provide this."

Under the same definition, Black's Law Dictionary draws the distinction:

> "**Appellate law attorney**... may handle either civil or criminal cases, and they are often considered to be highly skilled since the cases they argue are reviewed by judges appointed to the bench by virtue of their wisdom. … As professionals, attorneys are held to certain standards. Among these are duties for ethical behavior and professional competence."

That the Plaintiff can prove actual and factual innocence, thus meeting the Hoffenberg v Meyers standard, is one reason this motion should proceed. But further, this civil action is about the Defendants'

ineffective assistance of counsel. The defendants' incompetence and negligence affirmed the Plaintiff's wrongful conviction; Legal malpractice cause of actions in this case were based on the Defendant's negligence, fraud, and misrepresentation. Here we have to address Stavis' fraud and misrepresentation, including but not limited to not giving the Plaintiff anything to read until weeks after he submitted motions supposedly on her behalf but that misrepresented everything about her contentions.

In fact, the Defendants disregarded all of the plaintiff's evidence affirming her actual and factual innocence, focusing solely on work they previously did on an unrelated case for their client Michael Bindy, recycling that work and misapplying it to this Plaintiff's case even after they lost with Bindy. They failed to perform the basic prerequisite tasks required to understand the Plaintiff's case, including to but not limited to:

1. The Defendants admitted in an email dated 8/22/2016 (see Exhibit B – on file with the Southern District Court of New York) that they did not review any of the exhibits. Such a review would show that the government had possession of video recordings evidence that they suppressed. A review of the trial transcripts shows the government speaking of video evidence to the Jury that they never showed to the jury. It has always been the Plaintiff's contention that video evidence can only exonerate her and never implicate her in any wrong doing. The Defendants' laziness in this regard is a complete disregard of their professional responsibilities and indicative of their negligence and incompetence.

2. The Defendants admitted in an email dated 8/22/2016 they did not obtain discovery from the trial Attorney, Louis Freeman. The claimed that they only needed the trial and sentencing transcripts; but, as it will be shown below, these are not enough to counter the miscarriage of justice that lead to the Plaintiff's conviction. Because the Defendants did not bother to understand the Plaintiff's case in any detail at all, nor why she felt her conviction was wrongful and should be overturned, they chose to be ill equipped to effectively represent her.

3. The Defendants failed to address the Court's, executive officials and its witnesses perjured testimony and other deceptions perpetrated against the Jury and the Court as evidenced below in Section I. Substantive Due Process Violations. The government's entire case was built without physical evidence and entirely on testimony that was perjured or deceptive. Ignoring this is negligence and a failure to provide effective assistance of counsel.

4. The Defendants failed to raise the objection of the Best Evidence Rule. In every instance, any claim made by the government and their witnesses had a refutation available by way of suppressed, withheld or redacted

physical evidence. The Plaintiff made sure the Defendants were aware of these, but they chose to ignore it all. It is not an exaggeration to say that the objection of the best evidence rule should have been raised for physical evidence that contradict every single one of the government's witnesses.

5. Attorney Roger Stavis and Attorney Adam M. Felsenstein were clearly incompetent in the law by filing the bail pending appeal in the Appellate Court PRIOR to filing it in the District Court. The appeal was only granted due to the filing in the WRONG Court; it remanded back to the District Court due to Attorney Roger Stavis' and Attorney Adam M. Felsenstein errors.

6. Attorney Roger Stavis and Attorney Adam M. Felsenstein failed to appeal the trial judge's bail pending appeal ruling in spite of the fact that the trial judge was incorrect in her stated reasons for denying bail. The Judge very incorrectly stated that all the drugs the plaintiff dispensed were controlled substances when in fact, none of them were classified "controlled substances" at the time of being dispensed via the fulfillment pharmacies. As will be shown below, none of the drugs mentioned could even fall into the fake category the Judge and Prosecutors made up, "**addictive pain meds**", if such a category existed.

7. The Defendants failed to raise matters of her actual and factual innocence, as relayed to them in writing, verbally and via emails. The Defendants simply ignored every issue the Plaintiff raised with regard to withheld and suppressed exculpatory evidence, defects in the indictment, and other pertinent issues detailed below and as indicated in her 2255 Motion, her Recall to Mandate, and her Rebuttal to Government's Memorandum of Law of the United States of America in Opposition to the Motion of Lena Lasher Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Her Sentence and in Opposition to her Supplementary Motions. In fact, the Defendants disregarded all of the plaintiff's evidence to affirm her actual and factual innocence; they ignored exhibits that showed the Plaintiff's innocence.

The Defendants' incompetence is demonstrated by their not going through the discovery materials, and other materials the Plaintiff provided. They would have been able to confirm the plaintiff's actual and factual innocence if they had gone through the evidence, including the pharmacy records, read the transcripts of the trial and pretrial motions, and had they even tried to obtain the suppressed exculpatory video recording evidence that contradicts the government's case. The case for innocence is presented below, because the Plaintiff does not want to leave it as mere conjecture that if they had done due diligence that the wrongfulness of the conviction would

become clear. Rather, the Plaintiff feels it is important to demonstrate her actual and factual innocence at every opportunity and in no uncertain terms.

It is important that this civil action proceed because the Plaintiff's Constitutional rights were violated: pretrial, at trial, sentencing, post sentencing, and most importantly because the Plaintiff can demonstrate her actual and factual innocence. "A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." This Plaintiff satisfied both prongs of this test. First, her attorney clearly performed atrociously, given that it's difficult to think of a worse idea than failing to attain and review the suppressed exculpatory video recording, a Brady violation, while leaving the Plaintiff incarcerated and ignoring her emails, to help her demonstrate her actual and factual innocence. Secondly, counsel's deficient performance very likely prejudiced the Appellate Court against the Plaintiff as demonstrated below in Section I. Substantive Due Process Violations. Buck v. Davis, 580 U.S. ___ (2017) Supreme Court, Foster v. Chatman, 578 U.S. ___ (2016) Supreme Court

Further, the Plaintiff's substantial due process was violated and the Defendants failed to address them, thus the injustice she suffered was so egregious in the Defendants' hands that her complaint must proceed, as indicated below.

I. Substantive Due Process Violations

"To establish a violation of substantive due process rights by an executive official, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights and (2) that the conduct of the executive official was shocking to the contemporary conscience." Truong v. Hassan, 829 F.3d 627, 631 (8th City 2016) (internal quotations and citations omitted). "To be conscience shocking, the government action must be 'truly irrational, that is, something more than ... arbitrary, capricious, or in violation of state law." Draper v. City of Festus, 782 F.3d 948, 953 (8th Cir. 2015) (quoting Weiler v. Purkett 137 F.3d 1047, 105 (8th Cir. 1998) (en banc)).

Here, the Defendants' actions rise to the "conscience shocking" level by their deviation of standard of care by failing to defend the Plaintiff as she requested. That the Plaintiff can demonstrate her actual and factual innocence, and that the Defendants chose not to, is very pertinent here, because everything needed to show her innocence was provided by her to the Defendants orally, in writing by hand, and via email.

On September 2, 2015, the Plaintiff was wrongfully convicted of five counts and sentenced to three

years imprisonment. As detailed below, this conviction was entirely due to the deception of fraud committed by SEVEN executive officials and the District Court itself via: perjured testimony, planted, suppressed, tampered and withheld evidence, and the usurpation of Legislative power by the invention of laws by executive officials and the District Court to avoid proper application of the governing pharmacy laws as they exist. The executive officials and the District Court created a jurisdiction when none exists by treating drugs that are not Federally controlled as controlled substances.

The Second Circuit of Appeal's rulings was based on the District Court's fraudulent activity and thus supported a conviction that was based entirely on false testimony and no actual physical evidence. As detailed below, the following SEVEN executive officials and the District Court itself deceived the jury:

District Court Judge Naomi Reice Buchwald
Preet Bharara, ex US attorney
AUSA Daniel Richenthal,
AUSA Kristy Greenberg
DEA agent Popowich
DEA Agent Germano
DEA Agent Murphy
Pennsylvania State Board of Pharmacy Inspector Bat

These Deceptions, include but not limited to, which the Defendants failed to address:

A. Flaw in the Indictment that could have been easily raised by the Defendants, but they chose not to.

1. Count 1 of the Indictment, charged the Petitioner for shipping and directing others to ship Tramadol on August 27th, 2012, even though Tramadol only became a Controlled Substance under federal law on August 18th, 2014.

In fact, the District Court reluctantly admits in its August 21, 2014 ruling that "Defendant makes a somewhat more persuasive parallel argument that the Indictment's reference to Ultram (Ultram is the brand name for Tramadol) in Count One could be 'inflammatory and prejudicial.' United States v. Scarpa. 913 F.2d 993, 1013 (2d Cir. 1990)(citation omitted)." The District Court rightly agrees that the addition of the dispensing of non-controlled substances like Ultram to the charges is irrelevant to the offense of narcotics conspiracy charged in Count One, and hence carries the potential for juror confusion or prejudice. Def. Mem. At 22-23. But in spite of that admission, the District Court knowingly allowed this deception of the jury, with the following completely unfounded and untenable contention about why the charges were written as they were, continuing, "Because the appearance of Ultram in Count One appears to be merely a function of the placement of background information,

we need not reach a decision as to defendant's motion to strike at this time. Rather, with the consent of defense counsel, we will revisit the issue if and when this case progresses to a point at which the concerns raised by Defendant regarding prejudice and jury confusion are more immediate. Tr. At 33." The court's contention, that charge of misbranding Tramadol under the Controlled Substance Act is somehow "merely a function of the placement of background information" is untenable and purely a function of the court's bias against the petitioner in complete disregard for the law. Charges are charges, not background information. The charge reads exactly as a charge, not as background information, which is presented in the charges in the exact same manner that Butalbital is presented but Judge Buchwald does not pretend to interpret its inclusion as mere "background information." The only information conveyed in the charge is that the prosecution is claiming it is a crime committed by the Plaintiff, and that the judge agrees it is a crime, if true, by not dismissing the charge. The jury was never informed that the charge of misbranding of Tramadol was in the court's view just background information. They accepted the court's presentation of the charges in good faith. A jury should not have to suspect that the court is presenting them charges that are not in fact crimes. If this kind of deception is allowed, it sets an extremely dangerous precedent such that cautious jurors should from now on be suspicious that the judge is deceiving them about the legitimacy of the charges and the applicability of the law to the acts in question. But this is exactly what Judge Buchwald did. Dispensing Tramadol in 2012 was not subject to the Controlled Substance Act, but the Judge presented it to the jury as if it were. This is akin to saying it is a crime to eat a salad with a salad fork. Of course if a jury is told such is a crime, they would return a guilty verdict against all who know one fork from another. No jury is given an instruction that the judge might very well be deceiving them about the applicability of the law. The judge put on an expensive two-week show for the jury, acting like this was a trial concerning potentially criminal acts when none of was within her jurisdiction nor under the prosecution's authority.

The Plaintiff never gave Mr. Freeman permission to consent to the August 20, 2014 order. In any event, this issue was never revisited, yet testimony at the Petitioner's trial concerning "tramadol" was admitted presented to the jury by the court as if it were a controlled substance subject to the court's jurisdiction and to prosecution under federal law when it was not.

As this shows, Tramadol was not a federally controlled substance at the time of dispensing, but remained

as part of the charges from the day of the Plaintiff's arrest through to today, and no evidence other than its mere existence as a drug was shown for a reason to consider any misbranding around it, but the Defendant's did not bother to address these problems.

2. Lack of physical evidence:

Referring to Fioricet by the name of one of its components, Butalbital, both during the trial and in the indictment. This deception persists from the time of the Plaintiff's arrest through to today, but the fact that the Plaintiff never dispensed Butalbital and the drug in question is Fioricet has never been in dispute. The Prosecution's and the District Court's insistence on this bait and switch of drug names is in violation of the way the term "drug" is defined under federal law: 21 US Code Section 321 (g) (1). The relevant portions are as follows:

> The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

A component of a drug may be another drug, but in such cases it is just a component and not the drug. A drug that is made up of multiple components, some of which may be drugs on their own in their raw state may be considered a "fixed-combination drug" as defined under Title 21 Chapter I Subchapter Part 300 Subpart B 300.50. The relevant section is as follows:

> "(a) Two or more drugs may be combined in a single dosage form when each component makes a contribution to the claimed effects and the dosage of each component (amount, frequency, duration) is such that the combination is safe and effective for a significant patient population requiring such concurrent therapy as defined in the labeling for the drug. Special cases of this general rule are where a component is added:
> (1) To enhance the safety or effectiveness of the principle active components; and
> (2) To minimize the potential for abuse of the principal active component."

These definitions ares consistent with the knowledge that: a drug is an article unto itself not defined by its components, and that each drug's therapeutic value and potential for abuse must be assessed independently for each drug regardless of its components. Fioricet is a fixed-combination drug.

The Controlled Substance List created and maintained by the Attorney General of the United States indicates alternative names for drugs on it when such names exist. Fioricet is not listed as an alternative name

for Butalbital, and Fioricet is not on the Controlled Substance list because it lacks a potential for abuse. This is why Fioricet can never be called Butalbital, and Butalbital can never be called Fioricet, is that it would unnecessarily cause confusion between a drug with a potential abuse with one without.

This confusion is exactly what the Prosecution and its witnesses insisted on creating, and this confusion was intentionally indulged by the district Court in order to assist the prosecution gain a conviction. This deception was committed against the Grand Jury that indicted the Plaintiff, against the Plaintiff, against the District who willingly went along with it, against the Jury, and against the entire health care community who are just as susceptible to this wrongful prosecution as the Plaintiff was. Yet, the Defendants ignored this and the processes spelled out in the Controlled Substances Act section 811 that places section 812 under itself and requires the assessing of a drug's potential for abuse, and all the other steps involved in placing a drug on the Controlled Substance List, that prevent prosecutions based on a components of a drug and not the drug's own actual known potential for abuse.

The law itself is clear that if Fioricet were a controlled substance it would be listed on the Controlled Substances List and the Federal Register would indicate clearly when it was being considered for scheduling and fair warning would be indicated for when it would have become a controlled substance, as this is the case for every other drug that becomes a controlled substance. Further evidence of just how wrong this trial court is on this matter can be found in West Virginia Board of Pharmacy News from September 2014, where they state on page one: "Fioricet is not federally scheduled" (W V Vol 34, No. 1, see exhibit B). This evidence came into existence prior to the Plaintiff's trial and after her indictment, and it clearly adds to proof of the incompetence of the Defendants.

At trial, due to the fact the pharmacies never carried butalbital, the executive officials (AUSA Richenthal and Greenberg, DEA Agents Popowich, Germano, and Murphy) and the trial Judge, deceived the jury by calling Fioricet, the name of the drug that was dispensed, by the name of one of its components, butalbital. On its own Butalbital is a drug that is a controlled substance which required a valid prescription. But Butalbital is not Fioricet. Fioricet is a fixed-combination drug as described above. Fioricet is a NON controlled substance under federal law, has no potential for abuse, and does not require a valid prescription. The combination is formulated such that the patient can not abuse the drug: doing so would hospitalize them for liver damage due to the

addition of a demonstrably non-controlled substance that is available over the counter with out any prescription: Acetaminophen. This is no different than if a patient tried to abuse Tylenol, because the active ingredient in Tylenol is Acetaminophen. Because of this lack of a potential for abuse, Fioricet does not meet the criteria for a controlled substance under federal law as set forth under the Controlled Substances Act Subchapters 881 (a), 811 (b), 811 (c), 812 (b) (3) (A), or 812 (b) (3) (C). In particular, it does not meet the criteria that specifies that the findings that cause a drug to be a controlled substance under federal law must "be made on the record after opportunity for a hearing pursuant to the rule making procedures prescribed by subchapter II of Chapter 5 of Title 5."

This bait-and-switch of a drug's name for the name of one of its components causes the indictment to be a defective indictment. The changing of the drugs name was intentional and indicative of judicial bias. The administration officials, both prosecutors and agents, committed perjury and fraud on the Court and usurped legislative authority by trying to make Fioricet a controlled substance by calling it Butalbital, and the District Court invented its own laws to create a jurisdiction for itself over Fioricet by blindly accepting this renaming of the drug. If Fioricet was called by its proper name, it would be obvious to the casual observer that the District Court lacked of subject matter jurisdiction over this case. The defendants completely ignored this.

DEA agents Popowich, Germano, and Murphy all lied when they stated: 1) that they ordered and received butalbital, and 2) that they had invoices for butalbital. However no such invoices nor the medicines they ordered were presented to the jury as physical evidence to back up their claims, because if they had presented it everyone would plainly see they received Fioricet which is not a controlled substance. There was no physical evidence of any prescription, receipts, nor invoices of "butalbital" nor controlled substance marking on any of it, because there were none as there are none for Fioricet. A competent appeal attorney would address this matter.

Butalbital ships from the manufacturers as a POWDER. It is a controlled substance that has to be compounded; the Plaintiff could not compound butalbital into a tablet because the pharmacy was not equipped to compound anything into a tablet, nor extract anything out of a tablet. In fact, the pharmacies dispensed Fioricet, which ships from the manufacturers as a tablet, is a NON controlled substance which does not require a valid prescription, the pharmacies never dispensed Butalbital, not on the dates that the indictments claim the crimes

were committed and not ever. The pharmacies never received Butalbital from any manufacturer, they had no use for it. The Plaintiff was not working nor present at the pharmacies where the alleged crimes supposedly took place on the days of the alleged criminal activity.

Butalbital is clearly not the same drug nor an analog, nor has the same strength, indication, or even in the same drug category or classification as Fioricet. They are 2 different drugs for 2 different treatments and neither are in the pain med category. Fioricet and Butalbital are not interchangeable drug names. Fioricet is indicated for tension headache while butalbital is indicated for insomnia. Fioricet as a fixed combination drug is manufactured such that it has no potential for abuse, containing Butalbital 50mg, Acetaminophen 325mg, and caffeine 40mg. Butalbital is not the same drug as Fioricet because in its raw state, Butalbital has a potential for abuse. When incorporated in Fioricet that potential for abuse is eliminated. Long before a patient could be addictive to Fioricet, he would be hospitalized for liver toxicity from the acetaminophen in the same way he would if he abused over the counter Tylenol because Tylenol's active ingredient is acetaminophen.

In summation, the references to Butalbital in the indictment and at trial is false and misleading. It was NEVER in the possession of the pharmacies, never stocked by the pharmacies, and never distributed to the pharmacies by a distributor or manufacturer. Instead, NON controlled substances were intentionally referred to by the wrong drug name and represented to the jury as controlled substances or "highly addictive pain meds". This latter phrase was made up by the executive officials AUSA Richenthal and Greenberg, who were indulged in this by the District Court, without any facts to back up the invention of this phrase nor any references to scientific, medical, pharmaceutical or pharmacological literature (T.1768). This was done to prejudice and profile the Plaintiff; in fact, NONE of the drugs the Plaintiff dispensed via the "fulfillment" pharmacy were classified as "pain meds" (T.1768), or a controlled substance at the time of dispensing. The use of the word "addictive" itself is problematic. As the American Society of Regional Anesthesia and Pain Medicine provides great resources on the topic. No drugs, not even actual opioid pain meds, are called "addictive": they have a potential for abuse. The abuse of such drugs may lead to addiction. Addiction is considered a behavior with a wide range of causes and contributing factors. Abuse of medicines with potentials for abuse may lead to addictive behaviors and even addiction. It is this concept of potentials for abuse, and the range of those

potentials that are a guiding force behind the Controlled Substances Act: it was never meant to be a playground for overzealous and immature prosecutors to create ways to lock up and shame conscientious professionals.

Shockingly, there was no physical evidence, prescription, invoice, inventory and bill of laden of Butalbital or a name of a "highly addictive pain meds" introduced at trial, because there were NONE. There were no controlled substances dispensed by the Plaintiff or anyone in the pharmacies via the "fulfillment pharmacies", as the District Court claimed in denying the Plaintiff's bail pending appeal. A motion requesting her to name ONE controlled substance or "highly addictive pain meds" that the Plaintiff dispensed, Judge Buchwald has not respond to this motion because there were NONE.

Further, the suppressed video recordings, which will be expanded in item #4, showed the Plaintiff never handled nor dispensed "butalbital tablet"; the suppressed video recording will confirm that "butalbital tablet" was not stocked at the pharmacies, and the conviction of the plaintiff was ultimately for a NON-controlled substance, Fioricet. "Butalbital tablet" does not exist and is not manufactured by manufacturer.

Count 2, 3, 4, and 5 of the Superseding Indictment failed to allege that the Plaintiff sold misbranded drugs without valid prescriptions (face to face) because it failed to name any drugs or specific prescription. Counts 2, 3, 4, and 5 of the Indictment failed to charge any actual specific offense. Again the executive officials deceived the jury by not mentioning a drug name because only controlled substances, under the Controlled Substances Act, required valid prescriptions for dispensing. In fact, the Online Pharmacy Safety Act (S2002) introduced legislation which would have required valid face to face prescriptions for NON controlled substance prescriptions ordered online did NOT pass.

The Government also claimed these unnamed and unspecified prescriptions were not valid because there was "no bonafide face-to-face" relationship between a doctor and his patient; but there are two glaring problems with this. Firstly, a "bonafide" relationship is the standard for all prescriptions a doctor writes for a patient, and there a wide range of ways a doctor and patient can have a bonafide relationship. But, a "face-to-face" relationship is only required for Controlled Substances. In order to confuse the jury, the government made up this compound phrase. Secondly, to hold a pharmacist responsible for this without any physical evidence or any specific prescriptions named requires a number of leaps in logic. The Government's claim in this regard is an attempt to shift blame away from the doctors, if there is any genuine blame, shifting the supposed blame to the

Plaintiff. There is no formal assessment for a pharmacist to determine whether there is a bonafide relationship between a doctor and his patient, that relationship is between them; there is no established criteria under federal law for a pharmacist to know if the doctor consulted their patients. The signatures on the prescriptions are the doctor's promise to the rest of the health care community and the patients, that the prescriptions are valid and that their job was done properly. A relationship could in fact exist and be denied at trial, as the doctors testifying at the criminal trial against the Plaintiff in this civil action were only testifying to avoid their own jail time for other crimes. On top of this, the Plaintiff, before filling these fulfillment pharmacy prescriptions, actually required doctors to fill out and submit forms stating that they did phone consult directly with the patients. Evidence of this requirement that went above and beyond the requirements under the law was withheld by the District Court because it was physical evidence that directly contradicts testimony of one of the prosecution's witnesses.

None of this changes the fact that the Prosecution's and the district court's applying of the face-to-face requirement to non-Controlled Substances is a deception, deceiving the jury that the Controlled Substances Act's requirements for valid prescriptions was meant to be applied to NON – Controlled Substances.

3. Further, The Prosecution alleges that the Tramadol and "butalbital" prescriptions were misbranded by way of dispensing medicine that returned to the pharmacy after previously being dispensed. However, this assertion is shown to be false by reports from MURP, the company that the pharmacies use to destroy drugs, that verify that the pharmacy did return drugs and that they were destroyed by them. These reports were was entered into evidence. The Prosecution relied on their lie about what the drug's name is, but stating that Butalbital is not shown on this list and thus they stated a conclusion they and the judge knew to be false: that absence of Butalbital on the list indicates that we did not return it. No Butalbital was ever in the pharmacy, the agents ordered Fioricet and got it. It only became "butalbital" in Judge Buchwald's bizarro world court room where drug names have no meaning. Fioricet is listed on the MURP because in the real world Fioricet is not Butalbital.

The only evidence that this kind of misbranding occurred was testimony, which contradicted the Government's misrepresentation of the pharmacy paper trail, the MURP paper work. The Prosecution's witness Goloff lied to inspector Bat and on the stand concerning re-dispensing returned medicines. Goloff lied because he was written up for violating pharmacy law PRIOR to the PA BOP's inspection. Goloff resented the Plaintiff

for holding him accountable for being a bad pharmacist. Unfortunately, the District Court withheld the unredacted evidence. To reiterate, Goloff has a history of lying to officials about other health care professionals, including but not limited to Dr. Haytmanek. Inspector Bat, instead of "inspecting" took an easy paycheck by relaying on hearsay testimony.

In any event, the MURP reports, read intelligently and not in a way that pretends people outside of Judge Buchwald's show-trial stage, that all returns were properly disposed of. The Prosecution lied, and the Judge knowingly allowed the lie, by setting up a trial through all the pre-trial wrangling over the drugs name, to present the lie to the Jury that Butalbital was Fioricet, and then they misrepresented the meaning of the MURP report to imply that the any returned drugs in question was not destroyed. The Judge was intent on denying the Petitioner's Bail Pending Appeal because once the Petitioner's case is made before an impartial and fair-minded appeals court, her lies will be exposed for what they are and her acts of fraud will be self-evident to everyone

4. The executive officials and the trial Court deceived the jury that the Controlled Substances Act or any federal law makes one pharmacist responsible for another pharmacist's actions by accusing the Plaintiff of forcing the prosecutors' witnesses to break laws by supervising them remotely via phone and cameras. However, there is a number of problems with this accusation.

First of all, there were no crimes committed at these pharmacies by the Plaintiff. That statement stands in stark contrast to the prosecution's and its witnesses fiction created at trial, but it remains true; no crimes were committed.

Secondly, there is video evidence of the Plaintiff working at a pharmacy in New Jersey on all the dates that the alleged crimes took place in the Indictment (6/1/2012, 6/12/2012, 7/16/2012, 7/17/2012, 8/13/2012, 8/16/2012, and 8/27/2012), that clearly showed she was not remotely monitoring or supervising, nor directing employees in other locations to commit the alleged crime. This video recording was both suppressed and withheld and only came to the Plaintiff's possession in August 2017. The video recordings proved the Plaintiff's ACTUAL innocence; they showed the daily activity of the work flow in the pharmacies and that the Plaintiff abided by all pharmacy law and regulations in that she properly counted, labeled and stored, destroyed medications properly, and dispensed medications with valid prescriptions, all verified by doctors; yet, this was contradicted by the prosecutors' witnesses sworn testimony, including those of the Pennsylvania Board of

Pharmacy's pharmacy inspector THOMAS BAT, an executive official. Even though the Government only provided the Plaintiff with 2 months of the video that they confiscated from the pharmacies at the time of the arrest and refer to it at trial without showing it, it is sufficient to see the consistency in the plaintiff's work; that she did not violate any law. In this case, all prescriptions were hand counted. This act is CONSISTENCY shown throughout all of her places of employment that she abided by all the rules.

Thirdly, there is no federal law describing how one pharmacist can be held responsible for another pharmacist's actions. The only applicable law that provide directions or oversights to pharmacists and their actions in pharmacies is the pharmacy law (PA27.12(b)(2)). PA 27.12(b)(2) is the governing pharmacy law for theses matters. The governing pharmacy law (PA27.12(b)(2) and the criminal statute 21 U.S.C. 321 (g)(1), 352 (a), 352(c), 353(b)(1), and 353(b)(4)(A), and 21 USC 331(a) and 333(a)(2) require for the accused to be present at the pharmacy at the time the specific prescriptions in question were filled. The Plaintiff was NOT on duty on the Indictment dates, as evidenced by the video recordings, work schedule, time cards, and EZY passes. She can not be guilty of a crime she was not there to commit, and which she did not agree to commit, nor for an act that she did not condone. Because of potential biases and to avoid any shifting of blame, the pharmacy law eliminates any double standard or shifting of blame; each pharmacist is accountable for his actions and can NOT shift blame to someone else. It is the job of any pharmacist while on duty to ensure they themselves follow all laws, regulations, and policies; any misdeeds or mistakes are the responsibility of whoever made the misdeeds or mistakes. Further, any pharmacist on duty also serves as a "supervisor" of themselves and their technicians and is accountable for his shift. Thus it is impossible for her to "conspire with" or aid and abet because the governing laws do not hold her accountable for other employees' actions. These facts about the governing pharmacy law are common knowledge among pharmacists. The Defendants in this civil action were made aware, by the plaintiff, that pharmacists are responsible for their own actions and cannot blame their conduct on anyone else, be they a pharmacist in charge, a supervising pharmacist, or even the actual pharmacy owner.

5. The Defendants failed to raise the objection of the Best Evidence Rule over Bates Document 010085 with regard to false accusations that the Plaintiff forged the opium tincture prescriptions.

Much of the trial focused on opium tincture prescriptions for Dr. Haytmanek written by Dr. Cochran. Dr. Haytmanek is a patient suffering from chronic diarrhea and the opium tincture is an appropriate medication indicated for that ailment. Prosecution's witnesses Steven Goloff actually filled 17 of the 20 of these prescriptions. At some point, Steven Goloff decided to frame Dr. Haytmanek by reporting him to the PA Board of Medicine for being a "drug addict" who obtains his drugs illegally. At the Plaintiff's trial, the prosecution and 5 of their witnesses, Pharmacy Inspector THOMAS BAT (a Pennsylvania State Board executive official), pharmacists Steven Goloff and Daniel Geiger, technicians Albert Buck and James Barnes, framed the Plaintiff by falsely accusing her of forging these prescriptions and illegally dispensing to Dr. Haytmanek whom they called "an addict". Evidence confirming that the Plaintiff did not forge any Opium prescriptions for Dr. Haytmanek was withheld from the jury (Bates document 010085, T. 1939-1942). The trial judge knowingly allowed false testimonies of the Plaintiff forging those prescriptions (T.832). Even worse, AUSA Richenthal and Greenberg in their summation reiterated this false accusation of forgery telling the jury the Plaintiff forged Dr. Cochran's prescriptions. These perjuries were made more effective by the District Court's decision to withhold the physical evidence that showed these lies for what they are. Further, the Trial Judge, presuming the role of a handwriting analysis expert witness from the bench, flatly declared the Plaintiff forged Dr. Cochran's prescriptions. More damagingly, the story they made up about these prescriptions were disproved at a hearing before the Pennsylvania Board of Medicine on October 8th, 2013, 19 months prior to the Plaintiff's trial (docket # 0335-49-B file no. 12-49-11424 Pg. 28). It was a matter of record nineteen months prior to the Plaintiff's trial that there was nothing wrong with with any aspect regarding Dr. Haytmanek's prescriptions, but the Prosecution and its witnesses insisted on putting on a show slandering her and the doctor.

To reiterate, Dr. Haytmanek was exonerated of any wrong doing and shown to not be a "drug addict" by the Pennsylvania Board of Medicine, but the Government chose to stand in front of the Jury and lie about him and his prescriptions. If the Government's version events were true, the following would have had to happen:

A. Dr. Cochran's prescriptions pads would have to have been stolen,
B. The prescription pads would have to have ended up in the Plaintiff's possession,
C. Dr. Cochran would have to have failed to report these stolen controlled substances prescription pads,
D. Dr. Cochran would have to have been arrested for not reporting the stolen pads,
E. Goloff would have to have been arrested for dispensing 17 of these allegedly forged prescriptions,
F. The Prosecution would have a real crime to charge the Plaintiff instead of the nonsense that went on at her trial.

That none of this happened would seem to indicate that everyone on the Prosecution team knew it was all lies meant to slander the Plaintiff and deceive the jury.

6. The Defendants failed to raise the objection of the Best Evidence Rule over Judge Buchwald's withholding of faxes showing Dr. Konakanchi perjured herself, to convict the Plaintiff so that Konakanchi can avoid jail time for her own crimes.

The District Court allowed the Government to hold its rebuttal witness, Konakanchi, to the last possible minute, giving the Defense 50 minutes to prepare despite the Defense Attorney requesting more time. Konakanchi falsely testified that she never signed any faxes stating she phone consulted patients. Even if everything Konakanchi claimed was true, it did not violate the Controlled Substances Act because face to face between her and her patients was not required for any of the medications Dr. Konakanchi prescribed for the patients at Hellertown Pharmacy.

However, at trial, in the presence of no jury, the Plaintiff presented fax documents, found in the Government's discovery, from Dr. Konakanchi that prove Dr. Konakanchi perjured herself. The faxes confirmed the Plaintiff went above and beyond the law by requiring Dr. Konakanchi to fill out a form indicating that she did at least phone consulted with her patients. The only legal criteria that is established for a pharmacist to access a prescription's validity is the doctor's signature. That the Plaintiff asked more from Dr. Konakanchi is indicative of consciousness, not guilt.

Defense attorney requested to impeach Dr. Konakanchi; however, Judge Buchwald proved bias by denying the impeachment and withheld the evidence. Defense Attorney then requested a mistrial; District Court denied the mistrial.

The District Court deliberately withholding evidence showing Konakanchi perjured herself, to convict the Plaintiff so that Konakanchi can avoid jail time for her own crimes, is perhaps the most obvious example of Judge Buchwald's bias toward the Plaintiff. This evidence directly would sway the jurors to acquit the Plaintiff.

7. Dr Burling's own phone records, which should be considered best evidence and far superior to testimony from a witness who admits to be testifying to avoid jail time for his own confessed crimes, that show the

Witness and the Plaintiff were in contact numerous times in spite of the witness' claims that they had never spoken.

8. At trial, the Plaintiff was accused of changing Doctors' instructions without their permission. However, the official executives AUSA Richenthal and Greenberg and the District Court withheld evidence of emails and prescriptions documentation in regard to pharmacists Michael Della-Ventura and William Cantagallo who received the approval for the pharmacies to correct prescription dosages from the doctors.

The aforementioned were just a few issues which shocked the conscience, and if the jury knew of the aforementioned, the Plaintiff would have been exonerated. Unfortunately, due to the Defendants' failure to defend the Plaintiff by ignoring judicial and official executive's committing fraud and violating the Plaintiff's constitutional rights, as well as suppressing and withholding the exculpatory video recordings, and knowingly allowed perjured testimony, to obtain a conviction, warrant this civil action to proceed to address the Defendants' negligence and legal malpractice.

Most importantly, if the Plaintiff violated the law, the Prosecution would have used the video recording against her. Because the government knew that she did not break any law, they suppressed the video recordings from her despite referring to it at trial as if it was damaging evidence. This exculpatory evidence could have exonerated her and is a clear violation of Brady as well as a violation of Plaintiff's 5th Amendment Right (Due Process). Yet, the Defendants failed to even attempt to obtain and review the aforementioned suppressed exculpatory video recording evidence.

In fact, the best evidence rule (Evidence SS424-documents contradicting testimony) "rests on the fact that a document is a more reliable, complete, and a more accurate source of information as to its contents and meaning than anyone's description; this is no less true as to the extent and circumstances of a contradiction, contained in the document, to a witness' testimony, where the alleged contradiction relates not to collateral matters but to the incrimination of a defendant in a criminal case."

The Best Evidence Rule is easily applied in this Plaintiff's case just as it was in Gordon v. United States: "We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeachment weight and significance ... the alleged contradiction to this witness' testimony relate not to collateral matters but to the very

incrimination of petitioners. Except the testimony of this witness be believed, (pg.455) this conviction probably could not have been had." Gordon v. United States 97 LED 447, 344 US 414.

"As professionals, attorneys are held to certain standards. Among these are duties for ethical behavior and professional competence." Here, the Defendants violate these standards and they are subject to discipline. Most importantly, due to the Defendants' professional misconduct, it is essential for this civil action to proceed.

B. 1. The Plaintiff was granted in forma pauperis. The District Court unconstitutionally dismissed her amended complaint prior to service of process. In fact, "the Third Circuit Court of Appeals held the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) prior to service of process is improper.

"The Third Circuit Court of Appeals held the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) prior to service of process is improper." The vacating of a dismissal at the district court in Outess v. Sobolvetich is equally applicable here:

> "an action filed by a Pennsylvania prisoner at a State Correctional Institution, the complaint alleged the defendants, all judges, court clerks, or lawyers, conspired to have a civil case he filed in the State Court of Common Pleas dismissed. The district court granted the prisoner in forma pauperis status, and it then dismissed the complaint for failure to state a claim under Rule 12(b)(6) before service of process was made. The prisoner appealed.
>
> The Third Circuit held that 28 U.S.C. § 1915(d) ONLY allows dismissal of a complaint if it is frivolous or malicious. Once a plaintiff is granted in forma pauperis and the suit is not considered frivolous or malicious, it must proceed as any other suit under the civil procedures. A complaint may fail to state a claim upon which relief may be granted under Rule 12(b)(6), but it is not frivolous under §1915.
>
> The court held that once in forma pauperis status is granted the clerk must issue summons under Rule 4(a) and the court shall serve all process under §1915(c). Dismissal of the complaint under Rule 12(b)(6)is contrary to these rules, and it may create the perception the judge has abandoned the rule of neutral arbitrator." See: Outess v. Sobolvetich, 914 F.2d 428 (3rd Cir. 1990).

B. 2. The US Supreme Court Held Plaintiffs Have A Right To Amend Complaints; the District Court unconstitutionally dismissed the Plaintiff's amended complaint.

> "The US Supreme Court held that it is entirely contrary to the spirit of the Federal Rules of Civil Procedure (FRCP) for decisions on the merits of a case to be avoided on the basis of technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits of the case. The Supreme Court Held that denying a petitioner's motion to vacate

the judgment of dismissal in order to allow amendment of the complaint is not proper procedure. The court held that FRCP 15 allows for the amendment of complaints and District Courts should "freely grant" motions to amend. This case involved a Massachusetts woman who filed a complaint concerning her father's will and estate; this was a first circuit case." See: Foman v. Davis, 371 U.S. 178; 83 S.Ct. 227; 9 L.Ed.2d 222 (1962).

C. The Plaintiff' Motion to Change Venue is Proper and With MERIT

Although the Plaintiff did not address the issue of choice of law in her complaint or amended complaint, the Plaintiff has addressed it in her "Motion to Alter or Amend a Judgment under Fed. Rules of civil procedure Rule 59(e)"; NEW JERSEY law applies in this civil action because:

1.The trial was conducted in a FEDERAL COURT, involving the Plaintiff and the prosecutors' witnesses who were employed by the Riccio's pharmacies in New Jersey and Pennsylvania; these pharmacists were licensed by the states of Pennsylvania and New Jersey so the derelictions of professional duties this matter deals with are Federal Law, Pennsylvania and New Jersey state pharmacy laws which the Defendants did not utilize to acquit the Plaintiff. Thus, this civil action warrant the application of New Jersey law because NJ state law does not require a Petitioner to overturn their conviction prior to filing a legal malpractice suit against her appellate counsel (who are also **NOT her criminal defense attorney** and not subject to a free-pass for incompetence they claim is available to criminal defense attorneys, as evidenced in this appeal)

2. A federal court has diversity jurisdiction. "New York courts have adopted a flexible choice of law approach and seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute." White Plains Coat & Apron Co. v. Cintas Corp., 460 F.3d 281, 284 (2d Cir. 2006). However, the Court improperly applied New York STATE law as per its footnote and analysis: "(1) this Court sits in New York, (2) Lasher's trial and appeal took place in New York, and (3) Defendants practice law in New York" as evidenced below in # 4.

3. Regardless It is irrelevant and only a coincidence that the Defendants are licensed in New York, this was a federal case which involves FEDERAL laws, NOT New York state law. It was essential that the Defendants defended the Plaintiff with Federal regulations; however, they clearly failed as stated in all the Plaintiff's motions

against the Defendant. Thus, In the matter at hand, it is clear that New Jersey has the most significant interest in the dispute as detailed below, to protect the integrity of justice.

4. Further,

a. a final judgment has not been issued in that the complaint was dismissed without prejudice:

b. The Plaintiff is a New Jersey resident since 1987. Although she was wrongfully incarcerated and held in Danbury CT against her will, due to the Defendants' negligence; Danbury CT was her temporary "abode" where she was held at, it is not her "residence" as the Defendants derisively stated.

c. The alleged acts took place in New Jersey and Pennsylvania pharmacies, not in New York. New Jersey DEA agents who testified receiving packages in New York did not claim any wrong doing with regard to them. New York has no more to do with this case than any other state.

d. The relevant records (pharmacy paper trail including but not limited to prescriptions, invoices, MURP records, phone and faxes records, video recordings) were all located in the New Jersey and Pennsylvania pharmacies.

e. For the convenience of witnesses because ALL the witnesses are located in New Jersey and Pennsylvania. For example, prosecution's witnesses Pharmacists Goloff & Geiger, pharmacy technicians Albert Buck and James Barnes, Dr. Konakanchi are all located in Pennsylvania. The Plaintiff intends to call all the witnesses from the Riccio's pharmacies; they all reside either in New Jersey or Pennsylvania. Clearly the Defendants remain negligent, they did not even know that the witnesses are in New Jersey and Pennsylvania, NOT in New York as the Defendants tried to deceive your Honorable Court.

f. That the trial and appeal took place in New York is merely a function of the fact that the federal courts are located there, which is just a geographical coincidence. In fact, the Second Circuit sitting in New York is merely a geographical coincidence in that Its territory comprises the states of Connecticut, New York, and Vermont

g. That the Defendants, her appellate attorneys (not her "criminal defense attorneys"), are located in New York is irrelevant; their alleged qualification to work on federal cases was relevant which they could have done anywhere the federal government chose to try their cases. Because the Defendants were the Plaintiff's **appellate attorneys**, this case should have proceed according to the New York law standard cited but **misapplied** by the District Court; thus Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003) does apply to the Plaintiff's case, **if properly apply**.

h. New Jersey law allows a civil action of legal malpractice and negligence claim to PROCEED without the requirement of a reversal of her conviction, to protect the integrity of the Court's processes and in preventing injustice, no differently than the standard cited by misapplied by the district court in this action. Rather than acknowledge that, the Defendants deceptively misrepresent their source, and thus try to trick the court into falling for an error of omission, in their manipulative truncation of their quote from Udoh v. Moreira, No. CV14929 (FLW)(LHG), 2018 WL 623676, (D.N.J. Jan. 30, 2018): "A legal malpractice claim accrues upon a criminal defendant's exoneration which MIGHT be vacation of a guilty plea and dismissal of the charges, entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense or any disposition more beneficial to the criminal defendant than the original judgment". This incomplete quote from their source. If the Defendants thought an argument based on an error of omission and an assumption that no one would check their citation, they seem to providing two examples of their incompetence, which is central to this filing. Here the Plaintiff corrects the Defendant's error by completing their quote:

> "Plaintiff's claims against Defendant Moreira may also be construed as arising not only from Plaintiff's involuntary commitment, but also from Defendant Moreira's alleged acts of disloyalty and malfeasance as Plaintiff's legal counsel. New Jersey law imposes a two-year statute of limitations for legal malpractice claims against public attorneys. N.J. Stat. Ann. § 59:8-8; Stoeckel v. Township of Knowlton, 902 A.2d 930, 943 (N.J. Super. Ct. App. Div. 2006) ("All . . . causes of action against publicly employed attorneys which accrued on or after July 1, 1994, [except causes of action for tortious intentional conduct by a publicly employed attorney which accrued prior to June 29, 2004,] are subject to the two-year statute of limitations."). A legal malpractice claim accrues upon a criminal defendant's exoneration, which "might be vacation of a guilty plea and dismissal of the charges, entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense or any disposition more beneficial to the criminal defendant than the original judgment." *McKnight v. Office of the Pub. Defender*, 962 A.2d 482, 483 (N.J. 2008). A determination of actual innocence is not required; rather, only a demonstration that the Defendant is "able to show some injury caused by the alleged malpractice whether that relief is dismissal of the charges, acquittal on retrial, conviction of a lesser included offense or otherwise."

As the quote shows, the Udoh v. Moreira ruling relies heavily on McKnight v Office of the Pub. Defender ruling. That ruling only further strengthens the Plaintiff's contention, and undermines the Defendant's.

> "Both the rule we adopt today and the pre-existing decisional law did not impose on plaintiff a requirement of showing either actual innocence or exoneration. Although we now require that some form of post-conviction proceeding be filed or pending when the criminal malpractice action is commenced, that determination has no impact on plaintiff. In short, we have made no alteration in the manner in which accrual is ascertained and our additional requirement that post-conviction proceedings be filed or pending has no relevance in this case." McKnight v. Office of the Public Defender 962 A. 2d 482, 483 N.J. 2008.

Here, the Plaintiff's post-conviction proceeding was filed and is still pending at the District Court, Appellate

Court, and the US Supreme Court.

i. A trial may be relocated due to a variety of many factors, such as: travel costs, judicial expenditures, location of witnesses or evidence, choice of applicable law, racial and/or socioeconomic population breakdown of the area which proves unfavorable to the case, previous problems with the judge, authorities and other lawyers, and the Plaintiff's request for oral argument(s).

j. Also, the Plaintiff is an indigent and can not afford to travel to New York for oral arguments and trial.

Thus the aforementioned warrant NEW JERSEY jurisdiction, and her motion should be granted in its entirety.

The Plaintiff, Lena Lasher, sincerely believes that she can justifiability rely on the United States Supreme Court case Haines v. Kerner 404 U.S. 519 (1972), which clearly states that "all Pro-Se litigants must be afforded the opportunity to present their evidence and that the Court should look to the substance of the complaint rather than form."

REASON FOR GRANTING THE WRIT

This Petition for writ of certiorari must be granted for the following reasons:

I. To correct the District Court's error where they misrepresented a precedent, Hoffenberg v. Meyers, and thus failed to properly apply it.

The district court, in citing Hoffenberg v. Meyers, states "[U]nder New York law, a plaintiff cannot state a malpractice claim against his **criminal defense attorney** if his conviction 'remains undisturbed.'" Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003). However, the District Court was incorrect in this regard for at least two significant reasons, both easily found within Hoffenberg v. Meyers. The standard cited by the District Court only applies to "criminal defense attorneys" and not appellate counsel, as evidenced in the next paragraph of this motion.

Significant in the district court's misapplication of Hoffenberg v. Meyers, the Defendants were not the Plaintiff's criminal defense attorney; they were her **appellate counsel**, and so the standard cited does not apply to this case. Black's Law Dictionary makes a clear distinction between Defense counsel and appellate counsel: **"DEFENSE COUNSEL** is the name that is given to the **trial lawyer** who is the defendant's representative. ... The Basics of the Defense Attorney Role is to represent a defendant in court proceedings. They most often appear in criminal court when the defendant has been accused of committing a crime like burglary or murder. Whether the charges against the defendant are a misdemeanor or a major felony, they are entitled to vigorous legal defense, and it is the job of the defense attorney to provide this." Under the same definition, Black's Law Dictionary draws the distinction: "Appellate law attorney... may handle either civil or criminal cases, and they are often considered to be highly skilled since the cases they argue are reviewed by judges appointed to the bench by virtue of their wisdom."

"As professionals, attorneys are held to certain standards. Among these are duties for ethical behavior and professional competence." Here, the Defendants violate these standards and they are subject to discipline.

More importantly, the Southern District of New York turned a blind eye to the most relevant portion of Hoffenberg v. Meyers, failing to address the Plaintiff's proof of actual innocence. In this Plaintiff's case, the charges in the defective indictment are not crimes as detailed in the "amended complaint and jury demand", Innocence is also shown via exculpatory video recording evidence, which the Defendants REFUSED to help the

Plaintiff's attain. The Defendants also ignored other exculpatory evidence. "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003) Here, the Plaintiff clearly asserts and can demonstrate her ACTUAL and FACTUAL innocence.

II. Because of the Defendants ineffectiveness assistance in counsel, the plaintiff's conviction and sentence were affirmed. If only they had raised all the issues the Plaintiff had asked them to, by providing evidence of her actual and factual innocence, in that she abided by all the law and regulations, did not commit the underlying offense as affirmed in the suppressed exculpatory video recording evidence and by the pharmacy paper trail, and pursued and obtained the suppressed exculpatory video recording as she had requested multiple times, they would be able to prove the Plaintiff's actual innocence. However due to their incompetency, the Appellate Court should not deny her civil action.

Actual innocence, if proved, can overcome procedural hurdles, the Supreme Court held in McQuiggin. Satterfield argued that his lawyer was ineffective; just like the Plaintiff, her lawyer, Attorney Stavis, was ineffective as well. In this case, the video recordings proved the Petitioner's actual innocence in that she followed the law, did not commit the crime, and was wrongly convicted due to Attorney's malpractice and negligence, as stated in the "amended complaint and jury demand".

Thus, due to the Defendant's negligence, relief must be granted; the Plaintiff has adequately pled a cause of action for legal malpractice and negligence, as stated in her "AMENDED COMPLAINT AND JURY DEMAND". The Plaintiff has every right to move forward with this malpractice and negligence complaint, and present proofs of the attorneys malpractice and negligence, with evidence of the trial transcripts, witnesses, pharmacy paper trail, and suppressed video recordings. The Appellate Court must allow her Complaint to proceed, to protect the integrity of the Court's processes and in preventing injustice

III. **To resolve the existence of multiple conflicts between the decision of which review is sought and a decision of the second appellate court on the same issue.**

The Plaintiff was granted in forma pauperis. The District Court improperly dismissed her amended complaint prior to service of process. In fact, the Third Circuit Court of Appeals held the

dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) prior to service of process is improper. This action was filed by a Pennsylvania prisoner at a State Correctional Institution. The complaint alleged the defendants, all judges, court clerks, or lawyers, conspired to have a civil case he filed in the State Court of Common Pleas dismissed. The district court granted the prisoner in forma pauperis status, and it then dismissed the complaint for failure to state a claim under Rule 12(b)(6) before service of process was made. The prisoner appealed.

The Third Circuit held that 28 U.S.C. § 1915(d) ONLY allows dismissal of a complaint if it is frivolous or malicious. Once a plaintiff is granted in forma pauperis and the suit is not considered frivolous or malicious, it must proceed as any other suit under the civil procedures. A complaint may fail to state a claim upon which relief may be granted under Rule 12(b)(6), but it is not frivolous under §1915.

The court held that once in forma pauperis status is granted the clerk must issue summons under Rule 4(a) and the court shall serve all process under §1915(c). Dismissal of the complaint under Rule 12(b)(6)is contrary to these rules, and it may create the perception the judge has abandoned the rule of neutral arbitrator. This ruling may have been overruled by the passage of the Prison Litigation Reform Act (PLRA) which allows court to sua sponte dismiss meritless suits by prisoners, but it remains good law for suits by non prisoners. Accordingly, the district court's dismissal was vacated. See: Outess v. Sobolvetich, 914 F.2d 428 (3rd Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Our Supreme Court has held that "a legal-malpractice action accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages." Grunwald v. Bronkesh, 131 N.J. 483, 492, 621 A.2d 459 (1993) (citations omitted). Here, as evidenced in the complaint, the amended complaint, and all of the motions filed by the Plaintiff against the Defendants of their negligence and legal malpractice, the Court should grant the Plaintiff's motions by applying Hoffenberg v. Meyers, 73 F. App'x 515, 516 (2d Cir. 2003) properly, to allow for the interests of justice, to protect the integrity of the Court's processes and the Plaintiff's due process rights. In short, the injustice the Plaintiff suffered was so egregious that her complaint must proceed.

To reiterate, because of the Defendants ineffectiveness of assistance in counsel, the plaintiff's conviction and sentence were affirmed. If only they had raised even some of the issues the Plaintiff had asked them to raise, her appeal would have successfully overturned the conviction. The Plaintiff provided ample evidence of her actual and factual innocence, showing that she abided by all law and regulations. That she did not commit the underlying offenses is affirmed in the suppressed exculpatory video recording evidence and by the pharmacy paper trail. The Defendants did not pursue, and thus did not obtain, the suppressed exculpatory video recordings in spite of her multiple requests. Had they accomplished this as the Plaintiff herself was eventually able to do and is now pursuing an evidentiary hearing to admit this and other newly discovered evidence, they would be able to prove the Plaintiff's actual innocence. But they did not even raise the issue that the Prosecution told the Jury about supposedly incriminating video evidence that they were simultaneously suppressing. That suppressed evidence is exculpatory should not be surprising, but for prosecutors to call attention to it and to refer to it as incriminating while suppressing it seems shocking to all but perhaps the most jaded. It and many other issues should have been raised. Instead the Defendants ignored nearly every request and instruction the Plaintiff gave them. The Defendants even submitted the Plaintiff appeal and everything else without the Plaintiff first reading it; the Plaintiff would have never agreed to the Defendants' characterization of her as a drug dealer especially since she is maintaining her actual and factual innocence. Defendant Stavis' mischaracterization of the Plaintiff ignores everything that she provided him that he admitted to not even reading, and ignores the fact that the prosecutors and judge intentionally misrepresented the legal standards to the jury to gain the conviction. Stavis

ignores the fact that the prosecutors and judge conflated two different legal standards, the bonafide prescription and valid prescription, in order to manufacture this wrongful conviction. Thus, it is very clear to the Plaintiff that the Defendants had not read anything about her case in detail. In fact, they appear to be relitigating their Bindy case and not addressing the Plaintiff's case.

Thus, due to the Defendant's negligence, relief must be granted; the Plaintiff has adequately pled a cause of action for legal malpractice and negligence, as stated in her "AMENDED COMPLAINT AND JURY DEMAND". The Plaintiff has every right to move forward with this malpractice and negligence complaint, and present proofs of the attorneys malpractice and negligence, with evidence of the trial transcripts, witnesses, pharmacy paper trail, and suppressed video recordings.

The aforementioned show that the Plaintiff's motion is procedurally proper and is of substantive merits.

For the foregoing reasons, the Plaintiff prays the Supreme Court will grant this malpractice and negligence complaint, or any other remedy this Court finds necessary, as duly deserved and earned through the submission of this in forma pauperis motion to reverse an order and judgment dismissing the Plaintiff's complaint, to protect the integrity of the Court's processes, the Plaintiff's due process rights, and in preventing injustice. The injustice the Plaintiff suffered was so egregious that her complaint must proceed.

Respectfully submitted

lenalasher

Lena Lasher, Pro-se

Date: September 3, 2019